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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

JANUARY TERM, 1846.

By BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. IV.

SECOND EDITION

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

THE BANKS LAW PUBLISHING COMPANY

21 Murray Street,

NEW YORK.

1899.

SUPREME COURT OF THE UNITED STATES.

Hon. ROGER B. TANEY, Chief Justice.

Hon. JOHN McLEAN, Associate Justice.

Hon. JAMES M. WAYNE, Associate Justice.

Hon. JOHN CATRON, Associate Justice.

Hon. JOHN McKINLEY, Associate Justice.

Hon. PETER V. DANIEL, Associate Justice.

Hon. SAMUEL NELSON, Associate Justice.

Hon. LEVI WOODBURY, Associate Justice.

John Y. Mason, Esq., Attorney-General.

William Thomas Carroll, Esq., Clerk.

Benjamin C. Howard, Esq., Reporter.

Alexander Hunter, Esq., Marshal.

PROCEEDINGS OF COURT

HAD UPON THE

DEATH OF JUDGE STORY.

At the opening of the Court this morning, Mr. Mason, the Attorney-General of the United States, addressed the Court as follows:—

"*May it please your Honors:*

"Since your last term, the senior Associate Justice of this Court has departed this life. At a meeting of the members of the bar and officers of the Court, held on yesterday, resolutions were adopted expressive of their veneration for the memory of the deceased, and of their sense of the loss which has been sustained by the Court, the profession, and the country. They have done me the honor to impose on me the melancholy task of communicating their proceedings to the bench.

"I am but too sensible of the disadvantages under which I labor, in acquitting myself in this presence of the duty thus confided to me. I had not the advantage of any intimate personal acquaintance with Mr. Justice Story. But he was known to me, as to every lover of an enlightened jurisprudence, and to every admirer of learning and purity in our magistracy, through the fame which he had honorably won, and the light which he had shed on all the various subjects of professional learning, in his opinions delivered from that bench, and the works which he published to the world.

"At the early age of thirty-two years, he was appointed an Associate Justice of this Court. In thirty-four years of service in his high office, he acquitted himself of all his responsible duties with a dignity, integrity, and learning, which proved him worthy of this exalted judicial tribunal.

"He gave to the profession an example of successful industry above all price. It is wonderful that he should have accomplished so much; unfailing in his attendance here, participating largely in all the learned labors which bear so oppressively on this Court, constant in the discharge of his judicial duties in one of the most important Circuits in the Union, he found time to instruct, as a professor, large classes for many successive years, and to prepare and publish a greater number of learned legal works than any other author. Yet, in the midst of the severe and incessant

studies which could alone produce such results, he was devoted to the enchanting delights of elegant literature, and was distinguished for his happy and cheerful domestic life, and his spirited social intercourse.

"The learning which he displayed as a jurist and author extended his fame to every country where an enlightened jurisprudence prevails; and the amiable and Christian character of the man has filled a whole community with grief at his death.

"But your Honors, with whom he associated for a period so far beyond what falls to the lot of most of those who reach this elevated distinction, can best appreciate his character as a judge, and his virtues as a man, and will confirm the testimony of the gentlemen whose proceedings I now have the honor to present."

At a meeting of the members of the bar and officers of the Supreme Court of the United States, at the court-room in the Capitol, on the 3d day of December, A. D. 1845, David B. Ogden, Esq., was appointed Chairman, and the Hon. George M. Bibb, Secretary.

The Hon. John Davis, the Hon. George Evans, and the Hon. R. C. Winthrop were appointed a committee to prepare resolutions expressive of the sentiments and feelings of the meeting on the melancholy event of the recent death of the Hon. Joseph Story, one of the Associate Justices of the Supreme Court of the United States.

Whereupon Mr. Davis, in behalf of the committee so appointed, presented the following preamble and resolutions, which were unanimously adopted by the meeting:—

"Since the last annual session of the Supreme Court of the United States, one of its most distinguished members has fallen a victim to the lot of humanity. The earthly career of that able and faithful judge, Joseph Story of Massachusetts, has terminated, and we trust that his exalted virtues will secure rest to his spirit among those who are made perfect.

"The bar has been deprived of one of its brightest ornaments, and the bench of one of its most learned and illustrious members. Those who have long witnessed the pure example, and venerated the talents, learning, and untiring zeal of the deceased, cannot permit an event so solemn and afflictive to pass unnoticed. Few men of any age or country have left behind them stronger proofs of great and successful labors in legal research, or higher claims to public respect and gratitude. He explored, with extraordinary powers of analysis, the learning of the past, employing and systematizing those great principles of jurisprudence which illustrate his decisions as a judge, and give imperishable value to his works as an author.

"As a magistrate, he aimed to win esteem and respect for the bench by the purity of his example, and to inspire confidence in its decisions by a prompt, just, enlightened, and faithful administration of the laws.

"In the midst of the urgent duties of his high and responsible

station, which were sufficient to task a more than ordinary mind, he found leisure to indulge his love of legal study, and produced a series of works which have taken rank among standard authorities, and will carry his fame to posterity as a jurist of great accomplishments.

"His decisions on the bench, as well as the productions of his pen, prove alike the earnest zeal with which his mental energies were applied to sustain the constitution and laws of the republic, and the conscientious rectitude with which he discharged the great and complicated duties which devolved upon him.

"While we feel just pride in the attainments of one so distinguished as a public officer and as an author, we cannot forget those extraordinary social qualities, and that amiable deportment in private life, which endeared him to his friends and acquaintance. If in his high public station he commanded the esteem and confidence of the public, in the ordinary duties of life he won and retained the respect and love of all who were connected with him in the varied relations in which he stood to the community.

"When so pure and so illustrious a man descends to the tomb, while his usefulness is unimpaired and his work unfinished, the calamity is the more severely felt, and the occasion is a fit one for his bereaved friends and the public to give utterance to their grief, and to testify their veneration and respect for the memory of the deceased.

"Therefore, Resolved, 1. That we hold in the highest estimation the learning, the integrity, the distinguished services, and the exalted virtues of the late JUDGE STORY, and deeply deplore the loss which the bench and the country have sustained by the death of one so eminently qualified for the high station which he filled.

"2. That we sympathize with his bereaved family in their affliction, who mourn the loss of an affectionate husband, a kind parent, and a good citizen.

"3. That from respect to the memory of him who has filled so large a space in the affairs of the country, we will, during the present session of the Court, wear the usual badge of mourning.

"4. That these resolutions be communicated to the Court by the Attorney-General, with a request that they may be entered upon the records, and further, that they be communicated to the family of the deceased by the chairman of this meeting.

"DAVID B. OGDEN, *Chairman.*

GEO. M. BIBB, *Secretary.*"

To which Mr. Chief Justice replied:—

"It is difficult for me to express how deeply the Court feel the death of MR. JUSTICE STORY. He held a seat on this bench for so many years, and was so eminently distinguished for his great learning and ability, that his name had become habitually associated with the Supreme Court, not only in the mind of those more immediately connected with the administration of justice, but in that of the public generally, throughout the Union. He had, indeed, all the qualities of a great judge; and we are fully sensible that his

labors and his name have contributed largely to inspire confidence in the opinions of this Court, and to give weight and authority to its decisions.

"It is not, however, in this country only, that the name of Justice Story is respected and honored. His works upon various branches of jurisprudence have made him known to eminent men wherever judicial knowledge is esteemed and cultivated; and wherever he is known, his opinions are quoted with respect, and he is justly regarded as one of the brightest ornaments of the age in which he lived. But it is here on this bench that his real worth was best understood, and it is here that his loss is most severely and painfully felt. For we have not only known him as a learned and able associate in the labors of the Court, but he was also endeared to us as a man, by his kindness of heart, his frankness, and his high and pure integrity. We most truly and deeply deplore his death, and cordially unite with the bar in paying appropriate honors to his memory.

"The proceedings of to-day will therefore be entered on the records of the Court, as a lasting testimony of our respectful and affectionate remembrance of our departed brother."

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1845.

James Shields,	*District of Columbia.*
Albert T. Bledsoe,	*District of Columbia.*
Frederick Stanton,	*Tennessee.*
J. Van Buren,	*New York.*
Joseph W. Chalmers,	*Mississippi.*
James Grant,	*Iowa.*
Martin R. Zabriskie,	*New York.*
William F. Giles,	*Maryland.*
James D. Westcott, Jr.,	*Florida.*
John A. Rockwell,	*Connecticut.*
Gaspard Tochman,	*New York.*
George W. Brent,	*Virginia.*
Worthington G. Snethen,	*District of Columbia.*
William H. Brockenbrough,	*Florida.*
Peter A. Browne,	*Pennsylvania.*
Stephen Adams,	*Mississippi.*
Bradford R. Wood,	*New York.*
Robert C. Schenck,	*Ohio.*
Isaac E. Holmes,	*South Carolina.*
Henry W. Hilliard,	*Alabama.*
Augustus Kellogg,	*New York.*
Spencer Jarnigan,	*Tennessee.*
John M. Scott,	*Pennsylvania.*
John Wilson,	*Missouri.*
Stephen Strong,	*New York.*
Benjamin F. Butler,	*Massachusetts.*
Sanford J. Smith,	*New York.*
Fletcher M. Haight,	*New York.*
Elias B. Holmes,	*New York.*
John H. James,	*Ohio.*
Frederic E. Mather,	*New York.*
William Henry Trescot,	*South Carolina.*
Edward S. Dargan,	*Alabama.*
Alexander D. Sims,	*South Carolina.*
Archibald C. Niven,	*New York.*
Morton McMichael,	*Pennsylvania.*
Samuel Spencer,	*Florida.*
Thomas Warner,	*New York.*

Theo. Cuyler,	*Pennsylvania.*
Lyman A. Walker,	*New Hampshire.*
Harvey H. Allen,	*Texas.*
Samuel Ames,	*Rhode Island.*
George Eustis,	*Louisiana.*
Edward H. Hazard,	*Rhode Island.*
Alfred H. Hanscom,	*Michigan.*
Cogswell K. Green,	*Michigan.*
William H. Seward,	*New York.*
Vespasian Ellis,	*Missouri.*
Timothy Walker,	*Ohio.*
Samuel S. Phelps,	*Vermont.*
Jesse D. Bright,	*Indiana.*
Frederick W. Brune, Jr.,	*Maryland.*
George Turner,	*Rhode Island.*
Thornton F. Brodhead,	*Michigan.*
Louis Janin,	*Louisiana.*
La Fayette S. Foster,	*Connecticut.*
David Higgins,	*Ohio.*
Henry I. Glowacki,	*New York.*
Henry K. Smith,	*New York.*
E. D. Baker,	*Illinois.*
William T. Swann,	*District of Columbia.*
Samuel Rush,	*Pennsylvania.*
Samuel Stevens,	*New York.*
Joseph S. Bosworth,	*New York.*
Charles Wallace Brooke,	*Pennsylvania.*
Samuel Hood,	*Pennsylvania.*
Charles L. Woodbury,	*Massachusetts.*
Joseph T. Thomas,	*Pennsylvania.*
Christopher Robinson,	*Rhode Island.*
Alfred Bosworth,	*Rhode Island.*
Samuel C. Reid, Jr.,	*Louisiana.*
M. L. Martin,	*Wisconsin.*
Francis I. Dunn,	*Wisconsin.*
Benjamin H. Brewster,	*Pennsylvania.*
Samuel R. Hamilton,	*New Jersey.*
Willis L. Williams,	*Missouri.*
Samuel H. Laughlin,	*Tennessee.*
Charles Perkins,	*Connecticut.*
John K. Hackett,	*New York.*
William H. Platt,	*Alabama.*
Daniel G. Hall,	*Alabama.*
Alexander Gardiner,	*New York.*
Franklin S. Kinney,	*New York.*
Frederick Allen,	*Maine.*
Peter Clark,	*New York.*
Jerome B. Fitzgerald	*Michigan.*
Eras. C. Benedict,	*New York.*
Henry Smith,	*Michigan.*
James S. Sanford,	*New York.*

PHINEAS PEMBERTON MORRIS,	*Pennsylvania.*
JOHN A. BRYAN,	*Ohio.*
THOMAS B. STODDARD,	*New York.*
E. I. ROBERTS,	*Michigan.*
GEORGE RATHBUN,	*New York.*
W. W. WOODWORTH,	*New York.*
CHARLES W. MARCH,	*Massachusetts.*
GEORGE S. HOUSTON,	*Alabama.*

ORDER OF COURT.

THERE having been an Associate Justice of this Court appointed since its last session, it is ordered that the following allotment be made of the Chief Justice and the Associate Justices of said Court, among the Circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered of record, viz.:

For the 1st Circuit—The honorable LEVI WOODBURY.
For the 2d Circuit—The honorable SAMUEL NELSON.
For the 3d Circuit—The honorable ——— ———.
For the 4th Circuit—The honorable ROGER B. TANEY, C. J.
For the 5th Circuit—The honorable JOHN MCKINLEY.
For the 6th Circuit—The honorable JAMES M. WAYNE.
For the 7th Circuit—The honorable JOHN MCLEAN.
For the 8th Circuit—The honorable JOHN CATRON.
For the 9th Circuit—The honorable PETER V. DANIEL.

A TABLE OF THE CASES REPORTED

IN THIS VOLUME.

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A TABLE

OF THE

CASES CITED IN THIS VOLUME.

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES

AT

JANUARY TERM, 1846.

WILLIAM M. GWINN, MARSHAL, PLAINTIFF IN ERROR, *v.* BUCHANAN, HAGAN, & Co.. FOR THE USE OF WILLIAM HOLLIDAY & Co.

A plaintiff has no right to direct a deputy-marshal to receive a certain description of money in satisfaction of an execution.[1]

But the deputy-marshal then acts as agent of the plaintiff, and not as agent of the marshal.

If, therefore, the plaintiff, when he does this, gives to the deputy-marshal other instructions, which are disobeyed, the marshal himself is not responsible, but the plaintiff must look to the deputy.[2]

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[1] In *Griffin* v. *Thompson*, 2 How., 244, it was held that the marshal had no right to receive bank notes in discharge of an execution, unless authorized to do so by the plaintiff. In a subsequent case it was held that if he does receive bank-notes, and the plaintiff sanctions it, either impliedly or expressly, he is bound by it. *Buckhannan* v. *Tinnin*, 2 How., 258. In *McFarland* v. *Gwin*, 3 Id., 717, it was held that the marshal was not authorized to receive in discharge of an execution, anything but gold and silver, unless the plaintiff authorized him to receive something else. The reasoning of these cases proceeds upon the theory that the execution-plaintiff has full power to direct the execution officer in all matters pertaining to the enforcement of the writ, so long as he does not transgress the law by his instructions. Such is the general rule. *Tucker* v. *Bradley*, 15 Conn., 15; *In re Hampton*, 2 Greene, (Iowa), 137; *Pierce* v. *Partridge*, 3 Metc. (Mass.), 44; *Fitts* v. *Johnson*, 22 Ga., 307; *Rogers* v. *Dearmid*, 7 N. H., 506; *Richardson* v. *Bartley*, 2 B. Mon. (Ky.), 328; *Hill* v. *Pratt*, 29 Vt., 119; *Patton* v. *Hammer*, 28 Ala., 618; *Walworth* v. *Readsboro*, 24 Vt., 252; *Gorham* v. *Gale*, 7 Cow. (N. Y.), 739; *Godfrey* v. *Gibbons*, 22 Wend., (N. Y.), 569; *Stern's Appeal*, 64 Pa. St., 447; *Root* v. *Wagner*, 30 N. Y., 18.

[2] If the execution-plaintiff, or his authorized agent or attorney, directs the deputy officer not to do any thing after the levy of the writ until further instruction, such deputy ceases to represent his principal and becomes the agent of the plaintiff. *Michles* v. *Hart*, 1 Den. (N. Y.), 548. So any instructions to the deputy authorizing him to depart from the usual practice, makes him the agent of the plaintiff. *Gorham* v. *Gale*, 6 Cow. (N. Y.), 467. If the deputy refuses or fails to follow the instructions, but acts in conformity with the law, his principal is bound for his acts. *Sheldon* v. *Payne*, 7 N. Y., 453; *N. H. Savings Bank* v. *Varnum*, 1 Metc, (Mass.), 34.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Mississippi.

A judgment was obtained in that court, at May term, 1839, by the defendants in error against Ephraim Gwinn and James Ballance, for the sum of $2,679.88, with interest at the rate of eight per cent., from the 27th of May, 1839, until paid, and costs.

An execution was sued out upon this judgment on the 28th of June, 1839, and property of the defendants levied upon to the amount due on the execution, which property was suffered to remain in their possession, according to a law of that state, upon their executing a forthcoming bond with sufficient security. This bond was returned by William M. Gwinn, the marshal, at the next term (November term, 1839), "*forfeited*," whereby the said bond, according to the laws of Mississippi, had the force and effect of a judgment against the defendants in the original judgment, and their securities in the said bond.

Upon this last mentioned judgment, another *fi. fa.* was issued on the 19th of December, 1839, returnable to the next term of the court, to be held on the first Monday of May, 1840. This *fi. fa.* came to the hands of the marshal (the plaintiff in error), and was placed by him in the hands of T. M. Ferguson, one of his deputies, *to be executed. At the May term, the following return was made:—

*2]

"Satisfied in full on the third day of April, 1840.

"W. M. GWINN, Marshal,
per T. M. FERGUSON, D. Marshal."

The money was thereupon demanded of the marshal by the attorney for the plaintiffs (who are the present defendants in error), and upon this demand the marshal tendered to him the amount in the following funds:—A Treasury Note of the United States for one thousand dollars, and the balance in post notes of the Mississippi Union Bank, due in May and April, 1840, with fifteen per cent. added for exchange. These funds were refused by the plaintiffs' attorney, who thereupon moved the court for a judgment against W. M. Gwinn, the marshal, for the amount due on the said execution, upon the ground that the money had been collected by the marshal and not paid over on demand.

It appeared, on the hearing of the motion, that the following letter had been addressed by the plaintiffs' attorney to Ferguson, the deputy-marshal, while the execution was in his hands.

March 23d, 1840.

"DEAR SIR:—In the case of *Buchanan, Hagan & Co., use of Wm. Holliday & Co.*, v. *Gwinn & Ballance*, we are authorized to receive one thousand dollars in United States Treasury Notes, and the balance in post of the Union Bank, maturing May and April, 1840, *adding on the post notes fifteen per cent. for exchange.* This was what Mr. Gwinn proposed to us, and the plaintiff directs us to accede to the proposition, *provided the payment be made to us without delay*, in order that the funds may be remitted before any further depreciation shall occur. You will please communicate this to the parties at the earliest moment.

"Very respectfully,
"Your ob't servants,
"HARRISON & HOLT."

It appeared, also, that the money had been collected by the deputy-marshal on the 3d of April, 1840, in the funds mentioned in the said letter, and tendered to the attorney at May term, 1840, when he made the demand above mentioned; that the deputy-marshal did not notify the plaintiffs, or their attorney, of the receipt of the money, and that no demand for it was made previous to the term at which the execution was returnable, before which time the bank-notes had suddenly and greatly depreciated; and that Gwinn, the marshal, knew nothing of the instructions given by the plaintiffs' attorney, nor of the collection of the money, until the meeting of the court.

Upon this evidence, the Circuit Court gave judgment against *William M. Gwinn, the marshal, for the [*3 amount of the debt, interest, and costs due upon the judgment of the forthcoming bond. An exception was taken to this opinion of the court, and the present writ of error brought by the marshal upon this judgment against him.

The case was argued by the attorney-general, for the plaintiff in error. No counsel appeared for the defendants.

Mr. Chief Justice TANEY delivered the opinion of the court.

As a general principle, it is undoubtedly true, that the marshal is responsible for the acts of his deputy in the execution of process; and if the deputy had taken the funds mentioned in the testimony without any orders from the plaintiffs, or their attorney, and returned the execution satisfied the plaintiffs would not have been bound to accept these

funds in discharge of their judgment, and might have insisted on the full amount from the marshal in gold and silver.

But it is clear, that the plaintiffs had a right to accept in payment of their execution whatever they thought proper. The deputy-marshal was bound to obey their directions upon that subject; and neither the deputy nor the marshal can be held responsible to the plaintiffs for any loss they may sustain by reason of an act done in pursuance of their own instructions.

But the plaintiffs seem to suppose that the authority given to the deputy was not pursued, and that the payment of the money to them without delay was a condition annexed to the authority, which had been disregarded by the deputy. But however this may be, as between him and the plaintiffs, the act or omission of the deputy in that respect cannot make the marshal himself liable. Gwinn knew nothing of the directions given by the plaintiffs' attorney. So far as Ferguson was acting as deputy-marshal, he had no right to receive, in payment of the debt, any thing but gold and silver. He had no authority from the marshal to take any thing else. But when the plaintiffs interfered, and directed him to receive the funds above mentioned, he was, in receiving such funds, not acting under the authority of the marshal as his deputy, but as agent of the plaintiffs. And if, in executing the power they gave him, he disobeyed their instructions, they must look to him, and not to the marshal, who knew nothing of these instructions, had no concern with them, and who cannot, therefore, upon principles of law or equity, be held responsible for the manner in which they were executed.

The judgment of the Circuit Court must, therefore, be reversed, with costs.

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*4] JAMES BROWN, PLAINTIFF IN ERROR, *v.* JOHN CLARKE, DEFENDANT.

By the law of Mississippi, a judgment is a lien upon personal as well as real estate from the time of its rendition.[1]

Where there has been a judgment, an execution levied upon personal property, and a forthcoming bond, the property levied upon is released by the bond, and the lien of the judgment destroyed.

If, therefore, after this, another judgment be entered against the original de-

[1] CITED. *Buckingham* v. *McLean*, 13 How., 167.

fendant, this second judgment is a lien upon the property which has been released by the bond.

The lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond.[2]

If the forthcoming bond had been shown to have been void *ab initio*, the result would be different.

In cases of conflicting executions issued out of the federal and state courts, a priority is given to that under which there is an actual seizure of the property first.[3]

The mode in which bills of exceptions ought to be taken, as explained in *Walton* v. *The United States* (9 Wheat., 651), and in 4 Pet., 102, will be strictly adhered to by this court.[4]

THIS was a writ of error to the District Court of the United States for the northern district of Mississippi, to bring up for review certain instructions delivered to the jury in an action of trover, brought by the defendant in error against the plaintiff in error, and in which the plaintiff below obtained the verdict.

The case was this. Brown, the defendant below, obtained a judgment of $8,640.37, by confession, against one Haywood Cozart, in the Circuit Court of Lafayette county, Mississippi,

[2] CITED. *Bank of Old Dominion* v. *Allen*, 76 Va., 204.

[3] FOLLOWED. *Adler* v. *Roth*, 2 McCrary, 448. CITED. *Union Mut. Life Ins. Co.* v. *Chicago University*, 10 Biss., 198*n*.

In an earlier case the Supreme Court said: "The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff, having executions in his hands, may levy on the same goods; and, where there is no priority, on the sale of the goods, the proceeds should be applied in proportion to the sum named in the execution. And where the sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does the special property vest in the one, or the other, or both of them? No such case can exist; property once levied upon remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction." *Hagan* v. *Lucas*, 10 Pet., 400; *The Celestine*, 1 Biss., 1, 8; *Bell* v. *Ohio Life &c. Co.*, 1 Id., 260, 270; *The Oliver Jordan*, 2 Curt., 414, 415; *Hamilton* v. *Reedy*, 3 McCord (S. C.), 38; *Lewis* v. *Buck*, 7 Minn., 104; *Dubois* v. *Harcourt*, 20 Wend. (N. Y.), 41; *Buckey* v. *Snouffer*, 10 Md., 149; *Winegerberry* v. *Hafer*, 15 Pa. St., 144; *Rogers* v. *Darnaby*, 4 B. Mon. (Ky.), 241; *Moore* v. *Witherburg*, 13 La. Ann., 22.

[4] CITED. *Turner* v. *Yates*, 16 How., 29; *Mays* v. *Fritton*, 20 Wall., 418.

which was docketed on the 18th of May, 1840. Upon which execution was issued on the 6th, and delivered to the sheriff on the 20th of June following, and a levy made the same day on several slaves, the property of the defendant on the execution. A forthcoming bond was given by the defendant, with H. M. Cozart as surety, and which was approved of by Brown, the plaintiff.

This bond is in the penalty of double the amount of the judgment, made payable to the plaintiff in the execution, and conditioned well and truly to deliver the property levied on to the sheriff on the 17th of August (then) next, the day of sale, at a certain place, to be sold to satisfy the judgment, unless the same should be previously paid.

Clarke, the defendant in error, recovered a judgment of $2,117.31 against the same Haywood Cozart, in the District Court of the United States for the northern district of Mississippi, at the June term of said court, 1840; upon which an execution was issued to the marshal of the district, and a levy made, on the 9th of November following, upon six of the slaves in the possession of Cozart, and which had been before levied on under Brown's execution. They were sold by the marshal on the 7th December thereafter, and purchased in by Clarke, the plaintiff, the highest bidder.

*5] The sheriff returned upon the execution in the case of *Brown* v. *Cozart*, and upon the forthcoming bond, that the property was not delivered in pursuance of the condition, nor the money paid; and that it was therefore forfeited. And Brown, at the November term of the Circuit Court of Lafayette county, at which the execution was returnable, made a motion to the court to quash the bond, which was granted accordingly; the ground of the motion is not stated. And on the same day, the 23d of November, 1840, he sued out an *alias fieri facias* on the original judgment, returnable at the next term of said court.

To this execution, the sheriff returned that he had levied upon six slaves, naming them, in the hands of the marshal of the northern district of Mississippi, and also on other property which it is not material to notice. And further, that after the sale of the slaves by the marshal, he was indemnified by Brown, and required to make a levy upon them on the 7th of December, 1840, and that, on the 4th of January following, he sold them, by virtue of the execution, to Brown, the highest bidder.

It further appeared, that, at the time the marshal levied on the slaves, the 9th of November, 1840, Cozart had some fifteen or eighteen other slaves in his possession; that the marshal

took those levied on into his custody, and on the sale under the execution delivered them to Clarke, the purchaser; and that they were afterwards taken out of his possession by the sheriff under his execution, by the direction of Brown; that Hiram M. Cozart, the surety in the forthcoming bond, was a brother of Haywood Cozart, was a man of but little property, and lived with his brother, some six miles distant from Brown; and that after the levy by the marshal, and before the sale, the two Cozarts left the state of Mississippi for Texas, and carried away with them the fifteen or eighteen slaves not levied on by this officer.

When the testimony closed, the counsel for the plaintiff, Clarke, requested the court to give the following instructions to the jury, namely:—That if they believed the marshal made lawful levy on the property in dispute, the sale under his execution was valid, and vested in the purchaser a good title against other executions, whether founded on judgments of the state or federal courts; and that, if they believed that the sheriff levied his execution on the slaves and took a forthcoming bond, which was afterwards forfeited, the same was a satisfaction of the original judgment, and the subsequent quashing of the same did not affect the rights of the plaintiff, acquired by virtue of the marshal's levy after such forfeiture of the bond; and also, if they believed that the sheriff, after his levy, took a forthcoming bond, which was afterwards forfeited, and that the slaves therein named remained in the possession of the defendant Cozart, the levy of the marshal, made after the forfeiture of said bond, and sale in pursuance thereof, were *valid, notwithstanding the bond was quashed before the sale, but after the levy. And, further, if the jury believed that the defendant, Brown, agreed to approve of the surety on the forthcoming bond, and thereby permitted the slaves to remain in the possession of the said Cozart, the subsequent quashing of the bond upon his own motion did not place him in any better situation than if he had not issued an execution on the judgment. And, also, if they believed the approval of the bond by Brown was with a view to allow Cozart to remain in possession of said slaves, and to keep off and delay other creditor, then they should find for the plaintiff; and, also, if they believed the conduct of Brown was fraudulent in obtaining proceedings on his judgment, then they should find for the plaintiff.—All which instructions were objected to by the defendant's counsel; but the objection was overruled by the court, and the instructions given. [*6

The counsel for the defendant proposed the following in-

structions, namely:—That if the jury believed, from the evidence, the defendant, Brown, obtained a prior judgment in the Circuit Court of Lafayette county to the judgment obtained by the plaintiff, Clarke, in the District Court of the United States, Brown thereby obtained a prior lien upon Cozart's property for the satisfaction of his judgment, and that said lien could only be defeated and postponed by some act of Brown fraudulent in law; that the taking of the forthcoming bond by the sheriff, and the quashing of the same, were not acts deemed fraudulent in law; that the levy and sale of the slaves of Cozart by the marshal, by virtue of an execution on a junior judgment, was subject to the lien of the prior judgment, and communicated no title to the purchaser paramount to the lien of the prior judgment; that the forfeiture of a forthcoming bond, which is quashed for want of conformity to the statute, is not such an one as has the force and effect of a judgment, because not in conformity to the statute.—Which instructions were objected to by the counsel for the plaintiff, and were refused by the court.

The record adds, the jury returned a verdict for the plaintiff, and the defendant moved the court to set it aside and grant a new trial, which motion was overruled. To all which the defendant excepts, and tenders this his bill of exceptions, which he prays may be signed and sealed by the court.

The case was argued by *Mr. Chalmers* and *Mr. Johnson*, for the plaintiff in error, and *Mr. Mason* and *Mr. Milton Brown*, for the defendant. Of these arguments, the reporter has no notes except of *Mr. Brown's*.

Mr. Brown.

*7] John Clarke, the defendant in error, brought his action of trover *against James Brown, the plaintiff in error, for five slaves, in the District Court of the United States for the northern district of Mississippi. At the December term, 1841, of said court, a verdict was rendered for $3,225, the value of the slaves, and judgment entered accordingly for the amount of the verdict and costs. No exception appears of record to have been taken or filed to the opinion of the court during the progress of the trial. After the verdict and judgment, Brown, by his counsel, moved the court to set aside the verdict, and grant a new trial. The court, on argument, overruled the motion. The entry of this proceeding of record is as follows:—

"This day came the parties, by their attorneys, and then came on to be heard defendant's motion for a new trial; and,

after argument, as well in support of as against said motion, it is considered by the court that the same be overruled; to which decision of the court overruling said motion, the defendant, by attorney, excepts, and tenders his bill of exceptions, which is signed and sealed by the court, and ordered to be made part of the record in this cause."

On this alleged error of the court, in refusing to grant a new trial, this writ of error has been sued out. That the refusal to grant a new trial is no ground for a writ of error is the well settled doctrine of this court. 3 Pet. Dig., 106; *Barr* v. *Gratz*, 4 Wheat., 213, 4 Cond. Rep., 430; *United States* v. *Daniel*, 6 Wheat., 542; 5 Cond. Rep., 170.

What in this cause purports to be a bill of exceptions is founded on and follows the overruling the motion for a new trial, and was, as appears on its face, drawn up and signed, not only after the trial, but after the motion for a new trial was disposed of. It contains nothing that can be reviewed by this court. It contains a mere statement of facts given in evidence, and the charge of the court to the jury, not made matters of record, but only retained in the memory of the judge, and recalled to regulate the discretion of the court in granting or refusing a new trial. *Inglee* v. *Coolidge*, 2 Wheat., 363.

A bill of exceptions, to be the foundation of a writ of error, can only be for matters excepted to at the trial, and must appear of record to have been actually reduced to form, and signed pending the trial; and if, as in this case, it appear to have been drawn up and signed after verdict, it will be fatal. *Walton* v. *The United States*, 9 Wheat., 651; 5 Cond. Rep., 717. And although it may in some cases be the practice for the court to note exceptions at the trial, and reduce them to form and sign them afterwards, yet, in the language of the court in the case of *Walton* v. *The United States* (above cited), "In all such cases the bill of exceptions is signed *nunc pro tunc;* and it purports, on its face, to be the same as if actually reduced to form and signed *pending the trial. [*8
And it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before verdict."

Even if exceptions had been taken at the trial and signed, the motion for a new trial would have been a waiver of them. *Cunningham* v. *Bell*, 5 Mason, 161. In that case, Mr. Justice Story said:—"The motion for a new trial cannot be entertained, according to the practice of the court, unless the bill

of exceptions is waived. The party has his election, either to proceed on the writ of error to the Supreme Court, in order to have it determined there whether the points were correctly ruled at the trial; or waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways."

It is believed that the authorities referred to show conclusively that the writ of error in this case cannot be sustained. But should the court rule otherwise, and consider the matters contained in the bill of exceptions entitled to further examination, then the following statement of the case, in behalf of the defendant in error, is presented.

Clarke, the defendant in error, brought a suit against one Haywood Cozart in the District Court of the United States for the northern district of Mississippi, and at the June term, 1840, obtained a judgment. Cozart, in May, 1840, during the pendency of Clarke's suit, confessed a judgment for a large amount in the Circuit Court of Mississippi for Lafayette county, in favor of James Brown, the plaintiff in error. Executions, in due time, issued on both these judgments, and went into the hands of the proper officer of each court. Brown's execution was levied by the sheriff on twenty-two slaves, and the sheriff took a forthcoming or delivery bond, with surety, from Cozart. The surety was approved by Brown himself. The bond required the delivery of the slaves in August, 1840. They were not delivered, and the bond, under the statutes of Mississippi, was returned forfeited, having in itself the force of a judgment, and entirely extinguishing the original judgment.

On the 9th of November, 1840, after this forfeiture of the delivery bond, the marshal levied Clarke's execution on five of the slaves previously levied on by the sheriff, and sold them,—Clarke becoming the purchaser. On the 23d of November, 1840, Brown, by his own motion, procured the delivery bond from Cozart, taken on his own execution, and by his own express consent, to be quashed, with a view of reviving the lien of his original judgment, and overreaching that under which the sale of the five slaves to Clarke had been made. Brown then issued an *alias fieri facias* on his

*9] original judgment, and seized upon the five slaves purchased by and in the possession of Clarke, and had them again sold, he himself becoming the purchaser. Clarke brought his action of trover against Brown for the slaves taken out of his possession, and recovered judgment; to reverse which, this writ of error is sued out.

Was Clarke's title to the slaves in question complete by

virtue of the sale to him by the marshal? That the sale was in all things regular is not denied; but it is contended that Brown's judgment against Cozart, in May, 1840, gave him a prior lien on the property of Cozart, which overreached Clarke's judgment in June, 1840.

In Mississippi, by the act of 1824, a lien on all the property of the defendant commences with the date of the judgment. Brown, therefore (aside from the circumstances under which his judgment was obtained), had a lien commencing with his judgment of May, 1840. But this priority was lost both by operation of law and his own act. An execution issued, a levy was made, and a forthcoming or delivery bond taken, which, in August, 1840, was forfeited. The bond, after forfeiture, at once, and without further action on it, has the force and effect of a judgment. The statute enacts, "that any bond which shall be forfeited shall have the force and effect of a judgment, and execution may issue thereon against all the obligors thereon." How. & H. Dig., 653. By the uniform decisions of the Court of Appeals of Mississippi, under this statute, the forfeiture of a forthcoming bond creates a new judgment, in which the original judgment is merged and extinguished. In an early case on the subject, this language is employed by the court:—"The forthcoming bond, after forfeiture, becomes, by operation of law, a judgment; and as the law will not permit two judgments to exist at the same time against the same person for the same debt, this judgment, by operation of law, necessarily extinguishes the former." *Clark* v. *Anderson*, 2 How. (Miss.)., 853. In a very recent case it is said, "The original judgment, after the forfeiture of the bond, is no longer in existence." *Burns* v. *Stanton*, 2 Sm. & M. (Miss.), 461. The lien of the first judgment ceases, and a new and more comprehensive lien arises upon this statutory judgment, embracing the property of both principal and sureties in the forthcoming bond. And no action of the court on the forfeited bond is necessary; as soon as the bond is forfeited, the old judgment is extinguished, and a new lien attaches. *Lancashire* v. *Minor*, 4 How., 351; *Lusk* v. *Ramsey*, 3 Munf. (Va.), 434.

Brown's original judgment, therefore, was extinguished, and his lien rested on his statutory judgment of August, 1840. This the law designed to be ample, by requiring ample security on the bond. If it was in fact not ample, it was because of Brown's own act in directing the sheriff to take security, which he, without *such directions, would not have taken, and which Brown knew was not responsible. *10]

In this posture of things, Clarke's lien, under his judgment

of June, 1840, took precedence, and was entitled to prior satisfaction. While thus clearly entitled to precedence and priority, Clarke's execution was levied and the property sold, which Clarke purchased. Standing on this state of the case, it would be scarcely possible to doubt Clarke's complete title.

But now comes a new point in the cause. Cozart, and his brother, who was irresponsible, but who had been taken as security in the bond by Brown's directions, gathered what property they could, and both put out to Texas. Clarke, by his diligence, had saved the five slaves in question. It became important, therefore, for Brown to get clear of his new judgment, and get back to his old one. Accordingly, he moved the court to quash the delivery bond, which was done; on what ground does not appear. And it is believed no good ground existed; and that, if this new state of things had not arisen, no such motion would have been made.

And now comes the question, what was the effect of quashing this bond. Its effect, as between the parties themselves, was to restore Brown to all his rights under his original judgment of May, 1840, without regard to his subsequent statutory judgment. But not so when the rights of third persons intervened. Clarke was no party to that proceeding, nor was he, or could he be, heard on the motion to quash the bond. Had he been a party, and been heard on the question, it is believed he could have successfully resisted the motion. His rights, therefore, cannot be affected by the proceeding. So far as his rights are concerned, they stand as though such motion had never been made or decided.

If Clarke's rights are to be affected, it can only be upon the doctrine of relation; that the new judgment having been quashed, the old lien by relation was revived, to operate from the rendition of the first judgment. But it is a cardinal principle of the doctrine of relation, that it can never be extended to the prejudice of the rights of third persons. It leaves them as it finds them. *Heath* v. *Ross*, 12 Johns. (N. Y.), 140; *Jackson* v. *Bard*, 4 Id., 230. Then, although this proceeding restored Brown to his rights against Cozart, it cannot operate to divest the intermediate rights of Clarke, acquired without wrong on his part. This view does not, in the slightest degree, conflict with the cases of *Andrews* v. *Doe*, ex dem. Wilkes, 6 How., 554, and *Commercial Bank of Manchester* v. *Coroner of Yazoo County*, Id., 530. These cases relate to valid subsisting liens, not altered or affected by any circumstances subsequent to the rendition of the judgment.

Brown's priority of lien was not only lost by the extinguishment of his original judgment by the forfeiture of the

forthcoming bond, *but it was also lost by his own act. The lien of a judgment is a mere security, conferring no *jus in rem*, and which may be voluntarily abandoned, either expressly or by implication; and when so abandoned, the property becomes freed from its influence, and subject to all the general incidents of other property.

The sheriff, it would seem, on making the levy, was not willing to let Cozart retain the property upon the faith of the security offered. It was his duty, therefore, to take the property into possession until sufficient security was offered. Brown, however, stepped forward, approved and accepted the surety, which he knew to be insufficient, relying on Cozart's good faith rather than on the forthcoming bond, and discharged the sheriff from the responsibility of taking insufficient security. By this act he placed it in the power of Cozart to do what he afterwards did do,—run his property out of the country, leaving his creditors to suffer.

Brown, by voluntarily waiving his right to a good and sufficient surety to the forthcoming bond, and leaving the property in possession of Cozart, and by voluntarily suspending his right to proceed on his judgment and execution, lost the priority of lien which the law gave him; and which, being once gone by his own voluntary act, cannot be regained. The principle here contended for is analogous to that under which a surety may be discharged under an ordinary contract. If the creditor, without the consent of the surety, puts it out of his power to proceed for even a single day against the principal debtor, the surety is discharged. So, by parity of reasoning, if a judgment creditor suspend his right to enforce his lien but for a day by his voluntary act, his priority over other judgment creditors is gone.

The jury was also well authorized to find in favor of Clarke, on account of the course pursued by Brown in regard to his execution. It is to be observed that the judgment was obtained by confession, just before the sitting of the court which rendered Clarke's judgment. Cozart was the neighbor of Brown; his brother, the surety in the delivery bond, lived with him; he was poor, and wholly insufficient as surety for such an amount. With a knowledge of all this, Brown accepted him as surety in the bond, indorsed his approval upon it, thereby discharging the sheriff from responsibility for taking insufficient security, and permitted the negroes to remain in custody of Cozart. They so remained until the marshal levied the execution of Clarke, when both Cozarts absconded, and carried off the remaining slaves, enough, or nearly enough, to have satisfied Brown's execution. From

these facts and circumstances, the jury were well warranted in concluding that the judgment was confessed, with the understanding that Cozart was to remain in possession of his slaves, on giving his brother as surety; that this was intended to keep off other creditors; and that, finding it did not have the desired effect, he *absconded to Texas. Such conduct was calculated to hinder other creditors, and was fraudulent and void as to Clarke, the present defendant in error.

*12]

In conclusion, the defendant in error, by his counsel, contends, that upon the whole case it appears that substantial justice has been attained, and that the judgment should be affirmed.

Mr. Justice NELSON delivered the opinion of the court.

By the law of the state of Mississippi, a judgment is a lien upon the personal as well as real property of the defendant, from the time of its rendition (*Smith et al.* v. *Everly et al.*, 4 How., 178; *Commercial Bank of Manchester* v. *Coroner of Yazoo County*, 6 Id., 350); and if the first judgment obtained by Brown against Cozart could be upheld against the objections taken to it, there is no doubt, according to the law of Mississippi, that the instructions given by the court below to the jury were erroneous. That judgment was docketed on the 18th of May, 1840, whereas Clarke's was not recovered till the 16th of June following.

It is insisted, however, that the seizure of the property of the defendant by the sheriff, under the first judgment, and discharge of it on the execution and delivery of the forthcoming bond, operated to extinguish the lien, and let in that of the junior judgment of Clarke, so as to give it the preference. This raises the principal question discussed in the case.

By the act of 1827 (Laws of Miss., p. 123, § 2), the sheriff or other officer is required, upon the levy of an execution upon personal property, to take a bond, if tendered, with sufficient security, from the debtor, payable to the creditors, reciting the service of such execution, and the amount due thereon, in a penalty of double the amount of such execution, with condition to have the property levied on forthcoming at the day of sale; and if the owners of such property or the defendant in the execution shall fail to deliver the same according to the condition of the bond, such sheriff or other officer shall return the bond so forfeited, with the execution, to the court from which the same issued, on the return day thereof; and every bond so forfeited shall have the force and

effect of a judgment, and execution shall issue against all the obligors thereon, &c.

Under this statute, it appears to have been uniformly held in the courts of Mississippi, that the bond thus given to the creditor on the seizure of the goods was intended as a substituted security for the lien acquired by the judgment and seizure; and consequently, on its execution and delivery, the goods, by operation of law, are released from all charge, and left in the possession of the debtors as free and unencumbered as before it attached; and if the property is not delivered, in pursuance of the condition, the remedy is then upon the bond, which on the breach or forfeiture becomes, by *operation of the statute, a statutory judgment against the defendant and sureties from that time, followed by a new lien upon the real and personal estate of all the obligors. The original judgment is merged and satisfied by the new and more comprehensive statutory judgment upon the bond, and the remedy of the creditors limited to the enforcement of this judgment. [*13

This is, in substance, the view of the statute as expounded by the courts of Mississippi in several cases, and particularly in the case of *The Bank of the United States* v. *Patton, et al.* (5 How., 200), in the Court of Appeals, which was argued twice, and very fully considered by the court. (*Stewart* v. *Fuqua*, Walk. (Miss.); *Witherspoon* v. *Spring*, 3 How., 60; *Archibald et al.* v. *Anderson*, 2 id., 852; *King* v. *Terry*, 6 id., 513; *Minor* v. *Lancashire*, 4 id., 347.) In the case of *The Bank of the United States* v. *Patton*, the court, speaking of what would have been the effect of the forthcoming bond, if the statute had not annexed to it the force of a judgment, say,—"As it releases the levy, and restores the property to the debtor, it is tantamount to a satisfaction of the execution, and the creditor would be left to pursue his remedy upon the bond."

The court then liken it to the replevin bond in Virginia, which had been held to be a substitute for the original judgment, and operated as a satisfaction; and add,—"It was no doubt in view of this principle that the framers of our statute saw proper to relieve the creditors from the delay and expense of a second suit upon the bond, by giving to it after forfeiture the force of a judgment against all the obligors therein, with a consequent right to have execution on the same; and also to provide, that no security should be taken on the execution which is sued out upon the new judgment"

It will be seen, therefore, that the forthcoming bond and statutory judgment consequent upon the forfeiture, in its

operation and effect, reversed the original position of these parties in respect to the priority of lien under their respective judgments, and gave to Clarke, the plaintiff below, the preference, his judgment having been docketed the 16th of June, and the new judgment of Brown not taking effect till the 17th of August, the date of the forfeiture of the bond. (*Minor* v. *Lancashire.*)

If the case stood upon this footing, it is very plain that Clarke, the purchaser under the sale of the marshal, acquired the better title to the property in question, and that the instructions were in conformity to the law of the case.

It is contended, however, that the quashing of the forthcoming bond, and consequently the new statutory judgment, operated to revive the original one, and to restore the priority of lien, the same as it stood before any of the proceedings on that judgment had intervened.

*14] *We do not assent to this view of the effect of the order vacating the new judgment, so far, at least, as respects the liens or rights of third parties which have legally attached in the mean time to the goods of the defendant, discharged from the original judgment by the giving of the forthcoming bond. After that lien was suspended or discharged, the original judgment being, in contemplation of law, satisfied by the new and substituted security, the debtor was at liberty to deal with the property as his own, and it remained in his possession, subject to any charge or lien impressed upon it either by the act of the party, or by operation of law, the same, after the forthcoming bond, as before the entry of the original judgment. Possibly as between the parties the judgment revived, but it would be against principle, and work manifest injustice, to give to it this retrospective operation, so as to extinguish the intermediately acquired legal rights of third persons. We deny to it this effect.

It would be otherwise, if the forthcoming bond had been shown to be void, as it might then be treated as a nullity, and as affording no foundation for the statutory judgment consequent upon the forfeiture. Under such circumstances, the lien of the original judgment would remain unaffected, and might be enforced by execution; it would then, of course, continue uninterrrupted by the lien of any subsequent judgment entered up against the defendant.

This view of the statute was taken by the court of Mississippi, in *Carlton et al.* v. *Osgood et al.*, (6 How., 285.)

But no such ground is presented in the record before us; nor did it exist in point of fact in the case. On the contrary, the forthcoming bond was in conformity to the statute, and

the only reason for the action of the court in quashing the proceedings, for aught that appears or has been shown, was either that the tribunal conceded to the plaintiff the right to vacate his own judgment at his election, and thus voluntarily give up all the rights acquired under it, or that the surety was irresponsible, which latter ground would probably have been unavailing had the fact appeared before the court, that Brown himself, with full knowledge of all the circumstances, approved of the sufficiency of the security.

At all events, it is enough to sustain the ground upon which we have placed the priority of lien upon the property, that, for aught appearing in the case, the new judgment of Brown upon the forthcoming bond was regular, and existed in full force and effect until set aside and vacated on his own motion. For, if so, it is clear, upon the statute and decisions of the courts of Mississippi, that the lien of his original judgment against Cozart became thereby lost and postponed, so as to let in that of the junior judgment of Clarke, and consequently the sale of the marshal, by virtue of the execution under it, vested in the purchaser the better title.

We have thus far examined this case upon the law of Mississippi, *where the cause of action arose, as we understand it to have been expounded and applied by the courts of that state. [*15

Another view may be taken, leaving out of consideration the priority of lien as acquired under the judgments of the respective parties, and looking solely to priority as acquired by virtue of an actual seizure of the property under execution, regarding that as the test in cases where the conflicting executions issued out of the federal and state courts, and to the executive officers of the different jurisdictions. (*Hagan* v. *Lucas*, 10 Pet., 400.) In this aspect of the case, the legal result is equally decisive in favor of the right of the plaintiff below.

If we have not misapprehended the rule of law prevailing in Mississippi in the view already taken, the right to the property acquired under the seizure of the first execution of Brown became extinguished by the operation and effect of the forthcoming bond. No title, therefore, can be set up by virtue of that seizure.

The case, then, as it respects the right depending upon priority of actual seizure and legal custody of the property, instead of priority of judgment, stands thus:—The marshal levied upon the slaves on the 9th of November; the sheriff not till the 7th of December following. The former, therefore, under the law giving effect to the first seizure, was

entitled to the property, and of course the purchaser at his call acquired the better title.

In every view we have been able to take of the case, we are satisfied the judgment of the District Court was right, and should be affirmed.

The court have had some difficulty in noticing the exceptions taken to the instructions in this case, in the form in which they are presented upon the record. It is matter of doubt whether they point to the instructions given and refused to the jury, or the refusal of the court below to grant a new trial. If to the latter, no question is presented upon which error would lie, according to the repeated decisions of this court. (4 Wheat., 213; 6 id., 542.)[1]

The counsel were probably misled, in making up the record, by the practice in Mississippi, where error will lie to the appellate court for a refusal to grant a new trial by statute. (Laws of Miss., p. 493, § 53.) But the rule is otherwise in the federal courts. That state has also a statute providing for the case of exceptions to be taken in the progress of the trial in the usual form (p. 620, § 40), which is the form that should have been observed in this case. The practice is particularly stated and explained in *Walton* v. *The United States*, (9 Wheat., 651), and in several later cases (4 Pet., 102.)

The practice is well settled and exceedingly plain and simple, and will be strictly adhered to by the court.

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*16] *THE TOMBIGBEE RAILROAD COMPANY *v.* WILLIAM H. KNEELAND.

A corporation, created by the laws of another state, can sue in Alabama, upon a contract made in that state.[2]

The decision of this court, in 13 Pet., 519, reviewed and confirmed.

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[1] CITED, *Pomeroy* v. *Bank of Indiana*, 1 Wall., 598.

[2] CITED. *Chaffee* v. *Fourth Nat. Bank of New York*, 71 Me., 529.

The power of a corporation to make valid contracts in a state other than the one creating it, has been abundantly established. *Commercial Bank* v. *Slocomb*, 14 Pet., 60; *Bunyan* v. *Costes*, Id., 122; *Irvine* v. *Lowry*, Id., 297; *Stoney* v. *American Ins. Co.*, 11 Paige (N. Y.), 675; *Mumford* v. *American Ins. Co.*, 4 N. Y., 467; *Kennebec Co.* v. *Augusta Ins. Co.*, 6 Gray (Mass.), 204; *Ohio Ins. Co.* v. *Merchants Ins. Co.*, 11 Humph. (Tenn.), 1; *Day* v. *Newark India Rubber Co.*, 1 Blatchf., 628, 632; *Blair* v. *Perpetual Ins. Co.*, 10 Mo., 561; *Atterbury* v. *Knox*, 4 B. Mon. (Ky.), 92; *Silver Lake Bank* v. *North*, 4 Johns. (N. Y.) Ch., 370; *Brown* v. *Minis*, 1 McCord, (S. C.), 80; *St. Charles Bank* v. *Bernales*, 1 Car. & P., 569; s. c. Ry. & M., 190; *King of Spain* v. *Hullet*, 1 Cl. & F., 333; s. c.

Tombigbee Railroad Company *v.* Kneeland.

THIS case was brought up by writ of error to the District Court of the United States for the Middle District of Alabama.

It was an action of assumpsit on a promissory note made by the defendant to the plaintiff. The declaration stated, that the Tombigbee Railroad Company was a corporation constituted by law in the State of Mississippi, the officers and stockholders of which were citizens of that State; and that the defendant, who was a citizen of the State of Alabama, by his promissory note, made at Gainsville, in the last mentioned State, on the 20th of January, 1838, promised to pay to the plaintiff or order, six months after date, at the plaintiff's banking-house in Columbus, in the State of Mississippi, the sum of nine thousand dollars, for value received,—concluding with the usual averment, that the defendant had not paid.

The defendant appeared and pleaded:—1st. Non-assumpsit.

2d. That the plaintiff was a banking institution without the limits of the State of Alabama, to wit, in the State of Mississippi, and, unauthorized by and contrary to the laws of the State of Alabama, exercised the franchise of banking in the State of Alabama, on the day and year in the declaration mentioned, and at Gainsville, in the county of Sumpter, in the State last aforesaid, in the unlawful exercise of the said banking franchise, did, as a bank, discount the said note, contrary to the laws of the State of Alabama.

3d. That the plaintiff, unauthorized by and contrary to the laws of the State of Alabama, did establish at Gainsville, in the county of Sumpter, in the State of Alabama, an office and bank to carry on in the State of Alabama the franchise of banking, and, in the exercise of that business, issued their bills and promissory notes for the purpose of circulation as cash bank-bills and currency, on the day and year in the declaration mentioned, and before and after; and that the

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1 Dow & C., 169; *Giraga Iron Co.* v. *Dawson*, 4 Blackf. (Ind.), 202; *Lathrop* v. *Scioto Bank*, 8 Dana (Ky.), 114; *Williamson* v. *Smoot*, 7 Mart. (La.), 31; *New York Ins. Co.* v. *Ely*, 5 Conn., 560.

The legislature may prohibit a foreign corporation from contracting within the state. *Washington Ins. Co.* v. *Chamberlain*, 16 Gray (Mass.), 165; *Baltimore &c. R. R. Co.* v. *Glenn*, 28 Md., 287; *Hutchins* v. *New England Coal Mining Co.*, 4 Allen (Mass.), 580.

The right to make the contract carries with it the correlative right to enforce such contract. *Marietta Bank* v. *Pindall*, 2 Rand. (Va.), 465; see *Slaughler* v. *Commonwealth*, 13 Gratt. (Va.), 767; *British American Lead Co.* v. *Ames*, 6 Metc. (Mass.), 391; *Portsmouth Livery Co.* v. *Watson*, 10 Mass., 91; *American Ins. Co.* v. *Owen*, 15 Gray (Mass.), 491; *New York Dry Dock* v. *Hicks*, 5 McLean, 111; *Holcomb* v. *Illinois Canal*, 2 Scam. (Ill.), 236; *Frazier* v. *Wilcox*, 4 Rob. (La.), 518; *Lewis* v. *Kentucky Bank*, 12 Ohio, 172.

note, in the declaration mentioned, was made to and for the purpose of same being discounted by the plaintiff, exercising such banking privileges as aforesaid, on the day and year and at the place aforesaid, and that the plaintiff did discount the said note, and issue therefor its note and bills, in the exercise of the banking franchise aforesaid, contrary to the laws of Alabama, by reason whereof the said note was void.

4th. That there was no such corporation as the plaintiff had in that behalf averred in his declaration.

The plaintiff joined issue on the first and fourth pleas, and demurred to the second and third. And upon the hearing of *17] the *demurrers, the District Court held that these pleas were sufficient in law to bar the plaintiff of its action, and gave judgment in favor of the defendant. From this judgment the present writ of error is brought.

The case was submitted to the court without argument by the Attorney-General, for the plaintiff in error, referring the court to 13 Pet., 519. No counsel appeared for defendant.

Mr. Chief-Justice TANEY delivered the opinion of the court.

The only question arising on this record is, whether, by the laws of Alabama, a contract made in that State by the agents of a corporation created by the law of another State is valid. This point was fully considered and decided in the case of the *Bank of Augusta* v. *Earle*, 13 Pet., 519, and cannot now be considered as open for argument in this court. The principles decided in that case must govern this; and the judgment of the District Court is therefore reversed, with costs.

ALEXANDER LEVI *v.* JOHN THOMPSON ET AL.

The holder of a register's certificate of the purchase of a lot in the town of Dubuque, lawfully acquired, and issued by the register under the two acts of 2d July, 1836, and 3d March, 1837, has such an equitable estate in the lot, before the issuing of a patent, as will subject the lot to sale under execution, under the statute of Iowa.[1]

The doctrine established in the case of *Carroll* v. *Safford*, 3 How., 441, reviewed and confirmed.

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[1] In *Rhea* v. *Hughes*, 1 Ala. (N. S.), 219, it was decided that the mere possession and improvement of land belonging to the United States, however valuable, was not the subject of levy under an execution. But it was said

Levi *v.* Thompson et al.

THE commissioners under the act of the 3d of March, 1837, amendatory of the act entitled "An Act for laying off the Towns of Fort Madison," &c., approved July 2d, 1836, confirmed unto Alexander Levi and John Thompson, as tenants in common, the right of purchase, by pre-emption, of lot No. 68, in the town of Dubuque, being of the first class, containing seventeen-one-hundredths of an acre. The lot was entered in the land-office, and the receiver's receipt given to Levi and Thompson for the purchase money, on the 1st of April, 1840. It appears that William Chilson and Joel Campbell had instituted a suit, on the common law side of the District Court of Dubuque County, against Levi and Thompson, and that judgment was rendered against them for $780.50 and costs of suit, in August, 1839. Execution was issued upon the judgment in due form of law; it was placed in the sheriff's hands to be executed, and he levied upon the lot for which Lee and Thompson had a pre-emption certificate, and the same was sold to satisfy the execution, before a patent had been issued *by the United States to Levi and Thompson for the same. Thompson, the tenant [*18 in common with Levi, became the purchaser, paid the purchase money, and took the sheriff's deed for the same. Thompson, in November, 1841, sold the lot to the other defendants, who had paid for the same before Levi sued out his bill. They state, in their answer to Levi's bill, that when they bought the lot from Thompson, they were informed by

that the question whether the possession under a contract could be reached by a *fieri facias* depended upon a different principle. And in *Goodlet* v *Smithson*, 5 Port. (Ala.), 249, it was determined, that by the act of entry and payment of the purchase money, the purchaser acquired an inchoate legal title, which was the subject of levy and sale under an execution. In *Land* v. *Hopkins*, 7 Ala. (N. S.), 115, it was held that such land as described in the last case was subject to the lien of a judgment rendered against the execution defendant. See *McCaskle* v. *Amasine*, 12 Ala., 17. In Tennessee it was decided in 1842, that an occupant claimant of lands of the United States had no such interest as can be reached by an execution or bill in chancery. *Brown* v. *Money*, 3 Humph. (Tenn.), 469; but in *Scott* v. *Price*, 2 Head (Tenn.), 538, it was decided that it was otherwise, after the United States had relinquished the land to the state. Now by statute such lands are subject to sale. *Heffly* v. *Hall*, 5 Humph. (Tenn.), 580; *Lell* v. *Crossna*, 6 Id., 281; *Hall* v. *Heffly*, 6 Id., 444; *Bumpas* v. *Gregory*, 8 Yerg., 46. The case in 3 Humphrey was decided when the statute was in force. So in Missouri such lands are not the subject of sale. *Hatfield* v. *Wallace*, 7 Mo., 112; *Paulding* v. *Grimsley*, 10 Id., 214; *Bower* v. *Higbee*, 9 Id., 256; *Bray* v. *Ragsdale*, 53 Id., 170. Interests in mining claims may be sold. *McKeon* v. *Bisbee*, 9 Cal., 137; *State* v. *Moore*, 12 Id., 56; *Hughes* v. *Devlin*, 27 Id., 501. The majority of the cases follow the principal case. *Turney* v. *Saunders*, 4 Scam. (Ill.), 527; *French* v. *Carr*, 2 Gilm. (Ill.), 664; *Cavenetes* v. *Smith*, 5 Iowa, 157; *Jackson* v. *Spink*, 59 Ill., 404; *Thomas* v. *Marshall*, Hard. (Ky.), 19; *Lindsey* v. *Henderson*, 31 Miss., 324; *Jackson* v. *Williams*, 10 Ohio, 69. Contra, *Garlick* v. *Robinson*, 12 Ga., 340.

him, and so supposed the fact to be, that he had a full and perfect right thereto, free from all encumbrances and of all claim by any other person or persons, and that at the time of their purchase, and when they made the payments to Thompson for the same, they were utterly ignorant of any title or claim to property in Levi, or that he set up or pretended to have any claim or title to the same. That the first notice they had of any such claim by Levi was about three weeks before the date of their answer to his bill, when he sent them word that he desired them to make a division of the property with him. They further state, at the time of their purchase there was a small log-house upon the lot, of little or no value to them, which they tore down and removed. That they went into quiet and peaceable possession of the lot at the time of their purchase, and have so remained ever since; that they had made lasting and valuable improvements upon the lot; that for a considerable part of the time whilst they were making these improvements, Levi had been in the city of Dubuque, and they believe must have discovered them, as he frequently passed and repassed the lot, and never informed them of his having any claim to the same. The cause was tried in the District Court, upon the bill and answers of the defendants, and the court adjudged that the petition of the complainant should be dismissed. An appeal was taken to the Supreme Court, and that court affirmed the decree of the court below; and from that court it has been brought to this court by appeal.

The cause was submitted on printed arguments, by *Mr. Washington Hunt*, for the appellant, and *Davis* and *Crawford*, for the appellees.

Mr. Hunt contended, that the legislature of the Territory of Iowa could confer no authority upon the sheriff to sell the property in question, because the title was yet in the United States, and had not passed to Levi and Thompson at the time of the sheriff's sale, and cited *Bagnell et al.* v. *Broderick*, 13 Pet., 436; and *Wilcox* v. *Jackson*, Id., 498, 516, 517.

He also contended, that the sheriff's deed could pass no title, because it was sold as real estate, whereas the fee simple was at that time in the United States.

Mr. Hunt also raised other objections, which it is not necessary *to state, because the decision of the court turned upon a single point.

*19]

Messrs. Davis and *Crawford*, for the appellees, relied upon the validity of the statute of Iowa.

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Mr. Justice WAYNE delivered the opinion of the court.

The only question raised by the pleadings in this cause, and it seems to us the only one argued at its hearings in the District and Supreme Courts of Iowa, was, whether the lot, for which Levi and Thompson had a pre-emption certificate, which had been entered and paid for by them, was or was not liable to be sold upon execution issued upon a judgment rendered against them previous to a patent having been issued for the land by the government of the United States. Their right to a pre-emption purchase of the lot was acquired under the act of the 2d of July, 1836, ch. 262, entitled "An Act for laying off the Towns of Fort Madison and Burlington, in the County of Des Moines, and the Towns of Bellevue, Dubuque, and Peru, in the County of Dubuque, Territory of Wisconsin, and for other Purposes," and under the act of the 3d of March, 1837, ch. 36, amendatory of the preceding act just recited. The right of Levi and Thompson to a pre-emption, under those acts, is not a controverted point in the case. Taking it for granted, then, that it had been lawfully acquired, that they entered the land in the proper office, and that it was paid for in their names, this gave them the right to the register's certificate of purchase, to be transmitted to the commissioner of the general land-office, as in other cases of the sale of public lands. The fee continues in the United States until the issue of the patent, but the right to the fee was in the purchasers, and they were entitled to a patent for the land, unless there was some legal objection by the United States against issuing it, of which this court is not advised.

This right to the fee and a patent in this case gave to Levi and Thompson that "equitable right" to the land, under the certificate from the receiver of the land-office, which the law of Iowa has made subject to execution for the satisfaction of judgment. Stat. Law Ter. of Iowa, 197, January 25th, 1839.

We further remark, that the principle upon which the case of *Carroll* v. *Safford*, 3 How., 441, was decided, covers this case. Nor do we find any thing in the case of *Bagnell* v. *Broderick*, or of *Wilcox* v. *Jackson*, cited by the counsel for the plaintiff in error, or in any other case decided by this court, which conflicts with the decision it here gives.

We direct the decree of the court below to be affirmed.

*20] *McKean Buchanan, Plaintiff in error, v. James Alexander.

Money in the hands of a purser, although it may be due to seamen, is not liable to an attachment by the creditors of those seamen.

A purser cannot be distinguished from any other disbursing agent of the government; and the rule is general, that, so long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury.[1]

A decision of a state court, sanctioning such an attachment, may be revised by this court under the twenty-fifth section of the Judiciary Act.

Mr. Justice McLean delivered the opinion of the court.

This is one of six cases depending upon the same principle, which have been brought before this court by writs of error to the Circuit Superior Court for the county of Norfolk, state of Virginia, under the twenty-fifth section of the Judiciary Act of 1789.

Six writs of attachment were issued by a justice of the peace of the above county of Norfolk, by boarding-house keepers, against certain seamen of the frigate Constitution, which had just returned from a cruise. The writs were laid on moneys in the hands of the purser, the plaintiff in error, due to the seamen for wages. The money was afterwards paid to the seamen by the purser, in disregard of the attachments, by the order of the Secretary of the Navy.

The purser admitted before the justice that the several sums attached were in his hands due to the seamen, but contended he was not amenable to the process. The justice entered judgments against him on the attachments. The

[1] Cited. *Gilbert* v. *Lynch*, 17 Blatchf., 404; *Providence &c. Steamship Co.* v. *Virginia Fire &c. Ins. Co.*, 11 Fed. Rep., 287; *Dewey* v. *Garvey*, 130 Mass., 87; *Jardain* v. *Fairton Saving Fund Assoc.*, 15 Vr. (N. J.), 377.

But money in the hands of an agent charged with the payment of the salaries of the clerks in one of the executive departments of the government, was held the proper subject of attachment. *Averill* v. *Tucker*, 2 Cranch, C. C., 544; and money in the hands of an agent authorized to pay it to one of the principal's creditors is liable to attachment at the suit of another creditor. *Center* v. *McQuesten*, 18 Kan., 476. Contra, *Van Winkle* v. *Iowa Iron &c. Co.*, 56 Iowa, 245.

The salaries of township and municipal officers may be attached before payment; not so those of state officers, because the state being a necessary party, cannot be sued. *Rodman* v. *Musselman*, 12 Bush. (Ky.), 354. But in Maryland the salaries of all public officer, state and municipal, are exempt. *Keyser* v. *Rice*, 47 Md., 203. In New York the salary of a municipal officer in the hands of the comptroller, cannot be reached by attachment or any other process in behalf of a creditor. *Waldman* v. *O'Donnell*, 57 How. Pr., 215.

An attachment will not lie against imported goods in the custody of the collector, upon which the duties have not been paid. *Harris* v. *Dennie*, 3 Pet., 292.

cases were appealed to the Superior Court of the county, which affirmed the judgments of the justice. And that being the highest court of the state which can exercise jurisdiction in the cases, and its judgment being against a right and authority set up under a law of the United States, may be revised in this court by a writ of error.

The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitmate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the *hands of a disbursing officer, it is [*21 as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.

It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers.

We think the question in this case is clear of doubt, and requires no further illustration.

The judgments are reversed at the costs of the defendants, and the causes are remanded to the state court, with instructions to dismiss the attachments at the costs of the appellees in that court.

25

LYMAN A. SPALDING, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF NEW YORK, EX REL., FREDERIC F. BACKUS, DEFENDANTS.

THIS case was brought up from the Supreme Court for the Trial of Impeachments and the Correction of Errors of the State of New York, by a writ of error issued under the 25th section of the Judiciary Act. Reported below 10 Paige, 284; s. c. 7 Hill, 301.

The facts were these.

The relator, Frederic F. Backus, previons to the 20th day of July, 1840, had obtained a judgment in the Supreme Court of the State of New York against Lyman A. Spalding, the plaintiff in error, for the non-performance of promises, and on the said last mentioned day the relator, as complainant, filed a creditor's bill against the said Spalding, in the Court of Chancery of said State, before the Vice-Chancellor of the Eighth Circuit, on which an injunction was issued and served on said Spalding, to restrain him, among other things, from collecting, receiving, transferring, selling, assigning, delivering, or in any way or manner using, controlling, interfering or meddling with, or disposing of, any property, money, or things in action belonging to him.

On the 13th day of December, 1841, an order was made by said court to attach said Spalding for a violation of said injunction, and such proceedings were had in said court, that on the 21st day of March, 1842, the said court declared and adjudged that the said Lyman A. Spalding had been and was guilty of a contempt of court in wilfully violating said injunction, by disposing of property and paying out money contrary
*22] to the terms of said injunction; and that such misconduct of the said Lyman A. Spalding was calculated *to and did impair, impede, and prejudice the rights and remedies of the complainant in the said cause, and it was ordered that he pay a fine for said contempt to the amount of $3,000, and the costs and expenses in relation to said contempt of $196.51; and that he be committed to the common jail of the county of Niagara, until the fine, costs, and expenses are paid, and that a mittimus issue accordingly to the sheriff. And it was also ordered, that the costs and expenses be paid to the solicitor of the relator, and the $3,000 be paid to the clerk of said court, subject to the further order of the court.

On the 6th day of May, 1842, an *alias* mittimus was issued; on the 7th day of May, the said Spalding was arrested, and

continued under said arrest until the 29th day of September, 1842.

On the 11th day of April, 1842, the said Lyman A. Spalding presented his petition to be declared a bankrupt, pursuant to the act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," passed August 19th, 1841, ch. 9, and on the 17th day of September, 1842, was duly and fully discharged, under said act, from all the debts owing by him at the time of presentation of his said petition to be declared a bankrupt, and received his certificate thereof, pursuant to said act.

Afterwards, on his application, he was brought before a supreme court commissioner of said state, on *habeas corpus*, and claimed to be discharged from the mittimus, on the ground of being discharged by his certificate from the fine, costs, and expenses. The relator, having been duly notified, appeared by counsel and opposed said discharge, but the commissioner, on the presentation of the said certificate, discharged said Spalding from the mittimus on the 29th day of September aforesaid.

On the 18th day of November after, the relator made application to the said Vice-Chancellor for another mittimus to enforce the collection of said fine, costs, and expenses, and an order was entered that the said Spalding show cause before the Vice-Chancellor why the same should not issue.

On the 28th of said month, the relator and Spalding appeared before said Vice-Chancellor; and the said Lyman A. Spalding presented his certificate in bankruptcy aforesaid, and claimed that by the said bankrupt act he was by said certificate discharged from all his debts, and from the said fine, costs, and expenses.

On the 18th day of January, 1843, the said Vice-Chancellor ordered, adjudged, and decreed that a new mittimus issue, to commit the said Spalding to the common jail of the county of Niagara, until he pay the said fine, costs, and expenses, $196.51, to be paid to the solicitor of the relator, and the $3,000 be paid to the clerk of the court, subject to the further order of the court, and declared and decided that the discharge of the said Lyman A. *Spalding, under the bankrupt [*23 law, did not entitle him to be released from the payment of the said fine, costs, and expenses, nor from imprisonment for its collection.

From which decision and decree the said Spalding appealed to the Chancellor of the said state, and the said Chancellor, on the 2d day of June, 1843, affirmed the decision and order or decree appealed from, and decided that the said defendant,

Lyman A. Spalding, was not and could not be discharged from the said fine, costs, and expenses under the bankrupt act. 10 Paige (N. Y.), 284.

And on appeal by the said Lyman A. Spalding to the Court for the Correction of Errors of the state of New York, the said court affirmed the said order or decree of the said Chancellor, with costs and interest on the amount decreed to be paid, and decreed that the said Spalding was not by the bankrupt act discharged from the payment of the said fine, costs, and expenses.

The following is the opinion of the Court for the Correction of Errors, as pronounced by Chief-Justice Nelson.

The appellant was adjudged guilty of a contempt of court for a wilful violation of an injunction by the Vice-Chancellor of the Eighth Circuit, on the 21st of March, 1842, and amerced in the sum of $3,000, and costs and expenses of the proceeding, which were taxed at $196.51, with directions that he be committed to the jail of Niagara county until the same were paid.

On or about the 7th of May, he was arrested for non-payment of said fine; but succeeded in preventing an actual commitment into the custody of the jailer, by the use of the writ of *habeas corpus*, until he obtained his discharge under the bankrupt law, 17th September following, when he was soon after set at liberty on the production of said discharge, by Joseph Center, a commissioner to do the duties of a judge of the Supreme Court at chambers.

On the 18th of November, the relator, upon full statement of the foregoing facts, applied to the Vice-Chancellor for a recommitment, on the ground that the discharge of the commissioner was without authority, and void; which, after hearing counter affidavits, and counsel for both parties, he adjudged accordingly, and entered an order for said recommitment to close custody till the fine was paid.

On appeal to the Chancellor, this order was affirmed, and the question is now here on appeal to this court.

Chief-Justice NELSON. Upon the view I have taken of the case, the only question at all material to examine is, whether the fine inflicted upon the appellant for a wilful violation of the injunction is a debt within the meaning of the bankrupt law, so that his discharge granted under it, will operate to exonerate him from imprisonment. If not, then, beyond all question, the act of the commissioner in discharging the appellant from the mittimus was *without

*24]

authority, and the order of the Vice-Chancellor directing a recommitment proper.

By the 4th section of the bankrupt law (Laws Cong. 1841, p. 11), the certificate shall "be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," &c.

The adjudication upon which the fine was imposed, is as follows:—"The said Lyman A. Spalding has been and is guilty of a contempt of this court in wilfully violating the said injunction, and by disposing of property and receiving and paying out money contrary to the terms of the said injunction; and that said misconduct of the said Lyman A. Spalding was calculated to, and actually did, impede and prejudice the rights and remedies of the complainant in the said cause."

This act, for which the appellant has thus been adjudged guilty, is a criminal offence under the Revised Statutes (vol. 2, p. 577, § 14), and was before, at common law (4 Bl. Com. 129), for which he was liable to an indictment, and, on conviction, to fine and imprisonment.

He might have been punished in this way, and subjected to a fine not exceeding $250, and imprisonment for one year. (2 Rev. Stat., 582, § 46, and p. 577, § 14.)

But this remedy by indictment for suppressing the mischief is oftentimes found too tardy for the exigency of the case; and hence the law has also authorized the more summary proceeding by attachment, as for a criminal contempt, whereby the offender is arraigned at once upon the charges, and the course of justice more promptly vindicated and sustained. As has been well remarked in reference to this subject, laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

This summary mode of punishment is the one that has been resorted to in the instance before us; and upon a conviction, the propriety and justice of which is not in question, a fine of $3,000 and costs of proceedings has been imposed; a penalty, as we have seen, for a strictly criminal offence, and inflicted under a strictly criminal proceeding.

It appears to me, therefore, the very statement of the case is enough to show, that there is no color for the ground taken, that the fine is a debt within the bankrupt law, any more than would exist in the case if it had been imposed after convic-

tion, on an indictment for any other of the numerous minor offences within the calendar of crimes.

*25] It is contended, however, that these proceedings, being under the *provisions in the Revised Statutes (vol. 2, p. 440, tit. 13) designed for the purpose of enforcing civil remedies, should, though in form criminal, be regarded simply as another remedy for collecting the debt claimed in the suit in the Court of Chancery, and upon which they have been founded; that the fine is, in point of fact, imposed for the purpose of being applied to the extinguishment of that debt, whenever, in the progress of the suit, it shall have been established; that it is but incidental to the debt, and dependent upon it, and a discharge of the one must necessarily discharge the other.

The answer to all this is, that several cases of strictly criminal contempts have been incorporated into the provisions of the statute under this head, "Of proceedings as for contempts, to enforce civil remedies," &c., of which the case before us is one, for the purpose of authorizing the court to impose the fine, with a view to the actual loss or injury sustained by the party aggrieved, in consequence of the criminal act, and of applying the money in satisfaction of the same, instead of imposing it for the benefit of the people.

This is most manifest from a perusal of the several provisions. We find there the case of persons assuming to be officers, attorneys, solicitors, and counsellors of the court, and acting as such without authority. Also for rescuing property from seizure, and persons from arrest; for unlawfully detaining a witness or party from court; and for any other unlawful interference with the process or proceedings in the action; the refusal of a witness to attend or to be sworn; the improper conduct of jurors, in conversing with a party to the suit, receiving communications from him, or from any other person, in relation to the merits; for disobedience to any lawful order, decree, or process of the court, &c. (2 Rev. Stat., 441, § 1, Sub. 3, 4, 5, 6.)

All these are strictly cases of criminal contempts, which have nothing to do with the collection of debts, or enforcement of civil remedies beyond the support and vindication of the general administration of the laws; and the following provisions of the statute, regulating the punishment to be inflicted, shows the reasons for bringing them under this head. (§ 20, p. 443.) If the court shall adjudge the defendant to have been guilty of the misconduct charged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the

party, it shall proceed to impose a fine, or to imprison, or both, as the nature of the case shall require. (§ 21.) If an actual loss or injury shall have been produced by the misconduct alleged, a fine shall be imposed sufficient to indemnify the party, and to satisfy his costs and expenses, which shall be paid over on the order of the court; and the payment and acceptance of such fine shall be a bar to any action by the aggrieved party to recover damages for said injury. (§ 23.) When such misconduct consists in the omission to perform some act or duty yet in the power *of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, &c. [*26

Here, in cases confessedly criminal and indictable, and the penalties for which, ordinarily, would go for the benefit of the people, the courts are authorized to impose them, with a view to indemnity of the party aggrieved, making, at the same time, his acceptance of the fine a bar to any private action for the injury.

But the fine imposed is no less a penalty for a criminal act, and intended as a punishment for the same, than if inflicted for the benefit of the people. The imposition, in the way prescribed by the statute, accomplishes the double purpose of punishment for the misconduct, on the one hand, and indemnity to the aggrieved party, on the other.

I am satisfied, therefore, that the discharge under the bankrupt law has no sort of application to the case, and that the order for the recommitment by the Vice-Chancellor was proper and legal.

It has been urged that, whether the commissioner erred, or not, in discharging the appellant from the mittimus, under the writ of *habeas corpus*, the Vice-Chancellor had no authority to recommit; that the order discharging him should have been first reversed by *certiorari* before the second commitment, (§ 61, p. 473.)

This would be true, if the commissioner had had jurisdiction over the subject matter, and had rendered only an erroneous judgment in the premises; but has no application where his proceeding is wholly without authority, and void, as in this case. (2 Rev. Stat., 470, § 42, Sub. 3, § 44. *Cable* v. *Cooper*, 15 Johns. [N. Y.], 152.) (A Copy.)

N. Hill, Jr., *Reporter.*

To review this judgment of the Court of Errors, the present writ of error was brought.

The case was argued by *Mr. Curtenius*, for the plaintiff in error, and *Mr. Delano*, for the defendant in error.

Mr. Curtenius, for the plaintiff in error.

By the affirmation of the said order or decree, it is decided, that the said fine, costs, and expenses is not a debt, within the late bankrupt law of the United States. And that the certificate of the plaintiff in error under the said law did not discharge him from the payment of the said fine, costs, and expenses.

We insist on the contrary, and shall seek to maintain, that the said fine, costs, and expenses imposed on the said plaintiff in error is a debt. And that his certificate of discharge under the said bankrupt law did and does discharge him from the payment thereof.

On the decision of these points rests the whole of this cause. We make, therefore, as our

*27] *First Point, That the fine, costs, and expenses imposed on the plaintiff in error, previous to his petition in bankruptcy, was a debt, from which he was duly discharged by his certificate under the bankrupt law of the United States.

By the late bankrupt law (Laws of Congress, 1841, chap. 9), "any person whatsoever residing in any state or territory of the United States owing debts 'may petition' except where the debts were created by defalcation, as," &c., "or while acting in any fiduciary capacity," and on compliance with the act "shall be entitled to a full discharge fpom all his debts." And that said discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and engagements of such bankrupt, which are provable under this act."

In our case, there is no pretence that the plaintiff in error or his debts come under any of the exceptions in the first section; or that there is any exception in the law which excludes him or it. But the decision is against us on the ground that the law itself was not intended to apply to a case like ours. What, then, is our case?

In answer, it becomes necessary to inquire by what power, under what statute, and for what purpose, the imposition of this fine, costs and expenses was made, and the plaintiff in error placed beyond the reach of relief from the bankrupt law, and subjected to perpetual imprisonment.

The power is claimed to be exercised by virtue of the revised statutes of the state of New York, "as for a contempt."

There are two statutes, under the one or the other of which the fine, costs, and expenses were imposed. The one (2 Rev. Stat., 2d ed., 207) is entitled, "Provisions concerning courts of record, their process and proceedings," by which power is

given to punish as criminal contempts, wilful disobedience of any process or order lawfully issued or made by a court of record. The punishment to be by fine or imprisonment, or both, but the fine is limited to $250, and the imprisonment to thirty days. And section 14 expressly states, that these sections shall not extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy. Under this statute, the fine, &c., could not have been imposed.

The other statute (2 Rev. Stat., 2d ed., 410), is entitled, "Of proceedings, as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions," which provides, that,

§ 1. Every court of record shall have power to punish, by fine or imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, impeded, or prejudiced, in the following cases.

*§ 20. If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of any party, in a cause or matter depending in such court, it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require. [*28

§ 21. If any actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.

§ 22. In all other cases, the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings.

§ 26. Persons proceeded against according to the provisions of this title shall notwithstanding be liable to indictment for the same misconduct, if it be an indictable offence; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in forming its sentence.

The adjudication was under section 20, as the mittimus is in the words of this section. And the fine, &c., is under section 21, for the purpose of indemnifying the relator for the

removal of so much of the property, or money, on which he had a lien by his injunction.

That is, it belongs to the party, on his establishing his right to it by obtaining a decree of the court on his bill of complaint. The damage was the money, or value of the property, on which the relator had his lien by his bill and injunction; the offence, the disposing of that amount by the plaintiff in error; the fine is the amount of that damage, termed by the statute a fine. It is a certain, fixed, and definite amount; a debt, and belongs to the relator if he obtains a decree on his bill; if not, it then belongs to the plaintiff in error.

Here, then, we have the power, the statute, and the purpose under and for which the fine, costs, and expenses were imposed.

But it is urged against us that this is a fine for a contempt, an alleged wilful contempt; as though that implied a criminality which placed the unfortunate party adjudged guilty beyond relief, and interposed an insurmountable barrier between him and the benefit of the bankrupt law.

(Mr. Curtenius then proceeded to argue that the object of this statute was only to enforce civil remedies, by the people's interposing between party and party, and permitting a party to use the same process which the people do in their cases of contempt; that *the money was payable to one party to indemnify him for the loss which he had sustained by the act of the other party; that the offending party might still be indicted for the same offence, which could not be the case if both were offences against the public; that in case the claimant failed afterwards to establish his right to the money, it would be paid to the defendant, but never to the people; that even if it was a debt due to the people, it would be discharged by bankruptcy, inasmuch as they had chosen to produce the relation of debtor and creditor between themselves and the offending party.)

*29]

It is then a debt. 2 Jac. Law Dict., 200; *Ex parte Smith*, 5 Cow. (N. Y.), 277; *Wallsworth* v. *Mead*, 9 Johns. (N. Y.), 367; *McDougall* v. *Richardson*, 3 Hill (N. Y.) 558; *Case of James Baker*, 2 Str., 1152. It is not only a debt, but a debt discharged by the bankrupt law. 2 Moll., 442; *Ex parte Parker*, 3 Ves., 554; 1 Dea., 235; *Hopcroft* v. *Farmer*, 8 Moo., 424; *Lewis* v. *Morland*, 2 Barn. & Ald., 56; 1 Sch. & L., 169. These cases establish that the form of the process is not to be considered, but the cause of its issuing; that if the ground of the proceeding be a debt, it is a process of debt; and that if the process is to compel payment of a sum of money, it is a debt. The same views are sustained by the following author-

ities:—2 Rose, 196; Coop. C. C., 198; *The King* v. *Edwards*, 9 Barn. & C., 652; 1 Bos. & P., 336; 1 Cowp., 136.

Second Point. That there is error in the affirming the decree of the $196.51 of costs to be paid to the solicitor of the relator, and that the decree in this case, being void in part, is void in whole, and must be reversed. 1 Moo., 494; 4 Bl. Com., 285; 13 East, 190.

Third Point. That if the fine was imposed for a criminal offence, the statute under which the same was imposed is repugnant to a law of Congress, and the Constitution of the United States, and is therefore illegal and void.

It is repugnant to the bankrupt law.

1st. Because it operates as a fraud on the act, by securing a preference of one creditor over the general creditors.

2d. It seeks to compel the bankrupt to violate the act by paying one creditor before, and at the expense of, the others.

3d. It seeks to compel a violation of the act, and debars the bankrupt of its benefits.

The act declares all payments, &c., in contemplation of bankruptcy, and all preferences, void, and a fraud on the act, and that the person making such unlawful payments and preferences shall receive no discharge.

In our case, after the filing of his petition, the plaintiff in error was divested of all his property. He could not pay, for he had nothing. He could not pay the property in his schedules, because *it did not belong to him. And [*30 neither the relator nor the court could receive, and if received, the assignee might have recovered it again.

The order and the mittimus, then, sought to enforce an illegal act, a fraud on the creditors of the bankrupt, and a violation of the principle of equality among the creditors.

It is repugnant to the Constitution.

1st. If a criminal offence, it imposes, under the circumstances, an excessive fine, and a consequent cruel and unusual punishment.

We have seen, that, on filing his petition in bankruptcy, the plaintiff in error was by the act divested of all his property. If he swore to the truth, his schedules contained it all. If he did not, it still would belong to the assignee. His decree in bankruptcy was evidence that he had sworn to the truth, and the imposition of this fine, if criminal and going to the people, was excessive, and was a cruel punishment for the offence, for it imposed an impossibility. The law never imposes a fine, where it presumes the party can have nothing to pay. Here was no presumption, but actual legal evidence, that

there was nothing. If it be said that the order was made before his petition, and without knowledge of it, we answer, with full knowledge of all these facts it is sustained, and sought to be enforced.

2d. It doomed him in fact, by the order of a single judge, to perpetual imprisonment.

This follows of course;—divested of every thing,—deprived of liberty,—the narrow bounds of a prison cell the field of his enterprise—and hours of solitude, without means for the exercise of his industry, could never enable him to pay this heavy fine, costs, and expenses.

3d. It subjects him to punishment twice for the same offence.

We have insisted, that, if the fine was imposed for a criminal contempt, it is still a debt. And that if the offence is criminal, the statute is illegal and void; and that the only way in which the statute can or ought to be sustained is on the ground that it is civil, and that the fact that the fine under it belongs to the party is proof that it is so.

But it is objected, that the contempt is criminal, because, both at common law and by the statute, it is indictable; we say it is also civil. If indicted, the fine is limited to $250. If civil, to the damages of the party. In our case, the contempt is civil, and the fine the damages; and the plaintiff in error is still subject to indictment, and fine of $250. From which does he ask to be discharged? Certainly not from the fine on the indictment. Although from that, we insist, as before, that he would be discharged. We make as our

Fourth Point. The judgment of the relator against the plaintiff in error, at the time of the filing of his petition under the bankrupt *act, was a debt, and the ground on which the proceedings in chancery were had. The decree or order imposing the fine, costs, and expenses, therefore, is either a new or additional debt, founding and resting on the original; or, it is the remedy given by statute, to enforce, as for contempt, the payment of so much of the old debt.

*31]

If the fine creates a new or additional obligation on the part of the plaintiff in error to pay, it is a debt,—a debt of no higher nature or greater importance than a judgment for a tort, as a trespass on the person or the property of the relator, from which under the bankrupt law he would be discharged. (Cooke, B. R., 2, 5, 574.)

As a new or additional debt, it was certain, fixed, and definite, previous to the filing of his petition, and provable under the act,—provable by the relator, being his ascertained

damages, imposed for his benefit and payable to him, by the statute ascertaining and fixing it. By his certificate, therefore, he is discharged from it. 2 Rosé, 196; Coop., 198; 9 Barn. & C., 652; 1 Bos. & P., 336.

Or, if so much of the old debt, and the order, decree, and mittimus the remedy under the statute for its enforcement, then the plaintiff in error, being discharged from the debt itself, must be from the remedy for its enforcement.

Here, then, the plaintiff in error was ordered and decreed to pay the relator $3,000 and the expenses; which $3,000 would and must, if received by the relator, reduce so much of his judgment; what act or event would discharge the plaintiff in error from this order? Would the receipt of the relator? Certainly. Would a satisfaction of that judgment under the hand of the relator? Undoubtedly. Why? Because it would be a legal discharge.

Then why not, by the law of the land, as fully and clearly discharged from that judgment by his certificate discharging him from all his debts, as though he had produced the satisfaction piece of the relator? The one, the legal discharge of the relator; the other, equally so of the bankrupt law.

When discharged from the judgment, he is discharged from the execution, or process to enforce its collection, or any part of it, the same as if imprisoned on a *capias ad satisfaciendum;* the debt being discharged, the remedy passes with it, for there is nothing left to operate upon. For, if the money had been paid into court, it never could have become the relator's without proof of the existence of the judgment as alleged in his bill. If that judgment is satisfied at any time before the money paid over by the court to the relator, the money would revert to the plaintiff in error, or in this case, to the assignee in bankruptcy.

*As a new debt or obligation, or as a remedy for the collection of so much of the old debt or judgment, therefore, the plaintiff in error is equally discharged by his certificate. [*32

Again, this is manifest. The relator sought by his bill to collect this debt, say $5,000; he obtains a lien on $3,000, which is removed by the plaintiff in error; and he is ordered to replace it by paying that amount into court. If done, the relator suffers no injury. The relator sustains his bill by proving his judgment or debt of $5,000, and obtains an order that the $3,000 in court be paid over to him. Can it be supposed for a moment, that he is still entitled to a decree for the full amount of his judgment of $5,000 in addition?

And yet this is the certain result of the decision of the

Court of Errors. For if the $3,000 is paid to the relator, it cannot be applied to the payment of so much of the payment, because the whole of that is discharged by the certificate in bankruptcy. And because, under the present decision, the fine is no part of it.

The relator, however, must prosecute his bill of complaint to a decree, before he can obtain an order for the payment of the $3,000 to him. And that decree must be for the whole amount of his judgment of $5,000, because, under the said decree, the $3,000 is no part;—thus receiving the $3,000, and a decree for $5,000 in addition. Presenting the extraordinary fact,—a fact, too, without precedent in the courts of law or equity of this or any other country (but in direct violation of the common principles of both),—that a party, seeking to collect a civil demand of $5,000, may, by the act of the defendant, occasioning no injury whatever to him, be entitled to recover of that defendant $8,000. A decision producing such a result is erroneous, and must be reversed.

We have not urged in this court the point made by us in the courts below, in relation to the power of the Supreme Court commissioner to discharge the plaintiff in error on his certificate, because it does not involve the all important questions on which this case depends, and if the certificate entitles him to a discharge, it ceases to be a point of importance.

The point, that the voluntary part of the bankrupt law is unconstitutional, although on the printed points of the defendants in error in the court below, was not passed upon, raised, presented, or alluded to in the Court of Errors, and cannot therefore be raised here.

Mr. Delano, for defendants.

The points now made are the same, on the part of the defendants, as those insisted upon before the Court of Errors.

First. The Supreme Court commissioner, Center, had no authority to discharge the plaintiff in error. All the proceedings before him were without jurisdiction, and void.

*33] *1. Because the plaintiff in error was convicted and punished by the Court of Chancery, as for a criminal contempt, the cause of his imprisonment being plainly and specially stated in the mittimus.

A contempt, in its legal acceptation, means the treating of a court of justice, or person invested with judicial authority, in a contumelious or disrespectful manner, or in violating rules or orders made by competent tribunals. 6 Petersd. Abr., 106, 157.

The contempt, of which the plaintiff in error was con

victed, was a criminal contempt. This is defined, in the Revised Statutes of New York, to be the wilful disobedience of any process or order lawfully issued or made by any court of record. 2 Rev. Stat., 278; 2d ed. 207, § 10.

This species of contempt is also punishable, by indictment, by the laws of New York. Rev. Stat., 692, § 14; 2d ed. 577.

These enactments are merely declaratory of the common law, as it existed previous to the Revised Statutes; and the object of them is to define and limit the nature of the offense and the powers of the courts.

Blackstone enumerates, among the crimes for which punishment might be judicially inflicted, a contempt of the process of any of the superior courts of the king.

"A solid and obvious distinction exists between contempts, strictly such, and those offenses which go by that name, but which are punished as contempts only, for the purpose of enforcing some civil remedy." This distinction is clearly marked in the Revised Statutes of New York, and the note of the revisers shows such was their intention. The contempt, of which the plaintiff in error was found guilty, was the wilful disobedience of the process of injunction. He did not refrain from doing what he was enjoined not to do. The power to punish for a wilful disobedience of process of this kind is essential to the administration of justice; without it, the writ of injunction in many cases would be entirely nugatory. When the process, which goes by the name of contempt, is merely to collect money which the party may not be able to pay, it is then properly deemed a mere civil remedy. 4 Bla. Com. by Chitty, 122; 1 Hawk.'s P. C., 149, 150; 1 Kent Com., 300, note (*b*), 3d ed.; 3 Rev. Stat., 695, original note to §§ 10–15.

If the contempt was a criminal contempt, it being clearly set out in the mittimus, the commissioner, Joseph Center, had no authority to discharge the plaintiff in error, nor had he any jurisdiction over the matter. But it was the duty of the commissioner to remand the party to the custody of the officer, if any contempt was plainly and specially charged in the commitment. The discharge of the commissioner could not, therefore, be any valid objection *to the issue of [*34
the second *alias* mittimus. It was not a subject over which the commissioner had jurisdiction.

2. Because the commissioner, not being a court of justice, as required by the bankrupt act, had no authority to try the fact, whether the discharge was duly granted, or not.

The commissioner has merely the power of a judge of the Supreme Court at chambers. No issue could be made up or

tried. The discharge might be impeached for fraud, &c., and no court can give effect to the discharge, which has not power to inquire into its validity. An issue was claimed, and the relator required an opportunity to try the question.

The act of Congress neither expressly, nor by implication, vests any such authority in a commissioner, and he is expressly prohibited from its exercise by the forty-second section of the habeas corpus act.

3. No discharge could be granted if the bankrupt act released the plaintiff in error, except by application to the Court of Chancery.

A contrary course would lead to a conflict of jurisdiction between the several courts. The uniform practice in England and in this country is believed to have been to apply to the court where the judgment or decree is, or from which the process issued. (Act to amend the Law relating to Bankrupts, 6 Geo. IV., ch. 16, § 126.)

Second. The discharge under the act to establish a uniform system of bankruptcy did not release the plaintiff in error, although the Supreme Court commissioner had no jurisdiction; yet as the order appealed from was an application for a second *alias* mittimus, and the court held the discharge did not apply to the case, and was no answer to the application, the question in relation to the effect of the discharge in bankruptcy is presented by the case. The jurisdiction of the commissioner is not important, except as an answer to the point which may be made by the plaintiff in error, that there was a decision by a competent tribunal, not vacated or reversed, and that such decision could not be inquired into on the application to the Court of Chancery. The principal question remains, namely, the effect of the discharge of the plaintiff in error under the bankrupt act.

If this contempt was criminal, the power of Congress to grant a dispensation for crimes might well be questioned. It is not necessary to repeat what has been said under our first point. The act of Congress, commonly called the bankrupt act, does not embrace this case. The fourth section of the act declares the effect of the discharge in these words:—"And such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of
*35] such bankrupt which are provable under *this act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." The only debts discharged are those provable under the act. If the fine imposed upon the plaintiff in error was not a debt

provable under the act, the discharge does not present a bar. The fine imposed was not a debt, contract, or engagement. The course of practice in such cases is, as was done in this case, to order the money paid into court to abide the final result of the cause. A creditor's bill had been filed, and an injunction obtained; and for the wilful and voluntary breach of this injunction, the fine was imposed. Although the fine was imposed, in part, to indemnify the party, yet he had no claim to it until the result of the litigation should give it to him. It was to be paid into court, and there remain, to abide the final order of the court. It was not a debt provable under the act, for there was no one to prove it. In no way could it be proved as a debt. It was no more a debt than a fine for assault and battery, or any other fine or punishment which may have been imposed for violated law. It is contended, however, that the fine being imposed, in part, to enforce a civil remedy, this takes away the criminal character of the contempt, and assimilates the proceeding to that class of cases where it is conceded that the process is merely to provide a remedy for the collection of money in those cases where an execution cannot issue. It is true, that, aside from any injury to the aggrieved party, the fine is limited to $250, and the imprisonment to six months. The contempt is as criminal when it impedes and obstructs civil remedies, as when it does not. The crime consists, in this case, in the wilful disobedience of the process or order of a court of record; and the remedy to the party is also given in such cases by statute. Where an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify, and to satisfy his costs and expenses, &c. (§ 22.) In all other cases, the fine shall not exceed $250. Courts of record are, by the statute, authorized, and had power without it, to enforce remedies of parties by inflicting this punishment. The cases of attachments for nonpayment of costs, or for the nonpayment of any sum of money, nonperformance of an award where money is awarded, it is conceded, are merely remedies in nature of an execution. They require the performance of duties which may be beyond the ability of the party to discharge. This is not criminal. The crime consists in a wilful, inexcusable, and unatoned for disobedience of some lawful order or process. The definition implies the power to obey, but makes the *corpus delicti* consist in what is the essence of all crime, *mala fides*,—a deliberate design to obstruct the course of justice, and contemn the requirements of the process. Of this

contempt the plaintiff in *error was adjudged guilty, and a fine was imposed to compensate the party.

The cases cited, in the opinion of the Vice-Chancellor and Chancellor, sustain these views. The following cases also illustrate our positions:—*People* v. *Nevins*, 1 Hill (N. Y.), 154; *Ex-parte Parker*, 3 Ves., 554; *Rex* v. *Stokes*, 1 Cowp., 136; 1 Atk., 262; *Rex* v. *Pixley*, Bunb., 202.

Third. The voluntary part of the bankrupt act is unconstitutional. It is not intended to present any argument on this point. The case does not probably require it; and if it did, the whole subject has been so frequently discussed, that it is not supposed we can add any thing to the labor of others.

The relator, or defendant in error, claims that the writ of error in this cause was sued out for the purposes of delay only, and therefore asks that the judgment be affirmed, with the highest rate of damages and costs.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court have considered this case, and have come to the conclusion that the judgment of the Court of the State of New York for the Correction of Errors must be affirmed. But there is some difference among the justices who concur in affirming the judgment as to the principles upon which the affirmance ought to be placed. No further opinion will, therefore, be delivered, than merely to pronounce the judgment of this court, affirming the judgment rendered by the state court.

Mr. Justice McLEAN.

I dissent from the judgment of the court.

Mr. Justice WAYNE.

I do not concur with the majority of the court, and think that the judgment of the Court for the Trial of Impeachments and for the Correction of Errors should be reversed.

*37] THOMAS BEALS, PLAINTIFF, *v.* FELICITE HALE, DEFENDANT.

There were two statutes of the State of Michigan, both passed on the same day, namely, the 12th of April, 1827. One was "An Act concerning Deeds

and Conveyances," which directed that such deeds or conveyances should be recorded in the office of register of probate for the county, or register for the city, where such lands, &c., were situated. This act became operative from its passage.

The other was "An Act concerning Mortgages," which provided "that every mortgage, being proven or acknowledged according to law, may be registered in the county in which the land or tenements so mortgaged are situated." This act did not go into operation until several months after its passage.

In the case in question, there were two mortgages, both including the same property, in the city of Detroit, Wayne county, one of which was recorded in the city registry, and the other in the county registry.

These statutes are not so contrary or repugnant to each other as necessarily to imply a contradiction. Both can stand.[1]

The recording of a prior mortgage in the county registry was sufficient to give it validity and priority.

Statutes which apparently conflict with each other are to be reconciled, as far as may be, on any fair hypothesis, and validity given to each if it can be, and is necessary to conform to usages under them, or to preserve the titles to property undisturbed.[2]

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[1] CITED. *Welch* v. *Cook*, 7 Otto, 543.

[2] A statute is repealed by the enactment of a later one repugnant to, or covering the whole subject of the former. *United States* v. *Barr*, 4 Sawy., 254; *Dowdall* v. *State*, 58 Ind., 333; *United States* v. *Claflin*, 7 Otto, 546; *Campbell* v. *Case*, 1 Dak. T., 17; *Willing* v. *Bosman*, 52 Md., 44. But unless the repugnancy between the provisions of the two statutes is positive, there can be no repeal by implication. *Wood* v. *United States*, 16 Pet., 342; *United States* v. *Taylor*, 3 How., 197; *United States* v. 67 *Packages of Dry Goods*, 17 Id., 85; *McCool* v. *Smith*, 1 Black, 459; *Aspden's Estate*, 2 Wall. Jr., 368; and they must be so repugnant that it is impossible to consistently reconcile them. *Morlot* v. *Lawrence*, 1 Blatchf., 609; *United States* v. *Smith*, 2 Id., 127; *Milne* v. *Huber*, 3 McLean, 212; *United States* v. *Irwin*, 5 Id., 178; *Cotè* v. *United States*, 3 Nott. & H., 64; *Harford* v. *United States*, 8 Cranch, 109; *McLaughlin* v. *Hoover*, 1 Oreg., 31; *Winter* v. *Norton*, Id., 42; *Walker* v. *State*, 7 Tex. App., 245; *Parker* v. *Hubbard*, 64 Ala., 203. All the provisions need not be repugnant to work an entire repeal, where it is evident the later statute was intended to supercede the earlier one. *Daviess* v. *Fairbairn*, 3 How., 636; *Excelsior Petroleum Co.* v. *Embury*, 67 Barb. (N. Y.), 261; *King* v. *Cornell*, 16 Otto, 395; *Red Rock* v. *Henry*, Id., 596. But where such intention is not apparent the repeal is only co-extensive with the repugnancy. *Public School Trustees* v. *Trenton*, 1 Vr. (N. J.), 667.

Thus a revising or amendatory statute covering the whole subject matter of several earlier laws, repeals them all. *Butler* v. *Russell*, 11 Int. Rev. Rec., 30; *Norris* v. *Crocker*, 13 How., 429; *United States* v. *Cheeseman*, 3 Sawy., 424; *Breitung* v. *Lindauer*, 37 Mich., 217; *Strauss* v. *Heiss*, 48 Md., 292; *Tafoya* v. *Garcia*, 1 New Mex., 480; *United States* v. *Tynen*, 11 Wall., 88; *Murdock* v. *City of Memphis*, 20 Id., 617. But where the revising statute declares the effect it is intended to have upon the earlier statute, *e. g.*, where it provides that such provisions of the earlier act as are inconsistent with it are repealed, there is no implied repeal of such parts of the earlier act as are not inconsistent with the later one. *Patterson* v. *Tatum*, 3 Sawy., 164; *Pursell* v. *New York Life Ins. &c. Co.*, 42 Superior (N. Y.), 383.

Where a revising statute expressly repealed all but one of a number of statutes of one purport, it was held that the omission was an oversight, and the statute not mentioned was to be deemed repealed. *Mayor &c. of New York* v. *Broadway &c. R. R. Co.*, 12 Hun (N. Y.), 571. S. P. *State* v. *Barrow*, 30 La. Ann. (Pt. I), 657; *Prince George's County Commissioners* v. *Laurel*, 51 Md., 457.

A statute punishing an offence as a felony, is impliedly repealed by a subsequent statute punishing the same act as a misdemeanor. *Hayes* v. *State*,

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the district of Michigan.

It was an ejectment, brought by the plaintiff, Thomas Beals, a citizen of New York, against Felicite Hale, the defendant, a citizen of the state of Michigan. Nathaniel Weed, Harvey Weed, and Henry W. Barnes were, on application, permitted to defend their title to the premises, claiming that the said Felicite Hale was their tenant, and in possession under them.

The facts in the case are set forth in the special verdict of the jury, which was as follows.

"Issue being joined in this case, and the parties present, by their respective attorneys, hereupon comes a jury, to wit: John C. Mundy, Alanson Sherwood, William P. Patrick, Albert Bennet, Robert Rumney, Austin Stocking, Sylvester Granger, Garry Spencer, John Bour, James Beaubien, Tunis S. Wendell, and James Cicotte, senior, who, being empanelled and sworn to try the issue joined in this cause, and after having heard the evidence adduced therein, find specially the following facts, and say:—That John Hale was, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and twenty-eight, seized and possessed in his own right of said lots number sixteen, seventeen, and eighteen, in the city of Detroit, county of Wayne, and (then territory, now) state of Michigan.

"That being so seized and possessed of the said premises, he, the said John Hale, and Felicite Hale, his wife, executed a mortgage, to secure the payment of a certain sum of money, to one James Lyon, bearing date the thirteenth day of November, in the year of our Lord one thousand eight hundred and

*38] *twenty-eight, of the said lots, together with other lands lying in the said county of Wayne, as well as of certain lands in the county of Monroe, in the territory of Michigan, which said mortgage was recorded in the office of the register of the said county of Wayne, where said lots and part of said mortgaged premises were situated, on the thirteenth day of January, in the year eighteen hundred and twenty-nine, in Liber 9 of Mortgages, pp. 103, 104, 105, &c.,

55 Ind., 99; *State* v. *Smith*, 44 Tex., 443. S. P. *Johns* v. *State*, 78 Ind., 332; *People* v. *Tisdale*, 57 Cal., 104.

A general statute without negative words will not repeal a previous special act containing different provisions. *Rounds* v. *Waymart Borough*, 81 Pa. St., 395; *Chesapeake &c. R'y* v. *Hoard*, 16 W. Va., 270; *Wood* v. *Election Comm'rs*, 58 Cal., 561.

A recital in a statute that a former one was repealed or superseded by subsequent statutes, is not conclusive as to the fact; such a question is a judicial, not a legislative one. *United States* v. *Claflin*, 7 Otto, 546.

and also in the county of Monroe, where the remainder of said lands and premises were situated, in the office of register for said county, in Liber 9, Folios 281 to 286. That said mortgage was afterwards, to wit, on the twenty-first day of November, in the year eighteen hundred and thirty-eight, foreclosed under the statutes of the state of Michigan, and the said several lots sold at public auction, and struck off to said Lyon at the sale thereof, and that a sheriff's deed was afterwards, on the 6th day of April, A. D. 1842, executed to the said plaintiff, as assignee of the certificate of sale to said Lyon of the said lots, they not having been redeemed within two years from the time of sale, pursuant to statutes of said state in such case made and provided, which said deed was duly recorded.

"And the said jury further find, that the said John Hale, and Felicite, his wife, after the execution of the former mortgage, and before a foreclosure thereof, to wit, on the sixth day of June, in the year eighteen hundred and thirty-seven, for a good and valuable consideration, duly made, acknowledged and delivered, under their respective hands and seals, to Nathaniel Weed, Harvey Weed, and Henry W. Barnes (who had no notice of said prior mortgage unless said record was notice), another or second mortgage on the said premises, lots sixteen, seventeen, and eighteen, in the city of Detroit, county of Wayne, and state of Michigan, which said mortgage, bearing date the said sixth day of June, in the year eighteen hundred and thirty-seven, was duly recorded in the appropriate registry, on the 7th day of June, in the year eighteen hundred and thirty-seven, in Liber 8, Folio 343, of Mortgages, and which said mortgage was afterwards, on the thirty-first day of August, in the year eighteen hundred and thirty-nine, foreclosed under the statutes of said state, exposed to sale, and struck off to said Weeds and Barnes at the said sale, and, not having been redeemed within two years therefrom, that a sheriff's deed of said premises was executed on the sixteenth day of August, eighteen hundred and forty-two, and delivered to said Nathaniel and Harvey Weed and Henry W. Barnes, of all and singular the said premises, which was duly recorded.

"That the plaintiff and defendant both claim under the respective mortgages above set forth, and the sheriff's deeds under the respective foreclosures aforesaid; and that Felicite Hale, the defendant, was, at the institution of this suit, and still is, a tenant in possession of *said premises, under a lease from said Weeds and Barnes, who are admitted [*39 under the statute to defend as her landlords.

"And the jurors aforesaid, on their oaths aforesaid, do

further say, that if it shall appear to the said court, from the facts above found, that the recording of said prior mortgage from Hale to Lyon in the registry of Wayne county was sufficient record thereof to constitute notice of said mortgage under the laws of Michigan, in reference to mortgages of real estate situate in the county of Wayne, within the limits of the city of Detroit, then they find for the plaintiff.

"But should said court be of opinion that said record in the office of said registry for the county of Wayne was invalid and insufficient in law, so far as the said premises in the city of Detroit are concerned, to constitute notice thereof to the subsequent mortgagees, then they find for the defendants.

THOMAS BEALS }
vs. }
FELICITE HALE." }

On consideration of the said special verdict, the same being brought before the court on a motion for judgment on the verdict, the opinions of the judges were opposed on the point whether the recording of the mortgage from Hale to Lyon in the registry of Wayne county was a sufficient record thereof to constitute notice of said mortgage under the laws of Michigan, in reference to mortgages of real estate in the county of Wayne, within the limits of the city of Detroit; and it is ordered and directed, that this cause, with said point, be certified to the Supreme Court of the United States, in pursuance of the act of Congress in such case made and provided.

The cause was argued by *Mr. Henry N. Walker*, for the plaintiff, and by *George C. Bates* and *Alexander D. Fraser*, for the defendant.

Mr. Walker, for plaintiff.

The facts will appear from the special verdict. The question of law arises under two statutes passed on the same day. The first is entitled "An Act concerning Deeds and Conveyances," and will be found on p. 258 of Laws of Michigan for 1827. By this act it was declared that a city register's office should be established for the city of Detroit, in which "all deeds and other conveyances" relating to lands in the city should be recorded. The second act is entitled "An Act concerning Mortgages," and will be found on pages 273, &c., of Laws of 1827. This was approved the same day as the act concerning "deeds and conveyances," but to take effect some months after. This last act does not allude to a city register's office, but directs where all mortgages of lands situated *in the respective counties in Michigan

*40]

shall be recorded. The point of difference between the counsel, as well as the point certified by the court, is whether Lyon should have recorded his mortgage under which we claim in accordance with the act "concerning deeds and conveyances," in the city office; or in accordance with the provisions of the act "concerning mortgages," in the register's office of the county of Wayne. It was recorded in the register's office for the county, and plaintiff contends this was a good and sufficient record, for these reasons, viz.:—

First. The act of the Territory of Michigan which governs this case, as we believe, is the one "concerning mortgages." It was passed on the 12th of April, 1827, to take effect on the first day of January, 1828. It is entitled "An Act concerning Mortgages," and was the first law enacted concerning mortgages by the Legislative Council of the then Territory of Michigan. The first section directs, "that the registers of the respective counties of the territory, from time to time, shall provide fit and convenient books for the registering of all mortgages of any lands or tenements situated within their respective counties; in which books shall be entered the names of the mortgagors and mortgagees, the dates of the respective mortgages, the mortgage money, the time or times when payable, the description and boundaries of the lands and tenements mortgaged, the time when such mortgages are registered, and a minute of the certificate and acknowledgment thereof hereinafter mentioned, to which books of registry all persons whomsoever, at proper seasons, may have recourse; and it is hereby made the further duty of the said registers, when registering a mortgage, also to record at length the special power of sale, if any be contained therein; for which service the respective registers are hereby allowed to demand and receive the like rate of compensation which is allowed them for recording a deed; and if any register shall neglect or refuse to do the duty required of him by this act, he shall answer to the party injured all damages which shall happen by such neglect or refusal."

This section is general in its terms, and the language used is susceptible of but one construction. The command is positive, and the object of providing the books clear and certain. It is to record "all mortgages of any lands or tenements situated within their respective counties." Not only the instruments to be recorded are clearly pointed out, but the mode of registering, the compensation for the same, the penalty for neglect on the part of the register, and a provision that these records shall at all times be subject to inspection.

The second section of the same act is in the following words, viz:—

Sec. 2. "That every mortgage, being proven or acknowl-
*41] edged according to law, and such proof or acknowledg-
ment certified in *like manner, may be registered in the county in which the lands or tenements so mortgaged are situated; and in case of several mortgages of the same premises or any part thereof, the mortgage or mortgages which shall be first registered as aforesaid shall have the preference in all courts of law and equity, according to the times of the registering of such mortgages respectively: Provided, the mortgage or mortgages so to be preferred be made *bonâ fide*, and upon good and valuable consideration: and further, that no mortgage, or any deed, conveyance, or writing in the nature of a mortgage, shall defeat or prejudice the title of any *bona fide* purchaser of any lands or tenements unless the same shall have been duly registered as aforesaid."

There is as little doubt about the construction of this section as the first. The most comprehensive language possible is used. It declares "every mortgage" may be registered in the county where the lands and tenements mortgaged are situated, and the one first recorded shall have preference in all courts of law and equity. The jury in this case have found that the premises described in the declaration are in the county of Wayne, and that the mortgage to Lyon, under which we claim, was executed after the passage of this act, and was recorded in the register's office for the county of Wayne, as provided in this act. Where is there room for an argument against the validity of the record? Not from this act, for it is beyond a question, that, from the terms of the law, it includes this mortgage, as well as all other mortgages in the territory. There is no exception in the law; it is general, and applies to "every mortgage." It is not contended, we believe, that this law does not in terms reach this case, or that there is any ambiguity or uncertainty in the language used. But we are told that this statute is controlled and governed by another act of the Territory of Michigan, and this renders it necessary to examine that act.

The counsel for the defendant have contended, and so will argue to the court, that the act entitled "An Act concerning Deeds and Conveyances," found in the Laws of Michigan for 1827, page 258, approved April 12th, 1827, is the law of this case. It will be observed that the act "concerning mortgages," and the act "concerning deeds and conveyances," were approved on the same day. But the act concerning mortgages did not take effect until January, 1828, thus

making it have the same operation and effect, as though passed on a day subsequent. If the laws conflict, then the last one will govern. The act "concerning mortgages" appears from the statute book to have been acted upon by the legislature subsequent to the one "concerning deeds and conveyances"; it is on a subsequent page of the statute book, and if both laws took effect at the same moment, we suppose they would be construed (if thought to conflict in terms) like different sections of the same statute. The last one would stand, and the others fall. The application of *this well known principle would be conclusive, if the acts were thought to relate to the same subject-matter. But we suppose the first law has no reference to mortgages whatever. One evidence of it is, that on the same day an act is passed relating to mortgages, and providing for the recording of them in a specific manner. The first three sections of the act concerning "deeds and other conveyances" are the only ones which it is pretended have any application to this case. These sections read as follows, viz.:— [*42

"Sec. 1. Be it enacted by the Legislative Council of the Territory of Michigan, That all deeds or other conveyances of any lands, tenements, or hereditaments lying in this Territory, signed and sealed by the parties granting the same, having good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors, or proved and recorded as is hereinafter provided, shall be good and valid to pass the same lands, tenements, or hereditaments to the grantee or grantees, without any other act or ceremony in law whatever.

"Sec. 2. That all such deeds or conveyances of or concerning any lands, tenements, or hereditaments lying within this Territory, or whereby the same may be in any wise affected in law or equity, shall be acknowledged by the party or parties executing the same, or proved by one or more of the judges of the Supreme Court, or before one of the justices of any county court, a notary public, or any justice of the peace in any county within this Territory, and a certificate of such acknowledgment or proof being indorsed thereon, and signed by the person before whom the same was taken, such deed or conveyance shall be recorded in the office of register of probate for the county, or register for the city, where such lands, tenements, or hereditaments, respectively, are situated, lying, and being; and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and which shall not be acknowledged, proved, and recorded as aforesaid, shall be adjudged fraudulent and void

against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim.

"Sec. 3. That a suitable person shall be appointed register for recording deeds and other conveyances affecting in law or equity, or relating to real estate within the city of Detroit, who shall be sworn to the faithful performance of the duties of his office, and shall receive the same compensation as is or may be allowed for the same services to the register of probate in the several counties in this Territory."

We think if there was no statute like the one "concerning mortgages," still this court would say the act relating "to deeds and conveyances" is not applicable. "Deeds and conveyances" are not the terms used to designate mortgages. *43] An analysis of this *statute shows conclusively to our minds, that the construction attempted by the counsel for the defendant is not the one which the legislature contemplated. The latter part of the first section says, that a deed or conveyance within the meaning of this statute "shall be good and valid to pass the lands, &c., without any other act or ceremony whatever." Is this the way titles to lands are passed under mortgages? By no means. Before a perfect title exists under a mortgage, there must be a failure to pay. The property must be sold, and the equity of redemption which remains in the mortgagor cut off. Another statute declares how this is performed, and when these acts are to be done, and it is wholly different from the mode pointed out in this law. It is clear, then, the first section does not refer to or include mortgages. The second section declares that all such deeds, &c., referring back to the first section for a description of them, shall be acknowledged and executed in a certain manner, and "such deeds or conveyances shall be recorded in the office of the register of probate for the county, or register for the city where such lands, &c., respectively, are situated, lying, and being," and the penalty for not recording is, that all such deeds and conveyances shall be adjudged fraudulent and void against any subsequent purchase or mortgage for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of such subsequent deed, &c.

The counsel for the defendant insist that the mortgage under which we hold is void against them, for the reason that it was not recorded in the office of registry of deeds for the city of Detroit; though it is admitted that it was recorded in the

office of register of probate, or county register. The penalty for not recording a deed there is, that it shall be adjudged fraudulent and void, while the penalty in the act concerning mortgages declares it shall be postponed only. One act says that the deeds and other conveyances not recorded in pursuance of it shall be void, thereby rendering it necessary to record the deeds referred to in the city register's office, under this law; if applicable, we are not only not entitled to recover, but the mortgage under which we claim is void, whatever the value of the premises, while the second law, or the one relating to "mortgages," in terms declares that the mortgage first recorded shall have preference in all courts of law and equity whatever. It is conceded that the mortgage under which we claim was recorded first in the registry for Wayne county, where this last provision prevails, and if the act concerning mortgages govern this case, then the mortgage under which we claim is good, and we are entitled to recover in this suit. The different penalties in the two acts would, of itself, indicate that the act "concerning deeds and conveyances" was not intended to apply to mortgages, for we believe there is not a statute in existence in any country, nor is there a decision of any court, declaring the penalty for not recording a mortgage, as against *a second mortgage, is that it is [*44 void. It is always to postpone; never more. Any other law would be oppressive. Take this case, where the premises were worth, at the time the second mortgage was given, enough to pay both; if the mortgage under which we claim is void, then we could not have redeemed from them, and our whole security would have been lost, while if it was only postponed by paying their mortgage, we could have protected our debt. We are by no means certain, that, even if we admit (which we do not) the first act to be applicable to mortgages, we were compelled to record in the city register's office. Where is the record of the Lyon mortgage, under which we claim, to be found? In the office of register of probate, or county register (they are the same), of the counties of Wayne and Monroe. Where are the lands and premises situated? Answer: In the counties of Wayne and Monroe. Ay, but, say the counsel for the defence, they are partly in the city of Detroit also. True; but is not Detroit in Wayne county? Are not the lots in question just as much in Wayne county as though they were out of the city? Most unquestionably. The counsel for the defendant admit the record of the mortgage under which we claim is good for part of the lands in Wayne county, but contend it is bad for another part in the same county; this we do not believe can be maintained.

Our conclusions formed from an examination of these statutes alone are,—

1. That the first act on the statute book relates solely to "deeds and conveyances," and does not refer to or include mortgages.

2. That the second act, having been passed at the same time, to take effect subsequently, and relating solely to mortgages, applies to and governs this case, and if the provisions of the two acts are inconsistent with each other, the act concerning mortgages must be sustained.

3. But if the first act is sustained, then we say that a record of a mortgage in the probate or county register's office for Wayne county is good, though part of the lands may be within the limits of the city of Detroit. But,

Secondly. We say that this question has been decided. The present defendants in fact, Messrs. Weed and Barnes, filed a bill in chancery, before the Chancellor of the state of Michigan, against the present plaintiff, setting up the facts as found by the jury, except that the bill was filed before the day to redeem had expired. They asked the court to decide the same question now before this court, that is, the validity of the record of this mortgage to Lyon, under which we claim. The argument of the counsel then was the same as it will be here, that the mortgage to Lyon was, as against them, under the provision of the act "concerning deeds," &c., void, and they asked the court to compel us to release our title. They asked the Court of Chancery to decide this question; and after argument, the court did decide it, and the opinion of that court *fully sustained us in every respect. The Chancellor said there could be no doubt but that the first act did not apply, and that the second did apply; and that the Lyon mortgage, having been recorded in accordance with the provisions of the act "concerning mortgages," was entitled to a preference in all courts of law and equity whatever. We suppose this adjudication, being between the same parties and upon the same subject-matter, is conclusive. This court will follow that decision.

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It is unnecessary to refer this court to the numerous decisions establishing this rule. We believe it is without an exception that this court always follows the decisions of state tribunals, when the question turns on the construction of a state statute, where real estate is in controversy.

Mr. *Bates* and Mr. *Fraser*, for the defendant.

The special verdict having found the real estate in controversy to be situated in the city of Detroit, the only question

involved in this case is, whether the mortgage through which the plaintiff claims to derive title to the premises should, by the laws of Michigan, have been recorded in the registry kept for the county of Wayne, or in that established for the city of Detroit; if in the former, it is conceded that the plaintiff must prevail in this action; but if in the latter, then the defendant is entitled to judgment on the verdict.

It has been well remarked by Chancellor Kent, that "the policy of this country has been in favor of the certainty and security as well as convenience of a registry, both as to deeds and mortgages;" and it is believed that every state in the Union has some statutory provision on the subject. Congress deemed some temporary rule on this head indispensable for the new territories to be established northwest of the river Ohio, for in the ordinance of 1787, a provision is incorporated, prescribing the manner in which conveyances were to be executed, and proved and acknowledged, and requiring them to "be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose." Indeed, the security of title to real estate in a great measure depends on such registries; and it can scarcely be believed that the local legislature of Michigan should have been unmindful of the necessity of adopting adequate provisions on this subject. Yet if the reasoning of the plaintiff is correct, it would seem that the legislature of Michigan have been sadly deficient in this respect, until the year 1827.

The plaintiff has contented himself with bringing into view two statutes adopted in that year, one on the subject of recording deeds and conveyances, and the other concerning mortgages; and he has merely referred to some of the provisions of those acts, to establish his position, that the mortgage under which he claims was recorded in the appropriate registry. These two acts ought not to be [*46
*considered by themselves, for it will be found to be essential as well to a correct understanding of the subject, as to enable the court to put a proper construction on the statutes alluded to, that we carefully examine the previous legislation of Michigan on this subject.

The earliest provision is a law of 1805, in the Woodward Code (so called), at page 52, which declares, "that the clerks of every court shall record all deeds and writings, acknowledged or proved before such court, &c., together with the acknowledgments of married women, and all indorsements and papers thereto annexed, by entering them, word for word, in proper books, to be carefully preserved, and shall afterwards redeliver them to the parties entitled to them."

The next enactment is in the Code of 1815, at page 80, which provides "that all deeds and conveyances, which shall be made and executed within this Territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be any way affected in law or equity, shall be recorded in the register's office of the district where such lands or hereditaments are lying and being, within six months after the date of such deed or conveyance; and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any such subsequent purchaser or mortgagee, for a valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which such subse quent purchaser or mortgagee may claim." Next follows an "Act concerning Deeds and Conveyances," to be found in the Code of 1820, at page 156, the first section of which prescribes the requirements of "all deeds or other conveyances of any lands," &c., the second section of which declares, "that all such deeds or other conveyances of or concerning any lands, tenements, or hereditaments lying within his territory, or whereby the same may be in any wise affected in law or equity, shall be acknowledged, &c., in the office of the register of probate for the county, or register for the city, where such lands, &c., are situated, lying, and being, within six months after the execution of such deed or conveyance; and any such deed or conveyance, that shall at any time after the publication hereof be made and executed, and which shall not be acknowledged and proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for a valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such purchaser or mortgagee may claim." The third section provides for the appointment of "a suitable person as register for recording deeds or other conveyances affecting in law or equity, or relating to, real estate within the city of Detroit; who shall be sworn to the faithful performance of his office, and shall *receive the same compensation as is or may be allowed for the same services to the registers of probate in the several counties in this Territory; and the seventh section provides, "that it shall not be lawful for any register of any city or county in this Territory to record any deed, conveyance, or other writing, unless the same shall be acknowledged or proved as is directed by this

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act," &c., and the eighth section prescribes, "that all deeds and conveyances of lands, &c., which shall hereafter be made and executed in any other Territory, state, or county, whereby such lands shall be conveyed in whole or in part, or otherwise affected or encumbered in law, shall be acknowledged," &c., and recorded as aforesaid.

This comprises the whole legislation of Michigan, from the organization of the Territory up to the year 1827, on the subject under consideration; and the similarity of the provisions in these various acts can hardly escape observation. Aside from these statutes, no allusion is to be found, in the whole legislation of Michigan, to the subject of mortgages, until the year 1827; nor any separate provision touching their execution, registry, or foreclosure; and if the mortgages which had been executed on real estate within the city of Detroit anterior to that time are not covered by these provisions, fearful indeed must be the condition of titles to city property, for it will be agreed on all hands, that these statutes have been universally held, as well by the profession as the community generally, as comprehending that class of deeds. It is equally certain, that ever since the establishment of a separate registry for the city of Detroit, mortgages, and other deeds affecting real estate in the city, have uniformly been recorded in that registry. Such has been the practical construction put on the law of 1820, and on that of 1827, referred to by the plaintiff, up to the year 1837, when an act was passed (Laws of 1837, p. 268) requiring the duties of the city register to be performed by the register of the county of Wayne. Up to that time, scarcely an instance can be pointed out of a mortgage of city property being recorded anywhere else than in the city registry, except the mortgage on which the plaintiff seeks to recover in this action. It will be perceived, that the law of 1827 is merely a reënactment of the law of 1820, with this difference only, that the latter statute limited the time within which deeds should be recorded, and superadded a provision for the recording of deeds which had been previously executed "in the city or county registry, as the case might require, agreeably to the provisions of that act." And in the Revised Statutes of 1833, the act concerning deeds and conveyances of 1827 is again transcribed and adopted; and in both these acts the provision which requires "deeds and other conveyances affecting in law or equity, or relating to, real estate within the city of Detroit" to be recorded in the city registry, is still preserved and incorporated.

Now it is urged that the reason and necessity of these laws, no *less than the language employed and the con- [*48

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text, manifestly show the intention of the legislature to have been the establishment of a registry of every description of deeds which might affect real estate. The general object was to prevent frauds on purchasers, mortgagees, and perhaps creditors, by having a place to which all might resort for the necessary information.

The terms made use of are general. No particular description of deeds is to be found in any of the acts, but the language used is sufficiently comprehensive to include mortgages, else why introduce into these acts terms which would be inapplicable to the recording of conveyances merely; such as "all deeds, or other conveyances concerning any lands, or whereby the same may be in any way affected in law or equity?" And again, unless mortgages were in contemplation of the legislature, why declare that every such deed or conveyance that should not be recorded as aforesaid should be adjudged fraudulent and void against subsequent purchasers or mortgagees, unless such deed or conveyance should be recorded before the recording of the deed or conveyance under which such purchaser or mortgagee might claim? And further, why should the sixth section of the act of 1827 use the terms "deed, conveyance, or other writing?" and the seventh section require deeds whereby lands were sold, or "otherwise affected or encumbered in law," to be recorded?

This is the language employed in the several statutes that have been passed upon this subject anterior and subsequent to 1827; and at the very time, too, that the mortgage law of 1817, relied on by the plaintiff, formed a part of the revised code. To presume that these enactments did not apply to mortgages executed prior to 1827 is presuming that the legislature overlooked a subject of the deepest importance to the rights of parties, and the securities of titles; but if it be conceded that they did so apply, then it is insisted that they are equally applicable to mortgages executed after that period of time, since the same laws continued to be operative until the year 1837, long after the execution of the plaintiff's mortgage. And we emphatically ask, if the plaintiff in this case, in the position he now occupies, does not come within the meaning, spirit, and terms of those acts? Does he not claim rights in opposition to a subsequent mortgagee for a valuable consideration? Does not the "deed, conveyance, or writing" in virtue of which he makes this claim affect or encumber in law the premises in question? And if so, does not that statute affix the penalty of his own omission, by declaring that his deed shall be deemed fraudulent and void, unless registered in the city registry?

But independent of the manifest intention of the legislature, in the various provisions above alluded to, to include mortgages, we might with confidence refer to the practical construction which they have uniformly received, should any ambiguity be found in the terms in *which [*49 they are couched. Considering the purpose for which these acts were made, in order to attain them, they ought to have a liberal construction. The practice of recording mortgages of real estate, lying within this city, in the city registry has been sanctioned by a most extensive and continued usage, from the year 1820 to the year 1837, and it is apprehended that courts will take notice of such usage under a statute. If it is now to be condemned, few titles to city property will be secure. *Optimus legum interpres consuetudo.* The propriety of applying this maxim to this case is sufficiently apparent. Long usage has been allowed great weight in cases allied to this. In reference to a usage which had obtained, under a statute concerning the acknowledgment of deeds, Chief Justice Tilghman, in the case of *McFerran* v. *Powers*, 1 Serg. & R. (Pa.), 101, 107, says:—"So extensive and deep rooted is the practice, that many titles depend upon it; and it would be unpardonable to disturb it now, by a critical examination of the words of the act." To the like effect is the opinion of Chief Justice Marshall, in the case *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22, 29, 32, 33. And Lord Mansfield, in 2 Eden, 74, says, in reference to the usage which had obtained under the statute of Henry VIII., as to the jointures:—"Consider also the usage and transactions of mankind upon it. The object of all laws in regard to real property is quiet and repose." Chancellor Sandford, in the case of *Troup* v. *Haight*, 1 Hopk. (N. Y.), 239, 268, in regard to the acknowledgment of a deed, held that the general usage, long and unquestioned, has great weight in the construction of the act, though such construction be not given upon adverse litigation.

But it would appear that the plaintiff's sole reliance for a recovery in this action is based on the act concerning mortgages, adopted for the first time in the year 1827. Now let it be kept in view, that this is the first special act passed in reference to mortgages in terms; that it was adopted on the same day with the act concerning deeds and conveyances, though to take effect in January, 1828; and that both these statutes are incorporated in the Revised Statutes of 1833, at pages 279 and 283, as they originally stood, and we ask what is the inference to be drawn from this fact. Clearly, that no change was contemplated as to the particular registry in which these "deeds, conveyances, or other writings" were to

be recorded. If not, it may be urged, why the necessity of adopting a special provision in regard to mortgages? We answer, that this law was introduced merely as a remedial law, to provide for a statutory foreclosure,—a remedy unknown both to the common law and to our legislation; and the scope of the provisions of the act is conclusive on that head. The act appears to have been transcribed from the laws of New York, and the clause for the recording of mortgages was introduced without averting to the previous legislation on the subject. These two statutes then relate to the same subject, so far as *they relate to the recording of deeds or mort- *50] gages; and "it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." It is therefore an established rule of law, that all acts *in pari materiâ* are to be taken together, as if they were one law; and they are directed to be compared, in the construction of statutes, because they are considered as framed upon one system, and having one object in view. "Indeed the latter act may be considered as incorporated in the former." Dwarr. Stat., 699, 700; 4 T. R., 447, 450; 5 Id., 417, 419; Doug., 30. "And the rule applies, though some of the statutes may have expired, or are not referred to in the other statutes;" Dwarr. Stat., 700; 1 Burr., 445, 447; Bac. Abr., tit. *Statutes*, I, 3; 1 Vent., 244, 246.

If, then, as is most manifest, it was intended by the law of 1827 to record "deeds, conveyances, and other writings relating to real estate in the city of Detroit," in the separate record previously provided for that purpose, is it not fair to presume that the legislature contemplated that mortgages should also be recorded in the same registry? It would be absurd to suppose that it was designed to record one class of deeds, affecting city property, in the city registry, and another in the county registry; and yet we must arrive at that result, if the construction contended for by the plaintiff is to obtain. The construction contended for by us can be adopted without doing violence to the mortgage law; nor is this view of the case weakened by the fact, that that law was not to go into operation until some time afterward. This merely shows, that the law was adopted for the remedy provided to the creditor without resorting to a suit in chancery, and that that remedy was limited to mortgages executed after its passage.

It has been said that this question has been decided in this State by the Chancellor. We are not called upon to consider the effect of a decision of the highest tribunal of our State on the question, directly presented for its adjudication, but

that of a subordinate court, from which an appeal lies to the Supreme Court of the State (Revised Statutes of 1838, p. 379), in a case which was never argued, and between other parties than those to this record; and where an appeal, too, was taken to the Supreme Court, but the benefit of which was lost in consequence of an omission to file an appeal bond in due time. Surely such a decision, under such circumstances, cannot be considered as putting a settled construction on these statutes, nor prejudice the rights of parties. Besides, it is obvious from the opinion, that the Chancellor has taken too limited a view of this subject, for he considers the effect merely of the two acts of 1827, without the remotest allusion to previous legislation in connection with them.

*Mr. Justice WOODBURY delivered the opinion of the court. [*51

The sole question presented in this case is, whether a mortgage executed by the tenant and her husband to James Lyon, on the 13th of November, 1828, shall prevail over another mortgage executed by them to Nathaniel and Harvey Weed and Henry W. Barnes, on the 6th day of June, 1837. Being earlier in time, by nine years, the first mortgage ought of course to have precedence, and will entitle the demandant to recover, unless it was improperly recorded.

The facts, important to be now noticed in connection with that question, are, that, at the time of the execution of the first mortgage, there were two registries,—one in the city of Detroit, and the other in the county of Wayne, within which that city was situated. The premises in dispute were within the limits of the city, and the first mortgage was recorded, on the 30th of January, 1829, in the registry for the county of Wayne, but not in the registry for the city of Detroit, where the second mortgage was recorded, June 7th, 1827. On these facts, whether the recording of the first mortgage was legal or void must depend upon the construction of two statutes of the State of Michigan, both passed April 12th, 1827.

The demandant relies upon one of them, as being the only statute for recording "mortgages," and as his registry was duly made under that, he claims to recover. While the tenant relies upon the other statute, as embracing the case of mortgages, and as his was the only one recorded in conformity with it, and others not so recorded are declared void, he asks for judgment in his favor. It seems hardly to have occurred to either side, that a construction may be given to these statutes, which will make them both operative on this

subject, and sustain both of the mortgages according to their original rank and intent; and if no legal principle is opposed to such a course, it is certainly entitled to preference.

Because it is a well settled principle of construction, that conveyances are, if practicable on any reasonable view of the subject, to be sustained rather than pronounced void, and also, that statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each, if it can be and is necessary to conform to usages under them, or to preserve the titles of property undisturbed. *Cooper* v. *Telfair*, 4 Dall., 14; 1 Serg. & R. (Pa.), 105; 2 Cranch, 358; 5 Id., 25; Bac. Abr., *Statute*, I.

The statute which passed on the 12th of April, 1827, and related to "deeds and other conveyances," went into effect immediately, and was the only law of the State in force as to recording mortgages as well as other deeds, till January, 1828.

It provided, that all deeds should be recorded in the
*52] county of *Wayne or the city of Detroit, according as the land conveyed was situated in one or the other. Laws of 1827, p. 258.

Though the title to this act and general language do not embrace mortgages *eo nomine*, we do not agree with the counsel for the demandant, that they are not included.

In the second section, the word "mortgagee" is twice used. In the third section, also, "conveyances affecting in law or equity," "real estates," are spoken of. And besides this, it is reasonable to construe it as including mortgages under the general words of "all deeds and other conveyances of any lands," &c. (Sec. 1.), because they are sufficiently broad for that purpose, and because a similar generality had existed in the expressions in former laws in the territory on this subject (Woodw. Code, p. 52; Code of 1820, p. 156), and was construed to include mortgages; and because, if these are not included, there were eight months, from April, 1827, to January, 1828, during which no law except the first one was in operation, and consequently when no provisions whatever existed in respect to the recording of that important species of conveyance. The law, then, for that eight months, as to recording mortgages, must be considered to have been, that those relating to lands in the city of Detroit should be recorded there, and those relating to lands in other parts of the county of Wayne should be recorded in the registry for the county. (See the second section.)

The prior mortgage in this case, however, was not executed

within that period, but on the 13th of November, 1828; and in the mean time the other act, which passed on the same day with that we have just considered, had come into operation "concerning mortgages," and was made applicable to all executed after January 1st, 1828.

The next important question then is, What, if any, was the alteration made by it in respect to the recording of mortgages? and was the mortgage to Lyon, not having been registered as the first act required, recorded in the manner authorized by the last act?

That act purports to relate to "mortgages" alone; leaving other conveyances to be recorded as they had been under the other law during the eight months before it took effect. As to "mortgages," it provided, that those executed after the 21st of January, 1828, "may be registered in the county in which the lands or tenements so mortgaged are situated," and that a subsequent one, recorded before a prior one, should be preferred. Laws of the Territory of Michigan, p. 273.

The mortgage under which the demandant claims, being executed about eleven months after these new provisions, was recorded in conformity to them.

After this literal compliance with that law, and a construction under it which seems to uphold, as should be done, if practicable, the early mortgage, it does not seem desirable, and it is hardly expedient, *unless on principle necessary, to resort to a different construction, which would render the first security void as to the second mortgagee, although recorded in strict conformity with the law last going into operation. And as little does it seem expedient, unless necessary under imperative principles or precedents, to push this construction so far as to avoid or postpone any mortgages recorded in conformity to the provisions of the act first going into operation. The statute as to "mortgages" does not profess, in so many words, to repeal any portion of the other statute; nor is it necessary so to construe it. Going into effect later, if not passed later, it is true that any of its provisions entirely inconsistent with the laws in force before it took effect, or repugnant to them, might, without words of repeal, be considered as changed or abrogated, and the first impression would naturally be, that the provisions of the second law, so far as regards mortgages of land situated in the city of Detroit, were irreconcilable with the former act, and hence to that extent repealed it. But such a construction, though sustaining the mortgage to Lyon, might avoid many others and disturb numerous titles, and hence is not to be adopted, unless clearly the proper one. Ld. Raym., 371; [*53

Bac. Abr., Statute, C and G; *Stradling* v. *Morgan*, Plowd. 206. We think it is not the proper one.

A second law on the same subject does not repea' a former one without a repealing clause or negative words unless so clearly repugnant as to imply a negative. 1 Bl. Com., 89; 1 Gall., 153, in case of *Ship Argo*, "*leges posteriores priores contrarias abrogant.*" But if they be not so contrary or so repugnant, that the last act expresses or implies a negative of the first, then they may continue to stand together. And, if such be the case here, a mortgage of city property recorded in conformity to either law would be valid. Such, in our opinion, is the case here, there being no words of repeal or negation in the act concerning mortgages. Many cases of this kind, very analogous, are cited in *Foster's* case, 11 Co., 63, 64. See also 2 Roll, 410; 19 Viner Abr., 525.

Among them is one where an act of parliament made an offence punishable at the Quarter Sessions, and another passed making it punishable at the Assizes, without any words of repeal. It was held that you may indict under either, or at either court. 11 Co., 63.

The same result is arrived at, if the two acts be considered as passing and taking effect, as one law, on the same day. In that view, the last one only says that "mortgages" executed after the 1st of January, 1828, "may be registered" in the county where the lands lie; while the first one provided, that they "shall be recorded" in the registry of the city, if the lands lay within its limits. These provisions may stand
*54] well together, upholding, under one *act, a recording of mortgages in the city registry, as good in all cases of property situated there; and, under the other, upholding a record of mortgages of like lands in the county registry as also good, whenever any persons prefer to resort to that. As either of these views does not avoid the second mortgage, but only gives it, as was intended by the maker of it, a rank second to the first one, and as they both give force or operation to both statutes, and do not endanger or disturb titles either in the city or county, when either statute has been complied with, they ought to settle the question.

It may not be amiss to notice, also, that the mortgage to Lyon contained land in the county of Monroe, as well as in the city of Detroit, and having been seasonably recorded in that county, would be valid for some purposes, if not for this, without any second registry whatever in another city or county. *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Delancy's Lessee* v. *McKeen*, 1 Wash. C. C., 525.

It is gratifying to find that our conclusion in this case

accords with the result in the only decision which is supposed to have been made in the state of Michigan on this subject. See *Weed et al.* v. *Lyon et al.* in Harr. (Mich.), 363.

Had that decision been made by the highest judicial tribunal of the state, or been shown to accord with a settled usage and practice under these statutes affecting the title to real estate, we should have felt bound to conform to it, as a part of the local law. 9 Cranch, 87; 2 Pet., 58, 85; 6 Wheat., 119; 10 Id., 152; 11 Id., 361; 1 Brock., 539.

But though entitled to respect and weight, that case has not been treated as a precedent to control this, because the judgment was not in a court of the last resort, and is said to have been appealed from, but further proceedings defeated by some accident.

Let a certificate be sent down, that in the opinion of this court, the recording of the mortgage from Hale to Lyon was sufficient to give it validity and priority under the laws of Michigan.

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*THOMAS MANEY AND OTHERS, PLAINTIFFS IN ERROR, v. THOMAS J. PORTER, DEFENDANT. [*55

The decision of a state court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the 25th section of the Judiciary Act.

The party against whom the state court decided, instead of setting up an interest under the treaty, expressly averred that no right had been obtained.[1] In such a case, this court has no jurisdiction.

THIS case was brought up by writ of error to the Supreme Court of Errors and Appeals for the state of Tennessee, under the 25th section of the Judiciary Act.

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[1] The record must show a complete title under the treaty, and a decision against its validity. *Hickie* v. *Starke*, 1 Pet., 94; and the party prosecuting the writ must have claimed title *for himself* under the treaty; a claim for a third person is not sufficient. *Owings* v. *Norwood*, 5 Cranch, 344; *Verden* v. *Coleman*, 1 Black, 472.

While the jurisdictional facts must appear from the record, yet it is not necessary that the record should show *in express terms* that the Constitution, or a law, or treaty of the United States was drawn in question. It is enough if the proceedings set forth in the record show that a decision was made by the state court of one of the questions specified in section 25 of the Judiciary act. *Miller* v. *Nicholls*, 4 Wheat., 311; *Wilson* v. *Marsh Co.*, 2 Pet., 241; *Satterlee* v. *Matthewson*, Id., 380; *Harris* v. *Denny*, 3 Id., 292; *Crowell* v. *Randall*, 10 Id., 368; *Craig* v. *Missouri*, 4 Id., 410; *Davis* v. *Packard*, 6 Id., 41; *Murray* v. *Charleston*, 6 Otto, 432; *Minnesota* v. *Batchelder*, 1 Wall., 108; *Rector* v. *Ashley*, 6 Wall, 142; *Walker* v. *Villavaso*, Id., 124.

It is not enough that it appears that such a question might have arisen, or

have been applicable; it must appear that it did arise, and was decided. *Crowell* v. *Randall*, 10 Pet., 368; *Chouteau* v. *Marguerite*, 12 Id., 507; *Commercial Bank* v. *Buckingham*, 5 How., 317; *Maxwell* v. *Newbold*, 18 Id., 511; *Railroad Co.* v. *Rock*, 4 Wall., 177; *The Victory*, 6 Id., 382; *Hamilton Co.* v. *Massachusetts*, Id., 632; *Furman* v. *Nichol*, 8 Id., 44; *Aldrich* v. *Ætna Co.*, Id., 491; *Gibson* v. *Chouteau*, Id., 314; *Hurley* v. *Street*, 14 Id., 85; *Cockroft* v. *Vose*, Id., 5.

If it appears that the state court could not have rendered the judgment it did render without passing on the question, jurisdiction is shown. *Armstrong* v. *Treasurer of Athens Co.*, 16 Pet., 281; *Medberry* v. *Ohio*, 24 How., 413. In *Brown* v. *Atwell*, 2 Otto, 327, the court say: "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it." See also *Citizens Bank* v. *Board of Liquidation*, 8 Otto, 140.

There is no jurisdiction where the decision of the state court is *in favor* of the validity of the law or treaty drawn in question. *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Fulton* v. *McAffee*, 16 Pet., 149; *Strader* v. *Baldwin*, 9 How., 261; *Linton* v. *Stanton*, 12 Id., 423; *Roosevelt* v. *Meyer*, 1 Wall., 512; *Ryan* v. *Thomas*, 4 Id., 603. But see *Trebilcock* v. *Wilson*, 12 Id., 687, overruling *Roosevelt* v. *Meyer*, supra. But where the decision of the state court is *against* the validity of a patent for land granted by the United States to one of the parties, jurisdiction is conferred notwithstanding the fact that the decision is *in favor* of a similar authority set up by the adversary party. *Reichart* v. *Felps*, 6 Wall., 160.

Nor does jurisdiction attach where the decision of a state court of a question specified in section 25, may have been rested on some point in the case not within the purview of that section, and that point is broad enough to sustain the judgment. *Rector* v. *Ashley*, 6 Wall., 142; *Insurance Co.* v. *The Treasurer*, 11 Id., 204; *Klinger* v. *State of Missouri*, 13 Id., 257; *West Tennesssee Bank* v. *Citizens Bank*, Id., 432; *Steines* v. *Franklin County*, 14 Id., 15; *Kennebeck R. R.* v. *Portland R R.* Id., 23; *Commercial Bank* v. *Rochester*, 15 Id., 639. Nor where nothing appears in the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made. *Caperton* v. *Bowyer*, 14 Wall., 216.

Jurisdiction will be assumed where the Supreme Court can see that a Federal question was raised, though obscurely, even where the court have "a very clear conviction that the decision of the state court was correct." *Pennywit* v. *Eaton*, 15 Wall., 380.

In the leading case of *Murdock* v. *City of Memphis*, 20 Wall., 590, which was the first case in which the court felt called upon to decide whether the act of Feb. 5th, 1867 (14 Stat. at L., 385) was a repeal of section 25 of the Judiciary Act of 1789, and to construe the later enactment, it was held that the act of 1867 as it is now found in Rev. Stat., § 709, did repeal section 25 of the Judiciary Act. The court construe the new enactment at length, and lay down the following propositions as flowing from it:

1. That it is essential to the jurisdiction over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised and presented to the state court.

2. That it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, the Supreme Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

5. If it finds that it was rightly decided the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then the

The case was this: Thomas Maney, one of the plaintiffs in error, on the 4th of October, 1836, gave his note to the defendant in error, for $5,000, payable eight months after date. Suit was afterwards brought on this note, and judgment recovered in the State Circuit Court, from which Maney appealed to the Supreme Court of Errors and Appeals, where the judgment was affirmed against him.

He then filed his bill in the Chancery Court, and obtained an injunction. The defendant in error answered, and upon the hearing, the injunction was dissolved and the bill dismissed; and this decree was affirmed in the Supreme Court of Errors and Appeals against the said Maney and the other plaintiffs in error, who were his securities in the appeal bond. It is from the last mentioned decree that the present writ of error was brought.

In order to understand the character of the controversy in the state court, and the points in issue between parties, it is proper to state that by the 14th article of the treaty with the Choctaw Indians, made at Dancing Rabbit Creek on the 27th of September, 1830, it was stipulated that each Choctaw head of a family, being desirous to remain and become a citizen of the States, should be permitted to do so by signifying his intention to the agent of the United States within six months from the ratification of the treaty; and should thereupon become entitled to a reservation of one section of 640 acres, to be bounded by sectional lines,—one half that quantity for each unmarried child living with him over ten years of age,—and a quarter section for each child under ten; to adjoin the location of the parent. And if they resided on such land intending to become citizens five years after the ratification of the treaty, a grant in

Supreme Court must further inquire whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then the Supreme Court will reverse the judgment of the state court, and will either render such judgment as the state court should have rendered, or remand the case to that court, as the circumstances of the case may require.

This construction of Rev. Stat., § 709, was applied in *Railroad Co.* v. *Maryland*, 20 Wall., 645; *Moore* v. *Mississippi*, 21 Id., 639; *Citizens Bank* v. *Board of Liquidation*, 8 Otto, 142; *Myrick* v. *Thompson*, 9 Id., 297; *Tennessee* v. *Davis*, 10 Id., 283; *Bonaparte* v. *Tax Court*, 14 Id., 595.

fee simple was to issue; the reservation to include the improvement held by the head of the family at the time of the treaty, or a portion of it.

The bill filed by Maney stated, that in December, 1835, the *56] defendant informed him that many Indians had within the time prescribed *signified to the agent of the government their intention to remain under the above article of the treaty, whose names he had neglected to register and certify; and that in consequence of his neglect, the lands to which they were entitled, with the improvements, had in many instances been sold, and had passed into the possession of the purchaser; and those who still retained possession of their reservation had become much alarmed; that Gwinn and Fisher had undertaken to secure these reservations to the Indians entitled, or to obtain for them an equivalent; and had made contracts by which the Indians were to give them one half (and in some cases more), if they succeeded; that Gwinn and Fisher had employed the defendant in error to assist them in the business; that he held their obligation for twenty-five sections of these claims; that he had no doubt of success; that the matter had already been before Congress, and it had been ascertained that a majority of both Houses were in favor of it; that he was confident a law would pass authorizing commissioners to be appointed to investigate and decide upon these claims, and that the reservations would be made good to the persons entitled; and that if Congress did not pass the law, the rights could be enforced in the courts of justice; that the defendant in error represented these Indian claims as of great value, and said that they had been already located on good lands, which were worth ten dollars per acre, and proposed, as a matter of favor, to sell a portion of his interest to Maney: and that he (Maney), having himself no knowledge upon the subject, and relying altogether on the statements of the defendant in error, purchased from him one undivided half part of his claim to the twenty-five sections above mentioned for $10,000; and thereupon gave two notes of $5,000 each for the purchase money, and received from the defendant a covenant to convey.

The bill further stated, that for reasons therein set forth the complainant became dissatisfied with his purchase, and thought he had been deceived; and in March, 1836, he applied to the defendant to rescind it, who refused; but that afterwards, in October, 1836, he agreed to take back the one half of these claims; and thereupon the two notes before mentioned were cancelled, and the note on which the judgment was rendered was given by Maney, and a covenant

made by the defendant to convey, according to this contract; that at the time the last mentioned agreement was made, as well as before, the defendant had agreed that he would take back the lands and rescind the whole contract if the complainant desired it, in case Congress should pass a law authorizing a commission to examine into and decide upon these claims; that he and Gwinn and Fisher would continue their exertions to secure the titles, and that a law authorizing a commission to inquire into their validity would place them beyond reasonable doubt.

The bill further states, that the law proposed was passed by Congress; *but that the defendant had refused to rescind the contract, and had not continued to give his attention to the business as he promised; that he had sold out the residue of his interest; that Gwinn and Fisher, as the complainant understood, had likewise sold out their interest, or nearly all of it; that none of the claims had been secured, and the complainant did not think it probable that they would be obtained by the assignee of the Indians; that he had never received any thing in land or money, and apprehended that he never would; and prayed an injunction to restrain the defendant in error from suing out execution on the judgment at law, and that the contract might be rescinded and set aside. [*57

This is the substance of the bill, which is a very long one, going into much detail, and stating conversations which Maney alleges he held with the defendant in error, and with others, upon the subject; but which it is unnecessary to set out at length, as they are not material to the point upon which the case was disposed of in the Supreme Court.

The defendant put in his answer, denying and putting in issue all the material allegations in the bill; and it was upon this bill and answer, and the proofs taken upon the matters thus in issue, that the decree was made upon which this writ of error was brought.

The case was argued by *Mr. Brinley* for the plaintiff in error; and by the Attorney-General, for the defendant.

As the decision of the court rested entirely on the question of jurisdiction, all those parts of the argument which involved the merits of the case are omitted in the report.

Mr. Brinley rested his argument in favor of the jurisdiction of the court upon the proposition that the contracts of the Indians were held to be valid because they had a right or authority to make them under the state laws of 1829 and

1830; and that the authority exercised under those laws was repugnant to the treaty of 1830, and to the laws of the United States; and that the decision of the state court was in favor of the authority thus set up.

Mr. Mason, Attorney-General, contended that the facts in this case were not sufficient to sustain jurisdiction.

Mr. Chief Justice TANEY delivered the opinion of the court.

Upon examining the bill in this case, it is not easy to determine, from the loose manner in which it is drawn, whether the complainant claimed the relief he asked for on the ground that the representations made to him by the defendant were false and fraudulent; or on the ground that the consideration for which the note was given had failed, because the defendant was unable to convey him a title to the Indian reservations.

*58] It is evident, however, that the suit was not brought to uphold *any title or right which the complainant claimed under the Choctaw treaty, or under the law of Congress which he states to have been passed upon the subject. For he does not ask for a conveyance of the reservations, nor of the Indian title to them. And he does not even aver that these claims are valid, or that he has any title to them; but, on the contrary, charges that none of the claims had been secured, and states that he did not think it probable that they would be obtained by the assignees of the Indians. And as the case has been removed here from the decision of a state court, we have no right to review it unless the complainant claimed some right under the treaty with the Choctaws or the act of Congress, and the decision of the state court had been against the right, title, or privilege specially set up by him; and even in that case, the power of revision given to this court extends no further than to the particular question thus raised and decided against the party. In the case before us, no such title, right, or privilege was claimed by the bill, and of course no decision was made against it in the state court. We therefore can exercise no jurisdiction in the case, and are not authorized to examine any questions of fraud or failure of consideration, or breach of contract, which the bill may be supposed to present, and upon which the court of the state of Tennessee may now decide.

Upon referring to the reports of this court, it will be seen that the 25th section of the act of Congress of 1789, under which this writ of error is brought, has been often the subject of examination and comment in this court, and the construction

of the section and the practice under it well settled by many decisions. It is unnecessary to repeat here what the court have said upon former occasions. It is very clear, that this case is not within the provisions of the section, and the writ of error must therefore be dismissed for want of jurisdiction.

JAMES ERWIN'S LESSEE, PLAINTIFF IN ERROR, *v.* JAMES DUNDAS ET AL.

Although, by the law of Alabama, where an execution has issued during the lifetime of a defendant, but has not been actually levied, an *alias* or *pluries* may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the judgment, yet this is not so with respect to the real estate.[1]

By the common law, the writ of *fieri facias* had relation back to its *teste*, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.[2]

But if an execution issues and bears *teste* after the death of the defendant, it is irregular and void, and cannot be enforced against either the real or personal property of the defendant. The judgment must first be revived against the heirs or devisees in the one case, or personal representatives in the other.[3]

Such is the settled law where there is but one defendant.

Where there are two defendants, one of whom has died, the judgment cannot be *enforced by execution against the real estate of the survivor alone; and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the [*59

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[1] In *Clark* v. *Kirksey*, 54 Ala., 219, it was held that a sale of *lands* made under an *alias* or *pluries* execution issued after the death of the defendant in continuation of a *lien created during his life*, is valid without any revivor against the heirs. S. P. *Dryer* v. *Graham*, 58 Ala., 623. But where at the time of defendant's death there is no execution in the hands of the sheriff, though one had been previously issued and returned without levy, and none is issued for several terms thereafter, a sale under an *alias* or *pluries* subsequently issued confers no title on the purchaser. *Brown* v. *Newman*, 66 Ala., 275.

A sale of land under a *venditioni exponas* issued after the death of the judgment debtor, without revivor against the heirs, is void. *Harman* v. *Hann*, 9 Baxt. (Tenn.), 90.

In Pennsylvania, the death of either party after *fi. fa.* issued does not prevent the issuing of the *vend. exp.* A *sci. fa.* is unnecessary. *Bleecker* v. *Bond*, 4 Wash. C. C., 6.

Leave of court to issue execution should not be granted more than a year after the death of the judgment debtor, without proof that his heirs and personal representatives have had an opportunity to pay the judgment on demand, and that property available to pay debts has come to their hands. *Eaton* v. *Youngs*, 41 Wis., 507.

As to the proceedings required to be taken in Indiana, to enforce a judgment against the lands of a deceased judgment debtor, see *Faulkner* v. *Larrabee*, 76 Ind., 154.

[2] CITED. *Taylor* v. *Doe*, 13 How., 290.

[3] RELIED ON. *Mitchell* v. *St. Maxent*, 4 Wall., 243. CITED. *Puckett* v. *Richardson*, 6 Lea (Tenn.), 61. S. P. *Kane* v. *Love*, 2 Cranch C. C., 429.

case if he had been the sole defendant. The judgment must be revived by *scire facias.*[4]

Before and since the Statute of Westminster 2d (which subjected lands to an *elegit*), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him, within a year, without a *scire facias.*[5]

But before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived against the surviving defendant, and against the heirs, devisees, and terre-tenants of the deceased.

The interest of new parties would otherwise be liable to be suddenly divested without notice.

In these views, the highest court of the State of Alabama concurs. (See 6 Ala., 657.)

THIS case came up, by writ of error, from the Circuit Court of the United States for the Southern District of Alabama.

It was an action of ejectment brought by Erwin, the plaintiff in error, to recover a lot in the city of Mobile, known as Hitchcock's cotton-press, bounded on the north by Main street, on the east by Water street, on the south by Massachusetts street, and on the west by Royal street, under the following state of facts:

Prior to November, 1836, Henry Hitchcock was seized and possessed of the above lot, and on the 2d of November, 1836, a judgment was recovered against him in the Circuit Court of Alabama for Mobile county, by William McGehee, to the use of Abner McGehee.

By the laws of Alabama, this judgment was a lien upon the defendants' real estate.

On the 21st of December, 1836, Hitchcock sued out a writ of error to the Supreme Court of Alabama, giving the usual bond, with Robert D. James as surety, whereby the judgment was superseded.

On the 23d of June, 1838, the judgment of the Circuit Court was affirmed in the Supreme Court, which affirmance, by the laws of Alabama, operated as a judgment on the bond in error, against both parties obligors.

On the 14th of July, 1838, Hitchcock executed a mortgage

[4] See *United States* v. *Price*, 9 How., 96; *Thompson* v. *Parker*, 83 Ind., 105.

Although one of two joint defendants dies before entry of judgment, which is afterwards entered against both, yet, no motion being made to vacate it as against the deceased defendant, an execution against both is good, and may be satisfied out of property of the survivor. *Fabel* v. *Boykin*, 55 Ala., 383.

In Pennsylvania, if one of several joint defendants in a judgment dies, a *sci. fa.* may issue against the survivors, and the executor or administrator of the decedent. *Dowling* v. *McGregor*, 91 Pa. St., 410.

In West Virginia, if one of several defendants in a personal action dies after judgment, execution may issue without any suggestion as to his death, but it must be in the names of all the defendants, as if none of them had died. *Holt* v. *Lynch*, 18 W. Va., 567.

[5] CITED. *Ransom* v. *Williams*, 2 Wall., 317.

of the lot in question to Cowperthwaite, Dunlap, and Cope, to secure the payment of a debt due to them.

On the 18th of August, 1838, a *fi. fa.* issued from the Circuit Court clerk's office, on the affirmed judgment against H. Hitchcock, and Robert D. James, his security; which writ came to the hands of the sheriff of Mobile county, being for the amount of the debt, besides the ten per cent. damages. The sheriff indorsed that he received this execution on the 20th of August, and levied the same on certain lots in Mobile, as the property of Robert D. James, and returned it to the fall term.

On the 10th of October, 1838, Hitchcock, with the consent of *the mortgagees, leased the property to Mansoney and Hurtell for a term of five years. [*60

On the 29th of November, 1838, a *venditioni exponas* issued to the sheriff, commanding him to sell the property, on which he had levied, as shown by his return. To this *venditioni exponas*, he returned that he had advertised the property for sale, and that on the 2d day of March, 1839, all further proceedings had been stopped by an injunction.

On the 2d of March, 1839, Henry Hitchcock filed in chancery a bill against McGehee, praying, for causes shown in the bill, relief against the judgment at law, and that the same should be enjoined. On this bill, an order was made for an injunction in the following words:—

"On the complainant's executing bond, with good and sufficient security, in double the amount of the judgment at law, let an injunction issue agreeably to the prayer of the bill. P. T. Harris.

"28th February, 1839.

"To the Clerk of the Circuit Court of Mobile County, Alabama."

The complainant, Hitchcock, filed a bond by himself and William Crawford, as his security, in the penal sum of $8,404, payable to McGehee, dated the 2d of March, 1839, with a condition which, after reciting the rendition of the judgment, the filing the bill, and granting of the injunction, &c., ran in these words:—

"Now, therefore, if the said Henry Hitchcock shall pay and satisfy all damages that the defendant McGehee may sustain by the wrongful exhibition of said bill, and in all things abide by and perform the ultimate decree which may be rendered in the cause, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

A writ of injunction issued on the 2d of March, 1839, commanding the sheriff to stay proceedings on the execution; on which he returned, that on the same day he desisted from all farther proceedings, and returned the execution as enjoined.

On the 12th of August, 1839, Hitchcock died.

At the fall term of the Chancery Court, on the 25th of November, 1839, the following order was made in the cause:—

"HITCHCOCK *v.* MCGEHEE.

"This day came the defendant, by his solicitor, and suggests to the court, that the complainant has died since the last term of this court; and thereupon it is ordered, on motion of defendant's counsel, that the representatives of the complainant revive the proceedings by bill against the defendant, by the 1st day of April next, or *the injunction shall be from thence dissolved, and the defendant have leave to proceed at law."

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At the Spring term, 1840, the 22d of May, 1840, the following order was made:—

"At the last term of this court, an order was made suggesting the death of the complainant, and that unless the suit be revived on or before the first day of the next term of said court, that the injunction be dissolved, and no party complainant being made, it is ordered that the suit abate, and that the complainant's administrator, and heirs, and security on the injunction bond, pay the costs."

Hitchcock by his will bequeathed all his real and personal property to his wife, as trustee, with authority to make public or private sales and conveyances for payment of debts, and constituted her executrix.

On the 8th of July, 1840, Mrs. Hitchcock, without having taken out letters testamentary on the will, made an absolute sale and conveyance of the lot in question to Cowperthwaite, &c., subject to the lease above mentioned.

On the 10th of July, 1840, an *alias fi. fa.* issued on the affirmed judgment at law against Henry Hitchcock and Robert D. James, for the amount of the debt, and ten per cent. damages, given on affirmance, which came to the hands of the sheriff of Mobile county; on which he returned, that he had levied on the land (now the subject of this action of ejectment), as the property of Henry Hitchcock, pointed out to him by Isaac H. Erwin, executor of Henry Hitchcock, deceased; and that, on the first Monday of November, 1840,

he had sold the said land to James Erwin, who was the highest bidder, for four thousand five hundred dollars.

On the 10th of February, 1841, the tenants attorned to Cowperthwaite, &c., as landlords.

On the 3d of March, 1841, Erwin brought this suit against the tenants, who thereupon attorned to him, and agreed to hold under him as landlord.

On the 8th of September, 1841, Cowperthwaite, &c., conveyed all their estate and interest in the premises to Dundas and others, the present defendants in error, who, on the 22d of March, 1842, applied to the court to be admitted into the consent rule, and to defend the action as landlords, on filing certain affidavits. This motion was resisted by the plaintiff Erwin, and also by the tenants; but in March, 1843, the court admitted them to defend the suit. Whereupon the cause went to trial, and, under the instructions of the court, the jury found a verdict for the defendants.

The plaintiff took the two following bills of exceptions.

First Exception. "Be it remembered, that at the Spring term, 1843, of this Court, James Dundas, Mordecai D. Lewis, Robert L. Pittfield, *Samuel W. Jones, and Robert Howell, appeared before the court by their counsel, [*62 and filed the affidavit of H. Barney, which is made part of this bill of exceptions, and moved the court to be admitted to appear and defend the action against the plaintiff by entering into the consent rule, and pleading. The tenants in possession, Hurtell, Mansoney, and Griffiths, resisted the said motion, and showed cause on oath against the same, which showing, which is on file, is made a part of this bill of exceptions, together with the documents thereto appertaining and referred to, and the said motion was also resisted by the plaintiff. Whereupon, the said motion coming on to be heard, the same was argued, and the hearing of said motion was continued from term to term till at this term, when the said motion was argued, and upon argument had, the said motion of the said applicants, claiming to be landlords, was granted, and the objections of the said plaintiffs, and of the tenants thereto, were overruled. And the said parties, admitted by the court to defend against the will of the said plaintiff and tenants, and the said tenants thereupon, refused to plead. For all which decisions of the court allowing said motion, the plaintiff excepts, and prays this to be sealed as a bill of exceptions, which is done accordingly.

(Signed,) J. McKinley. [seal.]"

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Second Exception. "Be it remembered, that on the trial of this cause, on the issue joined between the said plaintiff and the said James Dundas, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, who have appeared as landlords, and entered into the consent rule, and pleaded not guilty; the plaintiff, to maintain the title, on his part, produced and gave in evidence the proceedings had in the Circuit Court of Mobile county, in the State of Alabama, in an action wherein William McGehee, use of, &c., was plaintiff, and Henry Hitchcock was defendant, together with the judgment, executions, sheriff's returns, &c., copies of all which are hereto annexed, marked A. Also, the proceedings of the Supreme Court of Alabama on the affirmance of said judgment, a copy of which is hereto annexed, marked B. Also, the record of the proceedings in a chancery suit, wherein the said judgment was enjoined, the injunction, &c., a copy of which is herewith, marked C. And the sheriff's deed on the sale of the property in controversy by the sheriff of Mobile county, under the said judgment, after the injunction was dissolved, a copy of which is herewith, marked D, showing that the same was purchased by James Erwin.

"It further appeared that Henry Hitchcock died on the 13th of August, 1839, that at and before the time of the rendition of the judgments, he owned in fee simple and was in the possession of the property sued for and sold by the sheriff,

*63] and continued so till his *death, except that he executed a mortgage on the 14th of August, 1838, by which he conveyed the said land to Messrs. Dunlap, Cope, and Cowperthwaite, under whom the defendants claim title.

"Upon the evidence offered by the plaintiff, the court instructed the jury that the sale by the sheriff was irregular and void, and that by such purchase at the sheriff's sale, under the said judgments, and the executions aforesaid, and the injunction proceedings, the sale and conveyance by the sheriff could convey no title to the plaintiff, and that therefore he was not entitled to recover in this action; to which the plaintiff excepts, and prays the court to seal this as a bill of exceptions, which is done accordingly.

(Signed,) J. McKinley. [seal.]"

Upon these two exceptions the case came up to this Court.

The case was argued by *Mr. George S. Yerger* (in a printed argument) and *Mr. Crittenden*, for the plaintiff in error, and *Mr. Clement Cox* and *Mr. Sergeant*, for the defendants.

Mr. Crittenden, after stating the case for the plaintiff in error, read the following opening argument by *Mr. Yerger*, viz.:—

The record in this case presents for the determination of the court two questions. First, whether the sheriff's sale to the lessor of the plaintiff, under and by virtue of the execution, issued after the death of Judge Hitchcock, but founded on a judgment obtained against him in his lifetime, is void. Second, whether the injunction obtained by Judge Hitchcock in his lifetime destroyed the lien of the judgment, or only suspended it.

I think the law upon both questions is in favor of the plaintiff in error.

By the law of Alabama, the judgment, not the execution, creates the lien upon lands. By the common law, an execution on a judgment may issue at any time within a year, without a *scire facias*. A sale made by or under such execution relates to the judgment, and passes the title from that time, as against the judgment debtor, and all who claim under him. If he had sold or assigned the property, no *scire facias* was necessary to make his vendees parties before execution issued, because the land was bound by the judgment, and his alienees took it *cum onere*. Upon his death, his interest, by operation of law, is transmitted to his heirs, or is vested by his will in his devisees; they, like the vendee or alienee, take it subject to the judgment. Be this, however, as it may, I believe, upon principle, it is clear, that, if an execution issues on a judgment within a year from the rendition of the judgment, though after the death of the defendant, if it is not superseded or avoided by the heir or terre-tenant, or by the guardian of the heir, before a sale is made under it, it passes the title of the ancestor from the date of the judgment. The execution in such case is not void, but is only *voidable, and if not avoided before the sale, the purchaser takes [*64 the title. The question has been repeatedly so decided. *Speer* v. *Sample*, 4 Watts (Pa.), 367; *Collingsworth* v. *Horn*, 4 Stew. & P. (Ala.), 237; *Mills* v. *Williams*, 2 Id., 390; *Preston* v. *Surgoine*, Peck (Tenn.), 72; *Drake* v. *Collins*, 5 How. (Miss.); Opinion of Chancellor Kent, in *Jackson* v. *DeLancy*, 13 Johns. (N. Y.), 537; and the principle seems to be recognized in the case of ——— v. ———, 13 Pet., 15, 16. The court, in the case of *Speer* v. *Sample*, 4 Watts (Pa.), 367, reviewed all the English and American cases upon the subject. The opinion there delivered is not only a masterly exposition of the law, but is, as I think, unanswerable. All the objections that have been urged against the validity of

such a sale are there met and conclusively refuted. The argument of the court is supported by the authorities referred to in the opinion so fully, that the point decided seems to be demonstrated.

The case of *Collingsworth* v. *Horn*, decided by the Supreme Court of Alabama, 4 Stew. (Ala.), although a case of personal property, in principle decides this question. The court there decide, that in regard to personalty, the delivery of the execution creates the lien, and that if an execution is issued in the lifetime of the party, the lien is created, and the property thus bound may be sold under a subsequent execution, without revival against the executors, provided the executions have been regularly and successively issued, so as to continue the lien upon the property. In that case, the execution under which the property was sold issued and was tested after the death of the judgment debtor, but the sale under it related to the lien acquired by the first execution; hence, there was no necessity to issue a *scire facias*. If the judgment creates the lien, and if a sale made under it relates to the judgment, as it unquestionably does, the principle which was asserted in *Collingsworth* v. *Horn* must necessarily and inevitably apply; and if, in the one case, there was no necessity for a *scire facias*, or if the execution without it was only voidable, there cannot be, upon principle, any reason why it should be required in the other.

I am aware there are a few cases which hold the contrary doctrine, and decide that the sale is utterly void. Some of these cases will be found, upon examination, to be based upon statutory provisions; others profess to be founded on the principles of the common law, which principles, however, I will respectfully attempt to show, were misapplied by the judges who decided those cases.

The cases relied on, as establishing the position that the sale in this case is void, are *Woodcock* v. *Bennett*, 1 Cow. (N. Y.), 711; 9 Wend. Id., 452; 10 Id., 211; 1 Yerg. (Tenn.), 40; 10 Id., 320; 16 Mass., 191; 20 Johns. (N. Y.), 106; Tayl. (N. C.), 261.

*65] The cases in 9 and 10 Wend. (N. Y.), are founded upon the authority *of *Woodcock* v. *Bennett*, 1 Cow. (N. Y.) The latter case settled the law in New York, and the subsequent decisions were governed by its authority. If the case in 1 Cow. cannot be sustained, it must fall, and consequently those which are founded on it must fall with it.

The case of *Woodcock* v. *Bennett* contains all the supposed principles of the common law relied on to sustain the position

that the sale in this case is void; hence, if it cannot be supported, neither of the other cases can be.

In that case, a judgment was rendered against two persons; after the death of one of them, an execution was issued and was levied on the lands of both, and the lands of both were sold. The court decided that the judgment was a charge on the realty and did not survive, as it would have done if the execution had been against the personalty, and they decide, as the execution issued against and was levied on the land of the deceased after his death without revival, the sale was void.

The court, in the outset, assume the position that the execution was void because it issued after his death. They say (see page 733), "The question here will be whether the execution was not necessarily void at the time it issued, inasmuch as it directs a sale of a defendant's property who was not then in existence, without first calling on the representatives to whom the property, if he had any, must have passed, and who, being strangers to both judgment and execution, had no day in court, to show that the process was either void or voidable."

The principle assumed here is, that an execution which issues after the death of a party is void, because it directs the property of a dead man to be sold, and because the representatives ought to have a day in court to contest it. I think this is not so, where either the execution or the judgment binds the property in the hands of the heir or executor. *In extenso*, it overturns a series of adjudged cases, from the time of Lord Coke to this time. By the common law, personal property is bound by the test of the execution, and it is settled that an execution which issues after a man's death, but tested before, may be executed and the property sold without making the personal representatives parties. See *Fleetwood's case*, 8 Co., 171; *Audley* v. *Halsey*, Cro. Car., 148; 4 Watts (Pa.), 369, and authorities cited. The ground upon which these cases were decided was, that the goods were bound, and the sheriff had a right to seize them in the hands of a purchaser or administrator; and yet, the reason given by the court, in the case in Cowen,—to wit, "that it issued after his death, without revival against the representatives, and directs the sale of a defendant's property who was not then in existence,"—would equally apply, and defeat this execution. Why does it not defeat it? Because the property was bound by it before the death, and the death *therefore cannot be noticed; *a fortiori*, if the real property is bound by the judgment before his death, it may be sold, although the execution issued afterwards. [*66

Again, the court says (same page),—"The general rule is,

that, where any new person is to be better or worse by the execution, there must be a *scire facias*." Although this is a general rule, it does not apply where the property in the hands of the new person is bound, either by the judgment or the execution. If a judgment debtor aliens the property bound by the judgment or the execution, must his alienee be made a party by *scire facias?* Surely not. Yet he is a new person, and his interest is affected by the execution. Why is it not necessary? Because the judgment bound the property. So, where an execution is tested before the death, but issued afterwards, the executor is a new party: he is affected by the execution, yet it need not be revived against him, because the property in his hands is bound by a lien which existed prior to the death of his testator. The truth is, new parties are only required to be proceeded against where neither the judgment nor the execution binds the property in their hands, but which property nevertheless must be appropriated to the payment of the judgment or execution. For instance, assets in the hands of an executor must be appropriated to pay the testator's debts. If there is a judgment, but no execution issued and tested in the lifetime of the testator, the goods are not bound; a sale by the executor would pass the title; in such cases a *scire facias* is necessary to have execution of the judgment. Not so where the execution is tested in the lifetime of the testator; there the goods are bound without any direct proceeding against the executor.

But, it is again said, the *scire facias* is necessary, because the new party may show the judgment had been paid or released, or satisfied. The same reason would apply where execution issued after the death, but was tested before. The judgment in the latter case might have been paid, as well as in the former. If the judgment has been paid, the remedy in such case for the executor or heir is to supersede the execution and stop the sale; yet, if this was not done, the sale itself would be absolutely void, even as to a *bonâ fide* purchaser, because, the judgment being paid, the sheriff had no authority to sell. 2 Hill (N. Y.), 566; *Wood* v. *Colvin*, and cases cited in page 567.

In cases where a *scire facias* is necessary, if it does not issue, the execution is only erroneous. It is as necessary to issue a *sci. fa.* if there has been no execution issued within a year, as where the party has died. Yet if it does issue without a *sci. fa.*, it is not void, but voidable.

The court, 1 Cow. (N. Y.), 739, says, the reason of this is, that in the former case there is a party alive who can avoid it,—in the latter case there is not; and say the court in

the former case, the law *permits the plaintiff to issue it, subject to be defeated on the application of the defendant, but in the latter case the act of issuing the execution is not warranted by law.

The court here take for granted the very thing in dispute. It is as much against law to issue an execution without a *sci. fa.*, after the year and day, as it is to issue it after the death of the party. In both cases, the execution may be avoided; in the first case by the party himself,—in the latter, if levied on the goods, by the executor, or on the land, by the heir or his guardian, or by the terre-tenant. The levy in both cases notifies them of the proceeding. The court is mistaken, I apprehend, in supposing there is a party to avoid in the first case and not in the last. For surely the executor, heir, and terre-tenant are privies in law and may avoid it. The distinction taken by the court is therefore unsound.

The court cite 2 Saund., 6, N. 1, and advert to many cases to show that, where heirs or terre-tenants are proceeded against, *scire facias* is necessary. But these cases do not decide that the execution is void, if issued without it, for the question arose upon writs of error, or motions to quash. The books also say, a *sci. fa.* is necessary where no execution has issued within a year from the rendition of the judgment, yet if it does issue, they also say it is only erroneous, not void. In all or nearly all the cases cited by the court, where it is said a *sci. fa.* may or must issue, the question was not whether it was void, if the execution did issue without it, but merely whether the process should be avoided or set aside.

The court cite the bill of rights of New York, "that no person shall be put out of his freehold or lose his goods, unless he be brought to answer," &c., &c. And they think this provision requires in all instances a *sci. fa.*

This might be true, if the goods or lands belonged absolutely to the assignee or representative of the judgment debtor, but as they take the land or goods subject to the judgment lien, which lien takes effect not from the sale, but from the rendition of the judgment, the goods never were in contemplation of law, after the sale, their goods or lands. The same argument would defeat a sale of lands or goods actually levied on before the parties' death, but not sold; so it would compel a *sci. fa.* to issue if the judgment debtor sold the land after the rendition of the judgment, but before a sale under it, for the land is as much the property of the alienee, in such case, as it is of the heir, after the ancestor's death.

The court then proceed to show that the New York act, which gives a remedy to the purchaser of lands who is evicted

on account of irregularity, &c., in the judgment, sustains the view previously taken by the court. This it is not necessary to examine.

*68] This case, from 1 Cow., was cited upon the argument of the *case in 4 Watts (Pa.), 367, and I think the opinion of the court in that case is a complete answer to it.

The case relied upon, from 20 Johns. (N. Y.), 106, presented merely the question whether it was erroneous to proceed by *sci. fa.* against some of the terre-tenants, without joining all. The court decided it was necessary to proceed against all. It was the case of a writ of error prosecuted by some of the defendants, and the observations of the court only apply to the case before them. The case simply decides it to be erroneous. The question, whether, if a sale had been made without *scire facias*, it would be void, was not raised by the record.

The cases in 9 and 10 Wend. (N. Y.), follow the authority in 1 Cowen, and such no doubt is now the law of New York, but these decisions, as I have shown, not being founded on principle, and being partly founded on a statute of New York, are no controlling authority for other courts.

The cases cited from Tennessee and North Carolina have no application. The lien of the judgment obtained against the ancestor, in both those states, is qualified by the act of 1784, or by the construction put on it by the courts. It is held, under this act, that the lien of the judgment, or rather the judgment itself, cannot be enforced after the death of the ancestor, until the personal estate is proceeded against and the plea of fully administered found in favor of the personal representative. *Boyd* v. *Armstrong's Heirs*, 1 Yerg. (Tenn.), 40; *Gilmer* v. *Tisdale*, 1 id., 285; *Peck* v. *Wheaton*, Mart. & Y. (Tenn.) 353.

The case of *Boyd* v. *Armstrong's Heirs* admits, if the sale passed the right before the death of the ancestor, it would be valid. Judge Haywood dissented in that case, notwithstanding the act of 1784. And afterwards, in the case of *Preston* v. *Surgoine*, in Peck (Tenn.), the court decided (Judge White dissenting), that if an execution issued after the death of the ancestor, but within a year from the rendition of the judgment, the lands were bound and might be sold, without a *sci. fa.* against the heirs.

In the case of *Overton* v. *Perkins*, 10 Yerg. (Tenn.), 328, the execution did not issue for several years after the judgment. The land, in the mean time, had been sold by the judgment debtor, in his lifetime, to Perkins, and by the Tennessee act of 1799, the lien of the judgment, as to purchasers, only exists for a year.

The case from Tayl. (N. C.), seems not to have been examined, and in North Carolina it has been decided (see 2 Murph. (N. C.), 45) that if a *fi. fa.* is issued instead of an *elegit*, the lands are only bound as goods and chattels are bound by the common law.

The case cited from 16 Mass. was decided upon the principle, that, in Massachusetts, an extent or sale did not relate by fiction to the time of the judgment.

*In the case cited by me from 13 Pet., the party died after a decree ordering the land to be sold, but before sale. The sale was made without revival, and it was held to be valid. This case, and those previously cited by me, completely overturn the reasoning of the court in 16 Mass., 191, and the other cases relied on. [*69

I conclude, therefore, as the judgment was rendered against Judge Hitchcock by the Supreme Court of Alabama, in June, 1838, and as the mortgage to Cowperthwaite and others was made in July, 1838, the sale under the judgment vested the title in the lessor of the plaintiff, and he is entitled to recover.

The next question is, whether the injunction obtained by Judge Hitchcock, which was afterwards dissolved, destroyed the lien.

It is a general principle, that a lien once created continues until actual payment, unless forfeited by some act of the party in whose favor it is created. *Rankin* v. *Scott*, 12 Wheat. 177; *Darrington* v. *Borland*, 3 Por. (Ala.), 35; *Overton* v. *Perkins*, Mart. & Y. (Tenn.), 367.

An act which merely suspends proceedings on a judgment does not destroy the lien of the judgment. *Tayloe* v. *Thomson*, 5 Pet., 358.

It seems to be a settled rule, that the act of the opposite party, or the act of the law, shall never affect the right of a third person. 5 Co., 87; 1 id., 102, *a*, 105, *b*, 106, *b*; *Lusk* v. *Ramsey*, 3 Mumf. (Va.), 417; 18 Johns. (N. Y.), 311, 363.

The rights of the plaintiff at law, after a dissolution of the injunction, stand upon the same ground they did when it issued. Mart. & Y. (Tenn.), 373, and cases cited by Judge Catron in delivering the opinion of the court in that case. See also the argument of Judge Haywood, 1 Hayw. (N. C.), 60, 61, 62.

The precise point was ably investigated and decided by Judge Catron in *Overton* v. *Perkins*, Mart. & Y. (Tenn.), 370.

The case cited by the defendants in error, from 1 Miner's (Ala.), was not a decision of the court; it was a mere dictum. Besides, it was a case of personal property, which was not bound by the judgment, but was only bound from delivery

of the execution to the sheriff. It may be that, on account of the perishable nature of personal property, the lien may be destroyed by the injunction. In the case of land, it is the judgment which binds and creates the lien in Alabama, and in such case the injunction suspends, but cannot destroy, the lien. See 3 Port. (Ala.), 35.

The case of *Winston* v. *Rives*, 4 Stew. & P. (Ala.), 269, is also cited to show that the lien is destroyed. This case does not decide the point. The judge, arguendo, takes it for granted that the law is so. It was also a case where personal property was levied on. The case in fact only decides that a second writ of error bond discharged the sureties in the first, *70] because they, as sureties, *were prevented by the *supersedeas* from asserting a right the law gave them, to wit, to have the judgment against their principle executed. The sureties might for this have been discharged, and the lien of the judgment remain unimpaired as to the principal.

The law is settled, that a judgment lien, which is a mere security of record for the debt, is not merged or extinguished by another security which is not of the higher character. A judgment founded on a judgment does not extinguish the first judgment. If a judgment were obtained on the injunction bond, it would not extinguish the original judgment. *Andrews* v. *Smith*, 9 Wend. (N. Y.), 53; *Jackson* v. *Shaffer*, 11 Johns. (N. Y.), 513; *Tayloe* v. *Thomson*, 5 Pet., 358.

But what is the ground of dictum in the case in 3 Port. (Ala.), 145, and 4 Stew. & P. (Ala.), 260? It is that the injunction bond is given to pay and satisfy the debt or judgment according to law. If there is no bond, or it is a forgery, or if it is conditioned for the payment of costs and damages only, and not for the payment of the judgment, or if the injunction issues without a bond, then and in either of these cases the lien of the judgment is not discharged, even if the law should be as stated by the judge in these cases, because he has not got the substitute for the lien, to wit, a bond and security to pay his judgment. The condition of the injunction bond executed in this case by Judge Hitchcock and his surety is only to pay the damages, &c., not the judgment; consequently, according to these cases, the lien is not discharged.

The levy of the execution on the land of James, the surety of Judge Hitchcock in the writ of error, does not affect the lien of the judgment, because the levy, being on real estate, was no satisfaction of the judgment. *Hogshead* v. *Carruth*, 5 Yerg. (Tenn.), 227; *Shepperd* v. *Rowe*, 14 Wend. (N. Y.), 260. And because, if the principal had property, it was the duty of

the sheriff to abandon that levy, and levy on the property of the principal. Aikin Dig., 164. The surety, in fact, could have stopped the sale, or, if the land was sold to satisfy the judgment, he still could, according to the Alabama law, have issued an execution on the judgment for his own benefit, and sold the property of the principal. 3 Stew. & P. (Ala.), 345; 4 Id., 277. Moreover, the injunction prevented it from being sold, and after the injunction was dissolved, it was the duty of the sheriff to levy on the property of the principal.

For the above reasons, and upon the above authorities, it is confidently believed the judgment of the court below ought to be reversed.

Mr. Crittenden, after reading the above argument, proceeded with his own.

The question is, as to the validity of the sheriff's sale. If it was erroneous, it can only be set aside upon a direct motion to that *effect, and not tried in a collateral [*71 action. Was it void, conveying no title whatever? The authorities show, that if execution issues after a year and a day, it is only voidable. What essential difference is there between that case and where it issues after death? In neither are the parties precluded from showing payment. It is said that injustice may be done; but how can a loss by forced sales occur any more when execution issues after the death of a defendant than when it issues after a year and a day? Sufficient notice is given in both cases by the sheriff's going upon the property, taking possession, and advertising. Is hardship a sufficient reason for setting aside a legal process? Must the law guard against possibilities, and is not an injury done to creditors by annulling the sale? Are sales, fairly made, to be declared null and void, upon the bare suspicion that a wrong may be done? When a lien is created by the judgment, it is as if public proclamation were made that the property is bound by that judgment. If so, to pursue it after the death of the defendant is only to adopt the analogous practice of a court of chancery, and consider it a proceeding *in rem*. This court has gone further than any other in giving effect to sales made under judicial authority. When a judge has declared what shall be done, ought not courts to enforce it? Bidders are encouraged to purchase at sales thus made, and the principle promotes the public benefit. A purchaser ought not to be bound to know whether a party is dead or not. It is an extrinsic fact. The sheriff may not know it himself; the party may have gone abroad. If the question were a new one, no good reason can be given why

the law should be so. The heirs of the party have not come forward to set the execution aside, but the question has arisen in a collateral action. Injustice must certainly be done by deciding in one way, and in the other there exists a possibility of its happening in some manner which is untold and uncomplained of. The case of *Speer* v. *Sample*, 4 Watts (Pa.), 367, is directly in point, and so is that of *Collingsworth* v. *Horn*, 4 Stew. & P. (Ala.), 237.

But it is said by the other side, that the lien of the judgment was destroyed by the injunction bond. On the dissolution of an injunction, the party stands exactly where he did before it was issued. Supposing the bond to be perfectly good, yet is there great delay in suing upon it, and in this case it is only to cover damages.

An injunction does not annul a judgment, but only restrains a party from proceeding. It is only a *supersedeas*, a temporary suspension of the rights of the party. 1 Mart. & Y. (Tenn.), 367.

Mr. Clement Cox, for defendants in error.

The points raised in the first bill of exceptions, relating to the admission of the present parties to the suit, have not been argued by the learned counsel, and are therefore presumed to
*72] be abandoned. (*Mr. Crittenden* remarked, that he did not formally abandon *the points, but did not argue them.) *Mr. Cox* said, in such case, he would not argue them either.

The remaining point in the case was this. That the sheriff's sale, under which the plaintiff claimed, and the deed from the sheriff, and the writs and proceedings upon which they were founded, were irregular and void, and conveyed no title, and the plaintiff was not entitled to recover in the action.

The sheriff's sale was void for two reasons.

1st. The injunction bond destroyed the lien of the judgment.

2d. The execution was wrongfully issued without a previous *scire facias*.

1. The record shows how the injunction was granted and bond given. We have a right to presume that they followed the statute. There were three judgments against Hitchcock, one in the court below, one in the Supreme Court, and one in chancery; and two judgments against his sureties; namely, one against James and one against Crawford. All five of these were alive at once, according to the doctrine contended for by the other side. But it is against the policy of the law to countenance multiplied securities for a single debt. The

law does not favor dormant liens, which tie up property. These are the principles of the common law and of the statutes of Alabama. The legislature and courts of that state have adopted them. A lien of a judgment upon lands arises from the Statute of Westminster 2d, giving an *elegit*.

1 Brock, 170, establishes that where there is a senior judgment with a stay and a junior judgment without a stay, the latter is preferred. See also 2 Brock, 252; 4 Pet., 124; 3 Ala., 560; 4 Id., 735—739.

This policy runs through many of the laws of Alabama. Thus, where a senior creditor has the debtor in execution under a *ca. sa.*, the debtor may dispose of his property to a junior creditor, and this without the *ca. sa.* supeseding the lien. Aikin Dig., 159, 160.

Also, if there be doubt in the mind of the sheriff, he may require a bond of indemnity. If a junior creditor gives such a bond, and the senior creditor refuses, the sheriff may legally sell and satisfy the junior creditor. Aikin Dig., 166, 167.

So, where a senior creditor lays by for a long time, the junior creditor may enforce his lien. 4 Ala., 543, 750; 1 Hayw. (N. C.), 72.

So, a junior creditor is preferred if he sells before a senior, although the latter takes out a series of executions. Aikin Dig., 156, and a corresponding principle at 162. A lien of an execution was held to be destroyed by an injunction. Miner (Ala.), 373.

Where there is a series of appeals, each one acts as a merger of the preceding ones. 4 Stew. & P. (Ala.), 269.

*The sureties in an appeal bond are discharged by new sureties being given in a higher court. 4 Stew. & P. (Ala.), 275; 3 Port., Id., 138, 153; *Wiswell* v. *Monroe*, 4 Ala., 9; 4 Id., 543, 735. [*73

2. The execution was wrongfully issued.

Erroneous executions are voidable where there is a party in court to avoid them; but where there is no such party, they are void. There are numerous authorities for this. Fitzh., N. B., 267, 597, where an *elegit* was said to be void, when issued after the death of the party, without a *sci. fa.*; O. Bridgm., 464; 7 Bac. Abr. 138, tit. *Scire Facias*, C, 4; 1 Salk., 319; 2 Ld. Raym., 768; 2 Saund., 6, *n.* 1; 6 T. R., 368; Bingh. Ex., 121; Chit. Gen. Pr., 522. American decisions: 1 Cow. (N. Y.), 711, 739; 10 Wend. (N. Y.), 206; 20 Johns., Id., 156; 16 Mass., 191, 193; 10 Yerg. (Tenn.), 328; 1 Id., 40.

Personal estate is held to be the fund first applicable to debts, and real estate is only to be reached in the mode therein pointed out. Aikin Dig. 151, 154, 156; Clay Dig., 191.

The case in 4 Stew. & P. (Ala.), 237, has been cited on the other side, in which it is said that such an execution is only voidable. But it is an *obiter dictum*, and relies on 13 Johns. (N. Y.), which has been overruled by the cases in Cowen and Wendell; and even the case in 4 Stew. & P. (Ala.), says, at page 249, that it would be different if third parties were involved. 4 Com. Dig., 250, tit. *Execution*, F; 3 Ala., 254.

Mr. *Sergeant*, on the same side.

This is a question to be settled by authority. What is the law of Alabama on the subject? Many cases have been cited, but the latest of all has not, namely, 6 Ala., 657. The case in 4 Watts was decided upon principles peculiar to Pennsylvania law. (Mr. *S.* here commented upon this case.) But what is the law of Alabama? The case in 4 Ala., 735, was decided in January, 1843, and the present case was tried in the Circuit Court in the following March. The same counsel who were employed in the case in 4 Ala. were engaged in this one, and even the title was the same in both, for it was Erwin's title, though in another form. The subject of controversy was this very title, and all the cases were quoted.

It is difficult, if not impossible, to see how the court could have decided as they did without deciding the precise point that the lien of the judgment was destroyed. It is a strictly local law. The judge who tried this case in the court below had before him, in manuscript, the decision of the highest court in the state, and it was, in effect, an appeal from that court to the Circuit Court of the United States. The defect in the argument of Mr. Yerger is, that it does not inquire what the law of Alabama actually is, but what
*74] *it ought to be according to the principles of the common law. We need not follow the distinction between a levy upon real and personal property, although it is obvious. When a levy is made on personal property, the sheriff becomes the owner, and it is hard to say when he may not sell it. But in land, he acquires no ownership.

Was the execution wrongfully issued? The general rule of law is, that there must be two parties. In 1 How., 282, 286, this court said that an execution was void which had been issued under a decree. That case came up from Alabama, and the decision was, therefore, upon the law of Alabama. Why should a sheriff sell the property of a dead man without giving notice to those concerned? What a chance for roguery and fraud! It is said on the other side that the execution is only voidable. But who is to avoid it?

Mr. *Crittenden*, for plaintiff in error, in reply.

We insist that the execution is not void, but only voidable. It is admitted that the judgment was a lien. Some cases say that where an execution is begun, and then the party dies, the execution goes on; that the property is in the custody of the law. That is reasonable doctrine, and avoids litigation. A *sci. fa.* is often more troublesome than the original suit. It is possible that some new defence may be drawn forth. But is the possibility of this to overbalance certain wrong on the other side? No good reason can be given for the distinction between real and personal property; and yet it is admitted that a sale of personal property would be good. Such distinctions, without reason, are discreditable to law and to science. The law of Alabama makes real estate responsible for debts equally with chattels. The case of *Collingsworth* v. *Horn* covers all the ground of this case, and has not been overturned. In 4 Ala., 752, the court say they "are willing to leave it open to be settled when it shall arise," and yet in 6 Ala. the court say that the preceding case settles the point. They seem to have overlooked the fact that in 4 Ala. the court were willing to leave it open. Is this court precluded, in such a state of things, from examining a question upon which there has been such vibration. In all the cases, the point is made to rest upon the common law, and not upon the statutes of Alabama.

Mr. Justice NELSON delivered the opinion of the court.

The first execution issued upon the judgment, in this case, was issued on the 18th of August, 1838, during the lifetime of both the defendants, and was therefore regular and valid; but, according to the return of the sheriff, a levy was made only upon the property of James, the surety, and was abandoned when the proceedings at law were enjoined by the bill in chancery. We may, therefore, *lay this execution out of the case. For, although according to the law of Alabama, when an execution has been issued during the lifetime of a defendant, but not executed, an *alias* or *pluries* may go after his death, and the personal estate of the deceased be levied on and sold to satisfy the judgment, for the reason that the lien, thus regularly acquired under the first, is continued by the succeeding writs, down to the time of the sale; yet it appears to be well settled there, that the practice has no application to the enforcement of executions against the real estate of the deceased. *Lucas* v. *Doe*, ex dem. *Price*, 4 Ala. N. S., 679; *Masony et al.* v. *The U. S. Bank*, Id., 735; and *Abercrombie* v. *Hall*, 6 Id., 657. [*75

The validity of the plaintiff's title, therefore, must depend altogether upon the execution issued on the 10th of July, 1840, nearly one year after the death of Hitchcock, under and by virtue of which the premises in question were sold and conveyed to him.

At common law, the writ of *fieri facias* had relation to its *teste*, though in fact issued subsequently, and bound the goods of the defendant from that date. The act of 29 Car. II. (reënacted in most of the States) took away this relation as respected the rights of *bonâ fide* purchasers, and confined its binding effect upon the goods as to them to the time of the delivery of the writ to the sheriff; but as between the parties, it remained as it stood at common law.

One consequence of this relation has been, that if the execution can be regularly tested in the lifetime of a deceased defendant, it may be taken out and executed against his goods and chattels after his death, the same as if that event had not intervened.

The theory or fiction upon which this result is arrived at is, that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant, and the goods being bound from the *teste*, or presumed issuing, execution upon them is deemed to have commenced in the lifetime of the party, and being an entire thing, may be completed notwithstanding his death.

It is regarded in the same light as if delivered into the hands of the sheriff and the goods bound in the lifetime of the defendant, for the reason the officer being entitled to seize them at any time after the *teste*, the death of the party could not alter the right; and therefore, though the execution came to the sheriff after, still if tested before, his death, the goods may be seized, in whose hands soever they may be found.

In illustration of the extent to which this doctrine of relation is carried, we may add, it has been frequently held, that, if a judgment is entered in vacation against a defendant who died the preceding term, an execution tested on a day in the said term prior to the defendant's death may be sued out
*76] without a *scire facias;* for, as the judgment signed in vacation relates *to and is considered as a judgment of the first day of the preceding term, and as the execution relates to the judgment, it may, in point of form, be considered as having commenced before the death of the defendant, on account of the date or *teste*, and, of course, upon the ground above stated, being an entire thing, be completed afterwards.

There are numerous authorities establishing this view of the case in respect to the enforcement of judgments and executions against the goods or other personal estate of the defendant. Gilb. Ex., 14, 15; Bing. Ex., 135, 136, 190; 2 Tidd Pr., 1000, 9th Lond. ed.; 7 T. R., 24; 6 Id., 368.

This doctrine of relation is resorted to with a view of meeting and avoiding the objection, which might otherwise be alleged, that the rights of new parties, to wit, the personal representatives of the deceased, would be affected by the issuing and enforcement of the writ upon the goods after the death of the defendant, who should be called in and made parties to the record for the purpose of enabling them to interpose a defence, if any, to the judgment. For, upon the construction given, the writ is regarded as having been issued in the lifetime of the defendant himself, and, inasmuch as he had not taken any steps to arrest it before his death, no good reason could be given for the interposition of his representatives. They, upon the view taken, were not new parties, nor parties at all to the proceedings, as the last step in the appropriation of the goods to the satisfaction of the judgment had been taken in the lifetime of their intestate.

The same doctrine, it seems, has been held to be equally applicable to executions against the lands and tenements of a deceased defendant, and therefore an *elegit* bearing *teste* before may be issued after his death, for the reasons given in the case of executions against the goods and chattels. 2 Tidd Pr., 1034, 9th Lond. ed.

It is otherwise as respects the writ of extent issued against the king's debtor; for, as that cannot be antedated, but must bear *teste* on the day it issues, it can only be issued against the lands and goods in the lifetime of the defendant. Another writ issues in case of his death to the sheriff to inquire into the special circumstances before execution is enforced. 2 Tidd Pr., 1049, 1053, 1057.

This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the result,—and which has also been confirmed by express decision in all courts where the authority of the common law prevails,—that an execution issued and bearing *teste* after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case, or personal representatives in the other. *Fitzh. N. B., 266; *Harwood* v. *Phillips*, O. Bridgm., 473; Dyer, 766; Plowd., 31; 2 W. Saund., 6, n. 1; 2 Ld. Raymond, 849; [*77

Archb. Pr., 282; 2 Id., 88; *Woodcock* v. *Bennett*, 1 Cow. (N. Y.), 711; 10 Wend. (N. Y.), 212; *Hildreth v. Thompson*, 16 Mass., 191.

Mr. Williams, in his note to the case of *Jefferson* v. *Morton*, 2 W. Saund., 6, n. 1, says, that, if the defendant dies within the year, the plaintiff cannot have an *elegit* under the Statute of Westm., 2, against his lands in the hands of his heirs or terre-tenants, or generally any other execution, without a *scire facias* against his heirs and terre-tenants, or personal representatives, although he may in some cases have a *fieri facias* against his goods in the hands of the executors, referring to the exception to the general rule, when issued in the lifetime of the defendant. So, if the conusee dies within the year, his executor cannot have an *elegit* at common law without a *scire facias*, nor, if the conusor dies within that time, can the conusee have an *elegit* against his heir or terre-tenant without such writ. The rule being, he says, that where a new person who was not a party to the judgment or recognizance derives a benefit or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance. *Penoyer* v. *Brace*, 1 Ld. Raym., 245; S. C., 1 Salk., 319, 320; S. C., Carth., 404.

Such is, we apprehend, the settled law of the case, where the judgment is against one defendant, and the execution issued and tested after his death.

In the case before us, the judgment upon which the execution was issued and the lands sold had been rendered against two defendants, one of whom was living at the time, but the lands sold belonged to the estate of the deceased. And it is material to inquire, whether, in this aspect of the case, a different rule can be applied to the sale.

At common law, a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the execution disturb the possession, as it went only against the goods and chattels. The statute of Westm., 2, ch. 18 (13 Ed., I.), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of *elegit* by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute, a moiety of the land is deemed bound from the rendition of the judgment. 2 Bac. Abr., tit. *Execution*, 685; 3 Bl. Com., 418; 3 Co., 12; *The People* v. *Haskins*, 7 Wend. (N. Y.), 466.

Before the statute, a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate.

Before and since the statute, in case of a judgment against two defendants, and the death of one, the charge of the judgment survived against the personal estate of the survivor; and execution *could be taken out against [*78 him within the year without a *scire facias*, and the debt levied. 2 Tidd, 1120; 1 Salk., 320; Bing. Ex., 136; *Norton* v. *Lady Harvey*, 2 W. Saund., 50, 51, n. 4, and 72, n. 3; 16 Mass., 193, n. 2; 1 Cow. (N. Y.), 738.

The writ, however, must be in form against both, to correspond with the record, but it could be executed against the goods of the survivor only; or, on making a suggestion of the death upon the record, the writ could be against the survivor alone. (Id.)

And if the judgment against both defendants is founded upon contract, the surviving defendant is entitled to contribution out of the estate of the deceased (Bing. Ex., 137, and cases cited); if upon tort, it would be otherwise.

But since the statute, if the plaintiff seeks to enforce the judgment against the real estate of the defendants in the case put, he must revive it by *scire facias* against the surviving defendant, and the heirs, devisees, and terre-tenants of the deceased, before execution can regularly issue. For, as to the real estate of the defendants, the charge of the judgment does not survive; and the execution must go against the lands of both; and as it cannot be regularly issued against the deceased co-defendant, nor be allowed to charge the estate in the hands of his heirs, devisees, or terre-tenants, until they have notice, and an opportunity to set up a defence, if any, to the judgment, a *scire facias* is indispensable to the regularity of the execution. 2 W. Saund., 51, n. 4; Bing. Ex., 137, and cases cited; 4 Mod., 316; 2 Co., 14, *a*; 1 Ld. Raym., 244; S. C., 1 Salk., 320; S. C., Carth., 404; 16 Mass., 193, n.; 1 Cow. (N. Y.), 711.

It will be seen, therefore, upon these authorities, that the same objections exist, both in principle and in reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one, which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For as the charge of the judgment against the lands does not survive, but continues upon the lands of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of the personalty, and the execution must therefore be issued against both if issued at all, it is obvious the lands of the deceased, in that event, are as liable to be sold by the sheriff as the lands of the survivor.

The rights of the heirs and devisees, and the reasons for protecting them by the *scire facias*, are the same in the one case as in the other; and when the law disables the plaintiff from suing out execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two, after the death of one. Otherwise, in both cases, the interest of new parties, upon whom the estate has fallen, or to whom it may have passed, is liable to be suddenly and without notice
*79] divested by the silent, and till then dormant, power of the *law; parties, too, who from their age and situation in life will not unfrequently be the least qualified to understand and protect these interests, being the children of the deceased defendant.

This writ of *scire facias* is also made necessary in order to secure the judgment in cases where the plaintiff has neglected to take out execution within the year. And yet it has always been held, that, if taken out after the year, the sale under it is valid, and the title of the purchaser protected. The execution is not void, but voidable, and may be regularly enforced unless set aside on motion.

In analogy to this course of decision, it has been argued that an execution issued after the death of the party should not be considered void, and the sale under it a nullity, and that the only remedy should be on a motion to set aside.

Before the Statute Westm., 2, already referred to (ch. 45), if the plaintiff had neglected to take out execution within the year, his only remedy was an action of debt on the judgment. The law presumed it had been satisfied, and therefore drove the plaintiff to a new original. 2 Tidd, 1102; 1 Bing. Ex., 123, n. This statute extended to him the writ of *scire facias*, by means of which the judgment could be enforced after the year by execution, and as the writ could thus be issued after the year by a *scire facias*, the judges held, if issued without, and the defendant did not interpose and set it aside, it was an implied admission that the judgment was unsatisfied and existed in full force. The issuing, under the circumstances, was regarded simply as an irregularity which it was competent for the party defendant to waive.

It is apparent that the analogy between this class of cases and the one under consideration is exceedingly remote and feeble, and that they stand upon different and distinct grounds, and the conclusions arrived at upon substantially different and distinct considerations.

Another ground has been urged in support of the sale in this case which deserves notice.

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It has been argued that the grantees of lands sold on a judgment against the grantor, or previous owner, through whom the title was derived, where the sale confessedly would be valid, stand upon the same footing as the heirs or devisees in the case of a sale after the death of the defendant.

But the distinction between the two cases is manifest.

In the first place, the grantee, in making the purchase, is presumed to have made the proper inquiry into the nature and validity of his title, and therefore to have known of the existence of the incumbrance, and to have taken the necessary precautionary measures against it.

The sale on the execution cannot take him by surprise, with ordinary attention to his rights.

And in the second place, the defendant in the execution, not the *grantee, is the party most deeply interested [*80
in the proceeding; for if his grantee, or any succeeding grantee under the title, should be dispossessed by reason of a sale on a prior incumbrance by judgment, he, the defendant in the execution, would be answerable over upon his covenants of title.

The grantee, therefore, is neither exposed to a sale under the judgment by surprise, nor is he the party usually interested in the sale. Upon the whole, without pursuing the examination farther, we are satisfied, that, according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing *teste* in this case after the death of one of the defendants, the judgment was irregular and void; and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity.

We may further add, that since this suit was commenced, and while it was pending in the Circuit Court of the United States, the highest court in the state of Alabama have had the same question before them, and have arrived at a similar result (6 Ala., 657). Judgment of the Circuit Court affirmed.

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CHARLES GRATIOT, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

The 67th article of the general regulations of the army, published in 1821, recognizes two disbursing officers upon fortifications; namely, the agent of fortifications and the superintending engineer. Where there is no agent, the superintending engineer can be required to perform his duty for a compensation which is fixed by the army regulations. The receipt of a sum of money by the superintending engineer, and custody of it until it could be turned over to the agent, will not justify a charge of two and one half per cent. commission. And in case of such a charge, there is no foundation for a question of usage to be left to the jury.

In this particular case, the charges made by General Gratiot for collecting money (as stated in the sixth, seventh, and eighth items of his account), were already included in his charge for disbursing, contained in the second item, because when disbursing these sums he was acting as agent for fortifications as well as superintending engineer, which duty the department had a right to require him to perform at a fixed compensation, which had already been allowed. The court below were right in refusing to permit evidence in support of these charges to go to the jury, because the only evidence was the transcript, which was not sufficient in law.

The charge of two and one half per cent., as contained in the second item of the account, was unauthorized by law, because it consisted either of charges of commission upon money which had come into his hands for stoppages, or for remittances made to him as disbursing agent, as above described.

The charge of a commission of two and one half per cent. for disbursements other than those on Forts Monroe and Calhoun, as contained in the third item of this account, was a charge for disbursing in the character of superintending engineer, acting also as agent for fortifications, and is not allowed by law.

The charge for extra official services, as contained in the fourteenth item of the account, is the same which this court substantially rejected when this case was formerly under consideration, reported in 15 Peters, except the charge for superintendence relative to the northern boundary of Ohio. Excepting this, the other services were within the ordinary special duties of chief engineer; and there being *no proof of what these extra official services had been except the account itself, the court below did not err in excluding it from the jury. *81]

The charge for extra official services was against law, because the duties performed necessarily belonged to the office of chief engineer, and if any services were performed beyond the duties of that office, it was necessary that evidence should be introduced to show what had been the chief engineer's personal as well as official agency.[1]

It was the province of the court below to decide, as matter of law, what were the duties of the chief engineer, and to judge whether any evidence had been introduced tending to show that General Gratiot had performed any services not appertaining to his station as chief engineer.

The army regulations under which General Gratiot was removed from West Point to Washington were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper.[2]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

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[1] FOLLOWED. *United States* v. *Brown*, 9 How., 500. CITED. *United States* v. *Smith*, 1 Woodb. & M., 194.

[2] CITED. *Low* v. *Harmon*, 72 Me., 105. See also *Ex parte Reed*, 10 Otto, 22.

It was the same case which was before this court at January term, 1841, which is reported in 15 Pet., 336. Being sent back to the Circuit Court, it came up for trial, after sundry preliminary proceedings which it is not important to state, on the 25th of April, 1843. On the trial, the United States produced and gave in evidence to the jury two transcripts from the books and proceedings of the Treasury Department, which were the same as those produced upon the former trial. The plaintiff also gave in evidence an original account, rendered by the defendant Gratiot to the plaintiff, signed by the defendant, showing a balance in his hands of $35,000 due on account of the appropriation for a fort at Grand Terre, Louisiana.

The plaintiff's case being here closed, the defendant produced his account against the United States, and proved, by a transcript from the books and proceedings of the Treasury Department, that each and every item of his account had been duly presented to the accounting officers of the Treasury Department for allowance against the United States, and had been by the said officers disallowed; which account was in the words and figures following, to wit:—

Report of Auditor on General Gratiot's Account.

Report of the Third Auditor of the Treasury on the accounts and claims of General Charles Gratiot, late chief engineer, transmitted to him by the Solicitor of the Treasury on the 25th of March, 1841, for the decision of the accounting officers thereon.

No. 1. For the safe keeping of and responsibility for the following sums placed in the custody of Charles Gratiot, from the 27th of August up to the 7th and 20th of September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the Treasury transcript admitted in evidence in the Circuit Court of Missouri, in the case of *The United States* v. *Charles Gratiot*, *during the April term of 1840, this during a period of time that he was not a disbursing agent, viz.:— [*82

On account of Fort Calhoun, . . .	$19,500 00
" " Fort Monroe, ...	26,550 00
Making the aggregate sum of . . .	$46,050 00

Commission on $46,050, according to usage in like cases, at 2½ per cent., ... $1,151 25

2. For disbursing, from the 20th of May, 1822, to the 30th

of September, 1829, both inclusive, $84,325 58, on account of the appropriations for fortifications, other than those on Forts Monroe and Calhoun, for which a separate and distinct accountability was imposed by law, and, according to the decision of the Supreme Court of the United States, as also that of the Secretary of War of the 26th of May, 1831, in the case of *Tuttle*, constituted a separate agency. Vide opinion of the Supreme Court of 1841, on the subject, and accounts of Tuttle, on file in the Third Auditor's office, by which latter it is shown, that although he, (Tuttle) received compensation for the construction or repairs of a fort, he was entitled to, and did receive, an additional compensation for disbursing, at the same time and place, the funds for other and distinct appropriations, and that he also received, at the same time, a like compensation for disbursing the funds of each separate appropriation for piers at New Castle and Marcus Hook.

Commission on $84,325 58, at 2½ per cent., as allowed by general regulations of the army, . . $2,108 14

3. For disbursing $30,531 60, on account of the appropriation for the repairs and contingencies of fortifications, from the 1st of November, 1823, to the 30th of September, 1829, both days included, as shown by Treasury transcript referred to above, which disbursements were other than those on Forts Monroe and Calhoun, it having been the usage of the Department to make the like compensation for disbursements under the like circumstances.

Commissions on $30,531 60, at 2½ per cent., being less than $2 per day, ... $763 29

4. For disbursing $591,039 00, on account of the appropriation for Fort Calhoun, from the 13th of November, 1821, to the 30th of September, 1829, both days included, 2,879 days, at $2 per day, being less than 2½ per cent., as allowed by general regulations of the army.

Account before rendered, ... $5,758 00

5. For disbursing $819,677 64, on account of the appropriations for Fort Monroe, from the 13th of November, 1821, to the 30th of September, 1829, both days included, 2,879 days, at $2 per day, as allowed by general regulations of the army.

Account before rendered, ... $5,758 00

*83] *6. For collections of money made for the United States from Jacob Lewis & Co., as per accompanying abstract, marked A, which service did not, under the regulations, enter into or form any part of the duties of a "disbursing agent."

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Commissions on the sums collected, viz.: $24,335 81, at 2½ per cent., according to usage in similar cases, $608 39

7. For ditto, ditto, from Samuel Cooper, as per accompanying abstract, marked B.

Commissions on the same collected, viz., $3,233 62, at 2½ per cent., ... $80 84

8. For ditto, ditto, for sales of public property, &c., as per accompanying abstract, marked C.

Commissions on sums collected, viz. $16,150 81, at 2½ per cent., ... $403 77

9. For 480 barrels cement, account rendered and admitted to his credit in former settlement, $1,404 00

10. For quarters furnished Lieuts. Dutten and Mordecai, on account of Forts Monroe and Calhoun.

Accounts heretofore rendered, ... $40 00

11. For this amount paid to Robert Archer, for medical attendance on persons employed at Forts Monroe and Calhoun.

Accounts before rendered, ... $552 00

12. For this amount expended on account of repairs and contingencies of fortifications, $345 59. Account before rendered and passed to the credit of General Gratiot in former settlement.

13. For the following sums withheld by the Treasury officers, viz.:—

Pay and emoluments from the 1st of April, 1836, to the 6th of December, 1838, both days included, $10,763 99

Allowance for fuel and quarters for same period, 905 80

Transportation of officers' baggage, . . . 618 77

$12,284 46

14. For certain extra official services, as more fully set forth in the accompanying account marked D, viz.:—for his extra official services in conducting the affairs connected with the civil works of internal improvement carried on by the United States; and in conducting also the affairs connected with the execution of the act of Congress of July 14, 1832, "to provide for the taking of certain observations preparatory to the adjustment of the northern boundary-line of the state of Ohio," referred to the Engineer bureau for execution by the executive of the United States, and other extra official services connected with the aforesaid items of charge, and which did not constitute any part of his duties as a military officer, but which properly appertained to the duties and functions of civil engineering, and were performed under an understood or implied *contract with the War Department, under the sanction and authority of the President of the [*84

United States, to be compensated therefor, over and above my official pay and emoluments, at a reasonable rate of compensation, according to the established usage of the Department in analogous cases, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days, at $3,600 per annum, that being the pay granted to John S. Sullivan, David Shriver, James Geddes, and Nathan S. Roberts, Esqrs., civil engineers employed under the act of the 30th of April, 1824, entitled an act to procure the necessary surveys, plans and estimates upon the subject of roads and canals, and less than the extra pay of Captain Andrew Talcott, of the Corps of Engineers, while he was employed under the orders of the Engineer Bureau, in executing the act of the 14th of July, 1832, above referred to, $37,282 19

15. For certain extra official services, specified in the items of charge contained in accompanying account marked E, none of which services constituted any part or parcel of the duties or services appertaining to the office or functions of any engineer, civil or military, nor of the proper business of civil or military engineering, nor of any of the legal or prescribed duties or functions of my office of chief engineer, or colonel of engineers, nor in any manner included in my official compensation as chief engineer, colonel of engineers, or brigade-general by brevet in the army of the United States; but all of which services were extra official in relation to each and every of my said official capacities, and were performed under an understood or implied contract with the War Department, under the sanction and authority of the President of the United States, to be compensated therefor over and above my official pay and emoluments at a reasonable rate of compensation, according to the established usage of the Department in analogous cases. For the specification of all which services, I refer to the items in my said account E, all of which I am prepared to show, and prove, were in fact such extra official services, and entitled me, under such understood or implied contract, to such reasonable compensation over and above my official pay and emoluments as aforesaid, viz.:—

The United States to Charles Gratiot, *Dr.*

Items.

No. 1. For his extra official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days, in receiving, acting on, and causing to be filed for safe keeping, in the archives of said desk or bureau,

23,408 letters and other papers (not accounts), 10 years and 130 days.

2. For his entire official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th *day of December, 1838, both days included, responding to the letters or other communications addressed to, or referred by, the Secretary of War to said desk on business pertaining properly to the administrative branch of the War Department, which responses have in the aggregate filled 10,003 pages of folio-post record, 10 years and 130 days. [*85

3. For ditto, ditto, ditto, during the same period of time as the preceding, in examining and causing to be filed, and preservation of, the returns of property received from the agents acting under the orders of said desk or bureau, say about 100 agents in number on an average, 10 years and 130 days.

4. For ditto, ditto, ditto, during the same period as the preceding, in examining the estimates for funds yearly, quarterly, and monthly, from the disbursing agents in correspondence with said desk or bureau, about 100 agents on an average; making requisitions on the Secretary of War, for the funds to be remitted to said agents by the Treasury Department; directing the mode of applying and accounting for the funds so remitted; keeping the account with the Treasury for such remittances; examining the vouchers rendered by the said disbursing agents in reference to price and application of the articles and labor paid for, and finally transmitting the said accounts to the Auditor for settlement, 10 years and 130 days.

NOTE. The amount disbursed by said agents, and accounted for to the Treasury during the time specified, was,—

For fortifications,	$7,899,571 75
" internal improvement,	10,242,425 42
" light-houses and beacons,	91,842 77
" Military Academy,	344,411 75
" lithographic piers,	2,057 20
" N. W. executive building,	3,120 59
" northern boundary of Ohio,	25,674 63
	$18,609,104 11

5. For his extra official services at one of the desks or bureaux of the War Department, from the 30th of July, 1828, to the 6th of December, 1838, both days included, in making weekly reports to the Secretary of War of the proceedings in said bureau in relation to each letter or other paper referred from him, or written by direction of the War Department, 10 years and 130 days, per annum. 99

6. For ditto, ditto, ditto, in causing all letters and other papers prepared at said desk or bureau to be recorded in books procured for that purpose. Term of service, from the 30th of July, 1828, to the 6th of December, 1838, both days included, 10 years and 130 days.

*86] *7. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in examination and approval, or return to the agent or party to the contract; for correction or alteration of all contracts appertaining to works to be executed under the direction of the said desk or bureau, and their (the contracts) subsequent transmission to the Second Comptroller of the Treasury for file, 10 years and 130 days.

8. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in examination of, and reporting upon, all doubtful or disputed claims under contracts executed under the supervision of said desk or bureau; and in making special reports on cases of claims referred to the War Department, by resolution of either branch of national legislature, or in reply to calls from committees, or individual members of Congress, governors of States and Secretary of War, on application made to Secretary of War, or directly to said desk or bureau, or in obedience to legislative enactment. Of these the following may be cited in part, viz.:

(Then followed a specification of twenty-two reports made on various subjects.)

9. For his extra official services at one of the desks or bureaux of the War Department, from the 30th July, 1828, to 6th December, 1838, both days included, in causing to be registered, in appropriate books of record procured for the purpose, the letters and all other papers relating to the current business of said desk or bureau; to accountability generally, and to other matters, &c.—10 years and 130 days.

10. For his extra official services at one of the desks or bureaux of the War Department, from the 30th July, 1828, to 6th December, 1838, both days included, in making quarter-yearly reports to the proper accounting officer of the Treasury of the agents connected with said desk or bureau who had rendered their accounts, and of those who had failed to do so.—10 years and 130 days.

11. For his extra official services at one of the desks or bureaux of the War Department, from 30th July, 1828, to 6th December, 1838, both days included, in carrying on the cor-

respondence in relation to the Military Academy, and forwarding to parents and guardians of the cadets circulars, numbering monthly on an average 338 communications, inclusive of the correspondence of the desks or bureaux before charged, item 2.—10 years and 130 days.

12. For his extra official services at one of the desks or bureaux of the War Department, from 25th November, 1832, to 30th June, 1835, both days included, in causing to be executed, by executive order, the provision of the act of 14th July, 1832, entitled, "An Act to provide for the Taking of certain Observations preparatory *to the [*87 Adjustment of the Northern Boundary of the State of Ohio."—948 days, or 2 years and 218 days.

For all which extra official services, I charge in the aggregate $37,127 42

PETER HAGNER, *Auditor.*

TREASURY DEPARTMENT,
Third Auditor's Office, April 5, 1841.

To ALBION K. PARRIS, Esq., *Second Comptroller of the Treasury.*

TREASURY DEPARTMENT,
Second Comptroller's Office, 19 *April,* 1841.

I have examined the several claims of General Charles Gratiot against the United States, as particularly set forth and described in the foregoing report, together with all the evidence, and am of opinion that the said claims are not admissible against the Treasury.

ALBION K. PARRIS, *Comptroller.*

The defendant, Gratiot, then gave in evidence sundry depositions, which occupy nearly one hundred pages of the printed record, and of which it is impossible to give any other than a condensed and summary account.

Benjamin Fowler, clerk in the Engineer's Department. He testified that the services mentioned in the above account were rendered by Gratiot; that the office styled the Engineer Department was always considered as a bureau of the Department of War, to which were referred letters, memorials, petitions, and other papers, to be replied to directly from the Engineer Department or reported on to the Secretary of War for his action; that from July 30, 1828, to December 6, 1838, the number of disbursing agents whose accounts passed through, and were examined in conformity to regulations in, said Department was two hundred and five, whose disbursements involved the keeping of three hundred and seventy-nine separate and distinct accounts.

J. G. Swift, who was an officer of the Corps of Engineers from the year 1802 to 1818, and colonel and chief engineer from July, 1812, to November, 1818. He testified, that the usage of the government had been to compensate officers of engineers, over and above their pay and emoluments, for services, mentioning his own case and two others.

Major William Gibbs McNeill, who was an officer in the army of the United States from 1814 to within the preceding four years, during which last four years he was a civil engineer. He stated, that whilst an officer of the army he received extra compensation when put on extraordinary duty or service; that the services charged in Gratiot's account did not belong to the duties of the engineer, either civil or military.

*88] *Captain Talcott, who held a commission in the United States Corps of Engineers from August, 1818, to September, 1836, and in that interval was advanced from the rank of second lieutenant to that of captain in said corps. Afterwards he became a civil engineer. He stated that he had received from the United States extra allowances for extra services, specifying the cases, and that the services charged for by Gratiot in his account did not appertain to either military or civil engineering.

Thomas L. Smith, Register of the Treasury, who furnished certified copies of certain accounts in which officers had extra allowances.

Major J. D. Graham, a major of Topographical Engineers since August, 1840, and Commissioner for the survey and exploration of the Northeastern Boundary of the United States, stating the amount of his pay and emoluments.

Colonel Cross, assistant quartermaster-general in the army of the United States, with the rank of colonel, also stating the amount of pay which he had received at sundry times.

Colonel Joseph G. Totten, colonel of the Corps of Engineers and chief engineer. His deposition contained, amongst other matters, the following interrogatory and answer, viz.:—

Interrogatory 2. Examine the records and other documents belonging to, and now on file or otherwise in, the Engineer Department, and state therefrom, as nearly as you can, what were the affairs or business committed by executive authority, or otherwise, to the said Engineer Department, to be ministered and administered by Charles Gratiot, then the colonel of the Corps of Engineers, and brigadier-general by brevet in the army of the United States, from the 30th July, 1828, to the 6th December, 1838, inclusive.

Answer. It appears from the records of the Engineer De-

partment, that the affairs or business committed to the general direction, supervision, and management of the said Department, during the period stated in the interrogatory, were the following, namely:—

I. *Military Engineering.*—Reconnoitring and surveying for military purposes, with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects; the selection of sites; the formation of plans and estimates; and the construction, repairs, and inspection of fortifications, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department, and there appears to have been disbursed for the fulfilment of those objects, and to have been accounted for to the Treasury Department, through the said Engineer Department, during the period the said Gratiot was chief engineer, about $7,537,675.

II. *Civil Engineering.*—First, reconnoitring and surveying, &c., under the provisions of the act of the 30th April, 1824, entitled, "An Act to procure the necessary Surveys, Plans, and Estimates *upon the subject of Roads [*89 and Canals," constituted affairs and business committed to the same general direction, supervision, and management; for the fulfilment of these objects, there appears to have been disbursed and accounted for to the Treasury, through the said Engineer Department, during and for the period stated above, about $67,980.

Second. The superintendence of the execution of the acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and repairs and improvements connected with the harbors of the United States, or the entrance into the same, with the execution of which the War Department was charged, and the inspection of the operations for the execution thereof constituted affairs and business committed to the same general direction, supervision, and management, and for the fulfilment of these objects there appears to have been disbursed and accounted for to the Treasury, through the Engineer Department, during and for the period stated above, about $10,032,870.

Third. Construction of light-houses and beacons constituted affairs and business committed in the same way, and for which objects there appears to have been expended and accounted for to the Treasury, through said Engineer Department, during the period stated in the interrogatory, the sum of about $96,625.

III. *Military Academy.*—During the period stated above, the then colonel of the Corps of Engineers was the inspector of

said academy, and was charged, by executive order, with the correspondence relating to it. There appears to have been expended for the support of that institution, and accounted for to the Treasury, through the Engineer Department, and for the same period, the sum of about $323,263.

IV. *Lithographic Press of the War Department.*—This establishment was placed, during the period of its existence, under the control of the Engineer Department; the sum which appears to have been expended in its support, and accounted for to the Treasury Department, through the Engineer Department, amounted to about $2,057.

V. *Northwest Executive Building.*—The execution of the work "for fitting up the basement rooms of the executive building, occupied by the War Department," was also placed under the direction of the Engineer Department. The amount expended and accounted for to the Treasury, through said department, appears to have amounted to about $3,120.

VI. *Northern Boundary of the State of Ohio.*—The operations in fulfilment of the provisions of the act of the 14th of July, 1832, entitled, "An Act to provide for the Taking of certain Observations preparatory to the Adjustment of the Northern Boundary of the State of Ohio," were under *90] the general direction of this department. *The amount expended in this service, and accounted for to the Treasury, through the Engineer Department, appears to have been about $35,474.

VII. *Ministerial and Administrative Duties.*—Receiving, acting on, and causing to be filed in the archives of the Engineer Department, all the letters and other papers, not accounts, thereto referred or received at said department. Responding to the letters or other communications addressed directly to it, or referred to it by the Secretary of War; examining and causing to be filed all returns of property transmitted by the subordinate agents; examining the estimates, yearly, quarterly, and monthly, transmitted by the disbursing agents of the department; making requisitions on the Secretary of War for the funds to be remitted in fulfilment of said estimates when approved; directing the mode of applying and accounting for such remittances; keeping an account with the Secretary for said remittances; examining the vouchers rendered by said Treasury disbursing agents for settlement through the Engineer Department, and finally transmitting the said accounts to the Auditor of the Treasury for settlement, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department. These disbursements appear to

have amounted, during the period stated in the interrogatory, to about $18,089,067. Making for a portion of the time weekly reports to the Secretary of War of the proceedings in said department, in relation to each letter or paper referred to or written by direction of the War Department; causing all letters and other papers prepared in said department to be duly recorded; examining and approving, or returning for correction or amendment, contracts for works or supplies required for the prosecution of the operations carried on under the superintendence of the said department, and transmitting said contracts subsequently to the Second Comptroller for file; examining and reporting upon doubtful or disputed claims on contracts executed under the superintendence of said department; making, when required, special reports on cases of claims referred to the War Department by resolution of either branch of the national legislature, or in replies to calls from committees, or members of Congress, or Secretary of War, or on applications made to the Secretary of War, or directly to said department; causing to be recorded the substance of the letters and other papers received at the Engineer Department which related to its current business; and making quarterly reports, to the proper accounting officer of the Treasury, of such disbursing agents of said department as had rendered their accounts for settlement, and of those who had failed in that particular, constituted affairs and business committed to the same general direction, supervision, and management.

This witness also stated, that in 1838 all the works of internal improvement, with the exception of the Cumberland road, were *transferred to the Topographical [*91 bureau, and furnished a list of sixty-eight works which were thus transferred.

The defendant, Gratiot, also gave in evidence a printed document of Congress, being document number six of the House of Representatives, of the third session of the Twenty-seventh Congress, which it was agreed might be used in all courts in which this cause might be pending, as if spread upon the record.

The defendant, Gratiot, further gave in evidence the depositions of witnesses and documents, spread upon the record of the former case.

James C. Wilson, a clerk in the Engineer Department. He testified that Gratiot performed the services presented in the twelve items of the account.

John C. Spencer, then Secretary of War, who testified that the Engineer Department was a bureau of the War Department, charged with such ministerial and administrative duties

as might be assigned to it by the Secretary of War. He also furnished certified copies of the following papers, viz. :—

1. A Regulation dated 10th of August, 1818.

2. A Regulation dated 27th of July, 1821.

3. Letters from the War Department to Colonel McRee and to Maj. Thayer, allowing them to go to Europe, with extra pay and rations.

4. The decision of President Monroe, allowing brevet pay to General Macomb, the predecessor of General Gratiot.

5. An order of the War Department, fixing the Engineer Department at the seat of government.

6. An order from the War Department, dated April 7, 1818, prescribing the duties of the Engineer Department, and also one dated on the 1st of August, 1828, allowing double rations to each officer of the Corps of Engineers charged with the construction of a fortification, or having a separate command.

Mr. Spencer also stated in his evidence, that he had directed the records and files of the Department of War to be searched for any evidence of any contract, express or implied, that General Gratiot was to receive extra compensation for the services charged by him, and that the proper officers reported that no such evidence was to be found except what might be derived from the papers furnished above, which report he (Spencer) believed to be true, and adopted as his answer to the interrogatory.

William B. Lewis, then Second Auditor of the Treasury, who furnished copies of Gratiot's accounts, with the accounts of other officers of the Engineer Corps who had received extra allowances.

Albion K. Parris, then Second Comptroller of the Treasury, who testified that the number of contracts transmitted from the Engineer Department to the office of the Second *92] Comptroller between *July 30, 1828, and December 6, 1838, amounted to about two thousand eight hundred and thirty.

General Towson, paymaster-general of the army, who testified as to the time when Gratiot received the pay of his brevet rank, and when it was stopped.

Asbury Dickens, Secretary of the Senate, who furnished a copy of a report made by Gratiot to the Secretary of War, upon a claim pending before the Senate.

Many of the witnesses above mentioned were cross-questioned on the part of the United States.

The defendant, Gratiot, further gave in evidence the following printed papers, which, it was agreed, might be used as if spread upon the record, viz. :—

1. Congressional Document No. 78, of the 2d session, 23d Congress.

2. Reports No. 449, 455, 456, 1st session, 23d Congress.

3. Extracts from the Army Regulations revised conformably to the Act of 24th April, 1816. War Office, September, 1816, pages 96, 97, 98.

The defendant, Gratiot, having here closed his evidence, the counsel on the part of the United States gave in evidence to the jury,—

1. The deposition of John C. Calhoun, formerly Secretary of War, who testified that he established what is known as the present bureau system of the War Department, of which the Engineer Department constituted a part; and that he had no recollection of any intention or expectation, in establishing the bureau system, that the chief of the Corps of Engineers should receive for his services, as the officer in charge of that bureau, any compensation over and above his pay and emoluments as an officer of the army.

2. Colonel J. J. Abert, colonel of the Corps of Topographical Engineers, who testified that he had never received or claimed any extra compensation for official services at one of the desks or bureaux of the War Department, while at the head of said bureau; that he had received extra compensation, but was not, during the time, in the direction of the bureau; that in his opinion, any duties of an engineer character, assigned by the Regulations, or by direction of the War Department, to either corps of engineers, become the proper and legitimate duties of that corps.

3. Thomas S. Jesup, major-general by brevet, and quartermaster-general of the army, who explained why the colonel of engineers and other officers, stationed at the seat of government, were allowed double rations, and testified that he considered the services charged for in Gratiot's accounts as the legitimate and proper duties of the chief engineer.

4. John H. Eaton, formerly Secretary of War, who testified that he was in office during a part of the time mentioned in Gratiot's *accounts, and that no contract or [*93 engagement was ever entered into by him with General Gratiot as to services to be performed by Gratiot.

The evidence being closed on both sides, the following agreement was filed:

Facts admitted by parties.—It is admitted by the parties, that the account referred to in the depositions of Colonel J. J. Abert and General Jesup is the same attached to the deposition of Benjamin Fowler.

The United States, by the district attorney, admitted that the defendant should receive credit for the sum of $5,758, being the fifth item of his account, to be deducted from the balance found due from him to the United States on the Treasury transcripts given in evidence; and also that the sum of $276, being one half of the eleventh item in his account, should, in like manner, be credited to him against the balance on said transcripts.

The defendant withdrew his claim for the fourth, ninth, tenth, twelfth, and thirteenth, and one half of the eleventh items in his account, the same having been allowed him in former settlements.

Whereupon the court instructed the jury, on the part of the United States, as follows:—

Instructions given.—1st. That the defendant is not entitled to any commission on the sums by him turned over to James Maurice, charged by him on account of Fort Calhoun and Fort Monroe, and rejected by the accounting officers of the treasury; (1.) because defendant received four dollars each day for his attendance upon the above works, by a former allowance, and by the one now ordered; (2.) because the only evidence is what the transcript introduced by the plaintiff furnishes; and such evidence is not sufficient to authorize any commission to be allowed merely for turning over to an accounting officer the moneys.

2d. Nor is the defendant entitled to any credit for commissions or disbursements on account of appropriations for fortifications as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished, is not sufficient to authorize the jury to allow the defendant the credit claimed.

3d. Nor is the defendant entitled to commissions for disbursements on account of contingencies and repairs of fortifications as charged by him, there being no evidence on this item of charge except the above-named transcript, which evidence is not sufficient to authorize the jury to allow any credit for this item.

4th. Nor is the defendant entitled to any credit for commissions as charged, upon any moneys collected of Jacob Lewis & Co. *and Samuel Cooper, or either of them; because the above-named transcript is the only evidence in the

*94]

cause to establish this charge against the United States, and such evidence is not sufficient.

5th. Nor is the defendant entitled to commissions as charged by him on account of sales of public property, there being no evidence but the foregoing transcript to establish the charge, which evidence is not sufficient.

In the five cases above, there is no evidence to warrant the credit claimed in either case.

6th. The services of the defendant, while chief engineer, charged with the duties of the Engineer Department, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, are not extra official services for which he is entitled to credit in this action.

7th. There is no evidence that the defendant performed any extra official service in conducting the affairs connected with the execution of the act of Congress of 14th July, 1832, to provide for the taking of certain observations preparatory to the adjustment of the northern boundary-line of the state of Ohio.

8th. The services alleged to have been performed by the defendant at one of the desks or bureaux of the War Department, the claims to which are specified in an account dated March 23, 1841, and appended to Benjamin Fowler's deposition, taken March 16, 1842, if such services were performed at the bureau of the chief engineer, and professedly in that capacity, they were among the duties appertaining to the office, and such as the defendant was bound to perform as chief engineer, without being entitled to any extra compensation above his pay and emoluments as a brigadier-general in the army of the United States. And as to items numbered from one to twenty-two, in the same account, for examining and reporting on various subjects, for which the defendant claims extra official compensation, his evidence, and the evidence of the United States, show them to have been examinations and reports on matters appertaining to the office of chief engineer. So are the reports on their face, so far as they have been given in evidence, nor is there any evidence in any degree to the contrary. To sustain some of them, no evidence whatever is offered; neither for making those in regard to which evidence has been offered, nor for such in regard to which no evidence has been offered, can the defendant claim extra compensation.

Exceptions.—To the giving of the eight instructions above set forth, and to the giving of each of them, the defendant, by his counsel, excepted.

The defendant, by his counsel, then prayed the court to instruct the jury as follows:—

1. That under the first count of the declaration, the plaintiff is *not entitled to recover against the defendant for any money received by him in any office or capacity other than chief engineer. Which instruction was given by the court.

*95]

Instructions refused.—2. That under the second count of the declaration, the plaintiff is not entitled to recover against the defendant for any money received by him in any office or capacity not mentioned in the bill of particulars of demands, furnished and filed by the plaintiff under that count, nor for any money which may have been received by the defendant at any other time than that mentioned in said bill of particulars, that is, the year 1839.

This last instruction was refused by the court, because there was no order made by the court on the plaintiff to furnish a bill of particulars, and on the memorandum furnished voluntarily to the defendant's counsel the court did not act, and might not have acted, if required to do so, under the circumstances, this being a matter of discretion.

3. That if the jury find, from the evidence, that the defendant performed any of the services for which he has charged in the last item of his account under the direction of the President or Secretary of War, and that such services were neither military nor civil engineering, he is entitled to compensation for such services as a set-off in this action. This last instruction was refused by the court.

4. That if the jury find, from the evidence, that the defendant performed any of the services in the item of his account appended to Benjamin Fowler's deposition under the direction of the President or Secretary of War, and that such services were not enjoined by the army regulations, the defendant is entitled to compensation for such services as a set-off in this action.

This last instruction was refused by the court, and the refusal reduced to writing in the following words:—

"This instruction is refused, and the eighth instruction, given on the part of the United States, is referred to as embracing the whole subject-matter. The court is furthermore of opinion, that the President or Secretary could well refer to the chief engineer any matter for report, &c., which appertained to the particular service devolving on the Engineer Department, in cases where Congress, or either House, by law or resolution, required information from the President on

that particular subject, aside from any injunction by the army regulations, and therefore the instruction cannot be given in the terms it is asked."

5. That if the jury find, from the evidence, that the defendant, by the direction of the President or of the Secretary of War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official *duties as chief engineer, he is entitled to compensation for such extra services, as a set-off in this action. [*96

This last instruction was refused by the court, and the refusal was reduced to writing, in the following words:—

"The court refuses this instruction, because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe and apply, and not the jury, and from such evidence to ascertain, as matter of law, what were the defendant's duties and acts; and taking all the evidence, and construing it the most favorably for the defendant, none is adduced showing, or tending to show, the defendant performed any service not appertaining to his station as chief engineer; and for the proper instruction on the item referred to, the eighth instruction on part of the United States, on this item, is to govern the jury.

"If for no other reason, this instruction would be refused, because the said eighth instruction concludes the whole matter. There is no fact, therefore, to which this instruction could apply, and it again refers the matters of law to the jury,—what the chief engineer's official duties were,—assuming to withdraw their decision from the court, and out of the previous instruction."

To all which decisions and opinions of the court in giving the instructions on the part of the United States, and in refusing the instructions which were prayed for by the defendant, and by the court refused, the defendant, by his counsel, excepts, and prays the court to sign and seal this his bill of exceptions, and that the same be made part of the record, which is done. J. CATRON. [L. S.]

To review these instructions and refusals, this writ of error was sued out.

The cause was argued by *Mr. Jones* and *Mr. Coxe*, for the plaintiff in error, and by *Mr. Mason*, Attorney-General, for the United States. There was presented also, by General Gratiot, a brief containing detailed references to such of the laws, military regulations, usages of the War Department,

&c., as tended to illustrate the two following general heads, viz.:—

1. The history, progressive organization, and proper functions, military and civil, of the engineer corps, and of the chief or colonel of engineers.

2. The effect of the brevet of brigadier-general, when it happens to be conferred on the colonel of engineers, and whenever any of the contingencies happen upon which he takes place according to his brevet commission.

These illustrations were intended to explain the following propositions:—

1. That when General Gratiot was detached from his original station of chief or colonel of engineers at West Point, to take *actual rank and command according to his brevet commission, with the pay and emoluments of a brigadier-general in the army of the United States, he was completely detached from the line of the engineers, and took a distinct station, rank, and command in the line of the army; indeed, that he could, by no possibility, according to existing laws and regulations, have assumed such station, rank, and command, and been allowed such pay and emoluments, as brigadier-general, without relinquishing, for the time being, his station and command in the line of the engineers, and all the peculiar functions and duties of engineer; in short, that he was as completely detached from the engineer line as if he had been ordered (and he might just as regularly have been ordered) to take command in the field of a brigade composed of different detachments.

*97]

2. That the pay and emoluments received by him, whilst in such command, as brigadier-general, were exclusively appropriated by law to his services in that rank alone, and had no more connection with or reference to any duties or services of engineering, than the like pay and emoluments received by any other officer of the like rank in the line of the army.

3. That, even if General Gratiot, in his then actual rank of brigadier-general, had been liable to be officially called on to perform engineer duties or services, still the particular services performed by him, and for which he claimed distinct compensation, as for extra official services, did not, in fact, appertain to the line, business, or science of engineering, in any of its branches.

4. That, even if those services had been (and, in fact, they were not) within the sphere of any branch of civil engineering, in which any act of Congress had authorized the employment of the Engineer Corps, still there was no provision in the law to prohibit extra compensation (over and above the

stated and official pay and emoluments) to the officers of the Engineer Corps so employed; and their title (as by an implied contract) to such compensation has been acknowledged and established by a numerous train of precedents and long usage.

5. But it is thought quite clear, that whilst stationed at the seat of government, in the actual rank and command of brigadier-general, according to his brevet commission, he was not liable to be called on, *ex officio*, for the performance of any of the peculiar duties or services of an engineer, whether military or civil.

Mr. Jones, for the plaintiff in error, contended that the instructions given by the court below were erroneous, because they undertook to judge of a fact which was proper for the jury. The circumstance that the evidence was reduced to writing made no difference, and did not authorize the transfer of the question from the jury to the court. All evidence taken under a commission is written, and yet goes, of course, to the jury. Usage is a fact, *and the determination of it cannot be withdrawn from that tribunal which is the exclusive judge of facts. [*98

The claim of General Gratiot was for services rendered beyond the line of his official duty. It is no new principle on his part. If his time and labor have been tasked beyond his office, he is entitled to compensation. This question has been frequently examined by this court, which has decided that there is no necessity for an express contract to establish such a claim. An implied contract is sufficient. The set-off is claimed under the act of 1794. (1 Lit. & Brown's ed., 366.) The claim need not be a legal one; if it is an equitable one, it is sufficient. The cases which illustrate this are *United States* v. *Macdaniel*, 7 Pet., 1; *United States* v. *Ripley*, 7 Id., 18; *United States* v. *Fillebrown*, 7 Id., 28.

The last mentioned case was analogous to this in some respects. Fillebrown was a clerk, with a fixed salary, and was moreover employed by a board to take charge of their books, at an additional salary of $250 per annum. A part of his set-off was for services prior to his appointment by the board, and this raised the question whether an implied contract was sufficient. This case of Fillebrown is understood to establish the five following propositions, viz.:—

1. That an equitable claim for an unascertained balance, to be fixed by the jury, was admitted.

2. That it was competent to show, by parol evidence, what were the extra services beyond the line of official duty, and that the whole question, whether or not such services were

extra, was a fact for the jury, to be established by parol evidence.

3. That parol evidence was admissible to show the measure of compensation for extra services in all officers of the government.

4. That the board had authority to employ a person who rendered the services charged for, and that the law will imply a promise to pay for them.

5. That the Secretary of the Navy could not disallow and annul the right to compensation.

(*Mr. Jones* then explained the account of General Gratiot, as set forth in the preceding statement.)

The situation of General Gratiot may be considered in three points of view.

1. As military engineer, being lieutenant-colonel from 1821.

2. As chief engineer, being full colonel.

3. As a brigadier-general in the army of the United States. When he was detached from the proper head-quarters of the corps, at West Point, he took rank as brigadier-general in the line of the army.

1. As military engineer.

The laws of May 9, 1794 (1 Lit. & Brown's ed., 366), July 16, 1798 (1 Id., 604); March 3, 1799 (1 Id., 749); March 16, 1802 *(2 Id., 132), show that the Corps of Engineers was entirely a military corps, and bound to do no other species of duty.

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The 63d article of the Rules and Articles of War, established by the act of April 10, 1806 (2 L. & B.'s ed., 359), is as follows:—

"ART. 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them respectively."

And this article is quoted in the general regulations for the army issued in 1816, 1821, and 1825.

In the regulations of 1825, there is the following paragraph:—

Par. 888. "The duties of the Engineer Department comprise reconnoitring and surveying for military purposes and for internal improvements, together with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects; the selection of sites; the formation of plans and estimates; the construction, re-

pair, and inspection of fortifications; and the disbursement of the sums appropriated for the fulfilment of those objects, severally, comprising those of the Military Academy; also, the superintendence of the execution of the acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of Congress, with the execution of which the War Department may be charged."

What right had the Secretary of War to change the destination of the corps, and divert it from the duties which the law had prescribed as legitimate?

But, at all events, this regulation does not require their attention to be bestowed upon any other works than those "with which the War Department may be charged." (*Mr. Jones* here referred to such acts of Congress as charged the execution of certain specific works upon the War Department.)

2. As chief engineer, being full colonel.

By the provisions of other enactments, but particularly in those of the last branch of the 27th section of the act of 1802, last of the 63d article of war, and the general regulations of the President under them, the officer of the Corps of Engineers is subject to be ordered upon other duties, which, although not lodged in his office or line profession, are nevertheless, like those named above, governed by the rules and articles of war. They are staff services generally, and which by law are designated, when performed by a detached officer, as extra official, and always compensated in addition to line pay and emoluments.

**Mr. Jones* then referred to several acts of Congress, to show that where officers were detached for staff [*100 duty, they were paid in addition. But the fact that General Gratiot performed staff duties is admitted by the United States in the account.

3. As a brigadier-general in the army.

"The chief of the Corps of Engineers shall be stationed at the seat of government, and shall direct and regulate the duties of the Corps of Engineers, and those also of such of the Topographical Engineers as may be attached to the Engineer Department, and shall also be the inspector of the Military Academy, and be charged with its correspondence."—General Regulations of 1821, p. 165, par. 1; or of 1825, p. 167, par. 887.

It is clear that this order or executive regulation detaches

the colonel of the Corps of Engineers from the permanent head-quarters of his corps, and places him in position to command "detachments composed of different corps," viz.:—

1. Corps of Engineers at head-quarters.
2. Officers of the Corps of Engineers on detached service.
3. Topographical Engineers attached to the Engineer Department.
4. Cadets of artillery, cavalry, riflemen, or infantry, attached to the Military Academy by the 3d section of the act of April 29, 1812, "making further provision for the Corps of Engineers" (3 Story, 1241, ch. 72;)—and
5. Post of West Point.

Mr. Jones then went on to show that by the 61st article of the General Regulations of 1816, and the acts of 1812 and 1818, General Gratiot was entitled to the pay and emoluments of a brigadier-general in the army, as claimed in his account.

Mr. Mason (Attorney-General), for the United States.

The history of the case is this.

On the 2d of March, 1819, the plaintiff in error, then an officer of engineers in the army of the United States, was ordered to Old Point Comfort to take charge of the works there building at the two fortifications, Fortress Monroe and Fort Calhoun.

On the 8th of November, 1821, the disbursing agent then at the post was removed, and the plaintiff was directed to take upon himself the disbursements of the public money, agreeably to the regulations for the government of the Engineer Department; which he did.

On the 1st of August, 1828, he became chief engineer, and removed to Washington, but continued in charge till the 30th of September, 1829. In his final account there rendered, the entire amount of his claims which were disallowed was, for a second per diem and other items, $8,958.91.

On the 26th of March, 1833, the plaintiff presented a new account "as agent for fortifications at Forts Monroe and Calhoun." *In this he charged a commission of one per cent. from November, 1821, to September, 1829.

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On the 30th of June, 1834, Congress made an appropriation for a "fort at Grand Terre." The whole amount appropriated was drawn from the treasury by General Gratiot, as chief engineer, in November and December, 1835. On the 6th of October, 1836, he repaid into the treasury $15,000 thereof, and retained $35,000, in addition to a balance of

$8,958.91 charged against him for disbursements at Old Point Comfort, previously to the 30th of September, 1829.

On the 1st of April, 1836, the pay and allowances of General Gratiot were stopped, and the amount directed to be appropriated to the extinguishment of his debt.

On the 15th of December, 1838, his accounts were again adjusted, and credits allowed him which reduced the balance against him to $29,292.13.

As an offset to this balance, General Gratiot, on the 11th of January, 1839, presented a new account at the treasury, in which he renewed his claim for a double per diem, and added a claim for a commission of $2\frac{1}{2}$ per cent. on disbursements made by him of "contingencies for fortifications." And also a claim of $37,262.44 as compensation for extra services in conducting works of civil engineering, from his appointment in 1828 to his dismissal in 1838.

In February, 1839, a suit was brought against him by the United States, in the Circuit Court of Missouri. It was tried in April, 1840, and judgment rendered in favor of the United States for $31,056.33.

On a writ of error, this court, at January term, 1841, received that decision, and, deciding several important principles in regard to the items of the set-off, reversed the judgment, on the ground that the defendant's evidence was excluded.

At April term of the Circuit Court of Mississippi, the cause was again tried, and the district attorney admitted the credits which are specified in the statements, and the defendant exhibited a new claim of set-off. The several items are enumerated from 1 to 15. Numbers 4, 9, 10, 12, and 13 were admitted or withdrawn, and the others were insisted. Numbers 1, 2, 3, 6, 7, and 8 arise out of transactions anterior to the plaintiff's becoming chief engineer. No. 14 is substantially the same charge for extra official service which was passed on by this court, 15 Peters, as No. 3, p. 376.

No. 15 is a new demand, claiming $37,127.42 for extra official services in the daily and current business of the chief engineer in his intercourse with the War Department, and asserts the principle, that the regulation of 1821, requiring the chief engineer to perform his functions at Washington, detached him from his regular duty, and made all his office business extraordinary service, for *which he [*102
demands extra compensation. The details of this item are very minute, and the principle on which the charge is ascertained does not appear; if allowed, it would have more than liquidated the balance in favor of the government.

In the opinion of the court in the case in 15 Pet., 373, it was deemed right, for the purpose of bringing this protracted controversy within narrower limits, upon the new trial in the Circuit Court, to state some of the views entertained by the court upon points which had been argued as fully as if the evidence had been admitted. And it was held, that by the regulations the plaintiff in error was not entitled to a commission on disbursements, but the per diem was in full of all extra compensation.

That as to a charge for disbursements of contingencies of fortifications, he was at liberty to show it by evidence.

That as to his charge of $37,262.46 for extra services in conducting the affairs of the civil works of internal improvement of the government, upon its face, this item has no foundation in law, and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it, and the ground of this opinion was, that the services alleged to be performed were the ordinary special duties appertaining to the office of chief engineer, on a review of the laws and regulations, &c.

On the new trial, it appeared that, instead of contracting, the subjects of inquiry were enlarged.

But it is submitted, that the principles involved are few and simple, and have been decided by this court.

The court on the trial gave the eighth instruction asked by the counsel of the United States, and overruled the third, fourth, and fifth instructions moved by the counsel of the plaintiff in error. And this opinion of the court involves the important inquiry on which the case turns.

The court instructed the jury, that there was no sufficient evidence to justify them in giving the defendant the credits claimed.

The inquiry was, what were the lawful duties of an officer holding his commission and receiving a salary for his services from the United States. Was this a question for the court or the jury?

It is submitted, that it was peculiarly a question for the decision of the court. It cannot be determined what was extra official, without previously determining what is the official duty. And this is necessarily a question of law.

It is in the nature of a *quo warranto*, in which the question of the sufficiency of legal authority is always decided by the court.

In the case of *Kendall* v. *Stokes*, 3 How., 87, it was held that a motion to charge on the proofs was equivalent to a

demurrer to the evidence, and such is the practice in Missouri.

In *Toland* v. *Sprague*, 12 Pet., 300, it was held that where *the evidence was in writing it was not error for [*103 the court to charge the jury as to its effect. And the court clearly recognized the same principle in the case of *Gratiot* v. *United States*, 15 Pet., 376. The learned judge who delivered the opinion of the court says,—"The court are of opinion that upon its face this item has no just foundation in law, and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it. The ground of this opinion is, that upon a review of the laws and regulations of the government applicable to the subject, it is apparent that the services therein alleged to be performed were the ordinary special duties appertaining to the office of chief engineer; and such as the defendant was bound to perform as chief engineer, without any extra compensation over and above his salary and emoluments as a brigadier-general of the army of the United States, on account of such services. In this view of the matter, the Circuit Court acted correctly in rejecting the evidence applicable to this item."

Thus having the sanction of this court, the Circuit Court was authorized, on the second trial, in charging the jury that the written evidence adduced was not sufficient to maintain the items of his account of offset.

Since the former hearing of this cause here, the case of Eliason and the United States has been heard and decided. It is reported in 16 Pet., 291–302, and the court there held, that by the regulation of March 13, 1835, no extra compensation could be allowed to an officer of the army from the 3d of March, of that year. Credit was disallowed to Captian Eliason under circumstances similar to those of the plaintiff in error, and his must share the same fate. Assuming, then, as I have endeavored to prove, that the Circuit Court did not err in instructing the jury on the sufficiency of the evidence, did the court err as to its opinion of its legal effect?

1. As to the first item,—of two and a half per cent. commissions, for safe keeping of and responsibility for $19,500, from the 27th of August to 7th of September, 1821, and for $26,500, from 27th of August to 20th of September. There is no proof touching this item, except the Treasury transcript. Colonel Gratiot was the commanding officer in charge of the works at Old Point Comfort. Major Maurice was the contractor. These funds were remitted to Colonel Gratiot, and by him paid over to the contractor. There is no law, and there is no proof of usage, to sustain the charge. If he had

been subjected to the trouble of disbursing it, as agent, he was entitled to no commission.

2. For disbursing contingents, from 20th of May, 1822, to 30th of September, 1829, &c., there is no additional proof, and he has been allowed a credit of four dollars per diem, which is exclusive of all extra compensation for disbursement.

3. Same answer.

*104] 6. For collections of money made of Jacob Lewis & Co., &c.

7. For collections of money made of Samuel Cooper.

These were moneys of the United States, paid to the disbursing agent, and carried into his accounts for disbursement. He was no more entitled to commission on these receipts, than on remittances to him from the treasury. Old printed record, p. 14.

8. Major Whiting, under orders, sold public property and paid proceeds to the disbursing agent, and carried them into account to his debit. The same reason applies.

These claims have been presented for the first time since this court decided that the plaintiff in error was not entitled to commission on disbursements, with the exception of a part of that for commissions on contingencies. On the former trial, that charge was $836, now it is $2,871.43.

14. This item is substantially the third item on which this court, at the former hearing, passed so emphatic an opinion. In amount it is somewhat larger; but whatever change has been made in the words, the principle is the same.

For services in conducting the affairs connected with the civil works of internal improvement, and in conducting the affairs connected with the execution of the act of Congress of 1824, for taking observations, &c., he claims compensation over and above the pay and emoluments of a brigadier general, at the rate of $3,600 per annum.

The legal duties of the Engineer Corps were so fully discussed, on the former hearing, that I am unwilling to occupy the time of the court in recapitulating them.

By no act of Congress have these duties been defined. In the act of 1794, 1 L. & B.'s ed., 366, no specific duties are assigned, but places it generally under the orders of the President. By the act of 1802, it was reorganized, "to do such service as the President shall direct." This general power has never been superseded. Every successive act of Congress and of the executive, and, I may add, the silence of the plaintiff in error for a long period that he was in office, show that there was never any just foundation for any such implied contract as must exist to sustain the charge.

The colonel of engineers was bound to perform any military or other duty, not incompatible with the character of an officer and gentleman, that the service may require, and the President direct.

The regulations of 1821 and of 1825 (see 15 Pet., 373, 374), require the chief of the Corps of Engineers to be stationed at Washington, and charges him with the superintendence of the Corps of Engineers, to which the Topographical Engineers is attached, and makes his duties comprise reconnoitring and surveying, for military purposes and for internal improvement, with formation of plans and estimates in detail for fortifications, &c.; also the superintendence *of the execution of acts of Congress in relation to internal [*105 improvements, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, with which the War Department may be charged by Congress. And in the case of *Eliason* v. *The United States*, 16 Peters, 302, the court hold this language:— "The Secretary of War is the regular constitutional organ for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and as such be binding on all within the sphere of his legal and constitutional authority." "Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken." To maintain his offset, the plaintiff must establish a contract, express or implied, and the daily established current business of his office, performed without any claim for extra compensation by his predecessor, himself, and his successor, for more than twenty years, it is now argued, was extra official, and that the law implies a contract to pay an extra compensation.

The plaintiff has taken many depositions. They certainly establish no usage in the Engineer Department, nor in any of the bureaux, as they are called, established in the War Department for a more regular and systematic despatch of business. The President had the authority to require the services of the chief engineer at any place, and the regulation of 1821 stationed him at Washington. The nature of his duties of superintendence, and of preparing plans and estimates, in subordination to the Secretary of War, necessarily devolved on him those duties, for which, in his fifteenth item, he has now, for the first time, asserted a claim to the amount of $37,127.42. The items will speak for themselves. On what principle the charge is made, I am unable to comprehend. The position is taken, that when he entered on the duties of the Engineer Department, at Washington, he received the

pay of brigadier-general, he ceased to act as colonel of engi neers, and was acting only as a brigadier-general of the army of the United States. He held the brevet rank of brigadier-general. Mr. Monroe had allowed to General Macomb, while performing the duties of chief engineer, the pay and emolu ments of his brigadier's commission. The reasons for that order are not very favorable to the position now taken. See record.

The brevet pay was allowed because he was performing the duties of the colonel of engineers; whenever he ceased to perform those duties, his brevet pay ceased with it. In reference to the instances of extra pay allowed, without examining them in detail, I will remark—

1. That the President had a discretion, by the act of to increase rations.

2. That neither the regulation of 1835, nor the law of 1835 *or of 1838, forbid extra allowances, where an appropriation was made by Congress for the object. See the opinion of Mr. Grundy, in 1839.

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3. That for duties taking the officer from his regular place of duty, subjecting him to increased expense, allowances have been made, by express assurance at the time. See Regulations of 1818, p. 67, Record.

That abuses have existed is well known; they form no basis on which the court will imply an undertaking to pay an extra compensation. These abuses produced the proviso of 1835, the act of 1838, and the stringent and conclusive act of 1842. None of the cases which have been decided by this court conflict with the positions I have taken. In McDaniel and the United States, and in Fillebrown and the United States, there were express agreements made by the Secretary of the Navy to pay for services out of the range of their regular official duties. In *Ripley* v. *United States*, the services must be without the range of official duties. And I may, with some confidence, insist, that the court will not be inclined to relieve the plaintiff in error from the burden which the law throws on him. His claim cannot be regarded with favor. Congress appropriated money for an important national work. It went into his hands as a public officer, charged with its application to that object. He diverted it to his own uses, on a claim which was disallowed at the treasury. Indulgence to such a course of conduct may defeat military or naval operations of the utmost importance to the country.

Mr. Coxe, for the plaintiff in error, in reply and conclusion. The case ought to be considered as if an action had been

brought by General Gratiot for a settlement of accounts. The history of the case given by the Attorney-General, might be correct, but it was not in the record, and he had forgotten to state a fact in it, which was, that when General Gratiot was dismissed, there was no ascertained balance against him. His account had been for five years before the proper accounting officers of the government, and was then unsettled. He asked that a balance might be struck, but was refused. It seemed as if in his case the old practice had been renewed, namely, *castigat audit que.* Gratiot was required to pay a large sum by a certain day, and, not doing so, the harsh measure of dismissal was resorted to. Already $20,000 of the claim against him has been extinguished, and we hope that more will be by the event of this suit. The Attorney-General has represented the danger of large sums being drawn from the treasury, but we ask for the establishment of no new principle. All that we claim is the impartial application of the same rule which has been extended to others. And if the apprehended danger did exist, is this the tribunal which ought to interpose *to prevent it? The answer has been already furnished by the Attorney-General, when [*107 he said that the legislature, by interfering, had put a stop to the supposed evil. This must therefore be the last case. The treasury doors are closed by legislative action, not by judicial decision. The Attorney-General has asked, if all the officers who have been brought to Washington by former secretaries are to have extra pay. Whatever may be the consequence, it was not our doing, and we are not responsible. In some of the departments, when boards of commissioners were established, post-captains in the navy were placed there, and received salaries for their administrative functions. They could not be placed on courts-martial, which shows that they were detached from the performance of their regular duties in the service, and yet they have never been obliged to ask for their pay. Since the time when General Gratiot was dismissed, and even now, there are four post-captains at the head of bureaux, entirely detached from military duty. They receive the salaries fixed by law. If this course had been taken formerly, when other officers were placed at the head of bureaux, there would have been no difficulty. If, therefore, the consequences apprehended by the Attorney-General should follow, it will be the government that will cause them, and they cannot be attributed to us. So, also, the commander-in-chief of the army has been appointed a commissioner to negotiate with the Indians, and paid with extra compensation. So, also, the quartermaster-general (Jesup) has been sent to Florida in

command of an army. These arguments, therefore, ought not to have any effect. This case, like all other cases, is simply a question of legal right.

The Attorney-General has said that the instruction of the court below amounts only to a demurrer to evidence. I am willing to regard it so, as if a motion for nonsuit had been made. But if General Gratiot had been the plaintiff, it was not a proper case for a motion for a nonsuit or a demurrer to evidence, because evidence had been given on both sides. Gratiot's witnesses were all cross-examined by the United States, and the whole evidence was offered which had been thus taken. This is a mere question of law. The amount is of no consequence. "No nation was ever impoverished by liberally rewarding services." If General Gratiot's services were really important, and beyond the line of his official duty, it is no matter what the amount involved may be.

General Gratiot was lieutenant-colonel of engineers when the colonel was promoted, and entitled to a brevet for meritorious services. He received it, bearing a character without exception, and even now there is no imputation on his personal honor and integrity. He was advised that he had rights, and asked no more than the Department had been in the habit of allowing. He presented claims for services beyond his official duty. Were they *so? That is the question which this court has to decide. They were for keeping several hundred accounts, paying money, and other things of an administrative nature. When this case was before the court in 1841, the following language was held, which is found in 15 Pet., 371. "It is true that the act of the 16th of March, 1802," &c., &c. "But however broad this enactment is in its language, it never has been supposed to authorize the President to employ the Corps of Engineers upon any other duty, except such as belongs either to military engineering or to civil engineering. It is apparent, also, from the whole history of the legislation of Congress upon this subject, that, for many years after the enactment, works of internal improvement and mere civil engineering were not, ordinarily, devolved upon the Corps of Engineers. But, assuming the President possessed the fullest power, under this enactment, from time to time to employ any officers of the corps in the business of civil engineering, still it must be obvious, that as their pay and emoluments were, or would be, regulated with reference to their ordinary military and other duties, the power of the President to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may

*108]

not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the War Department in similar cases, acting in obedience to the presumed orders of the President," &c., &c., &c.

The Attorney-General has said that we must either admit or deny the authority of the "Regulations," and that we are on the horns of a dilemma. But not so. If the President had the power to detach officers for other services than those within the strict line of their duty, it has nothing to do with his power to contract with them for extra compensation for these services. The court said so in the former case, and added, that they had no right to say whether the implied contract was established by evidence or not. Why? Because it was not a question of law, but a question of fact, for the jury. It is true that, at page 376, the court say that one of the charges "has no just foundation in law; and therefore, that the evidence which was offered in support of it, if admitted, would not have maintained it." But this is merely an *obiter dictum*, not a point decided; and it is not easy to see how the two passages can be reconciled with each other. It would seem as if the court thought that civil engineering was a part of the regular duty of the corps. This is an open question. The Attorney-General thinks that we require a reversal of the former opinion of the court. But not so. We only wish that the same rule should be extended to us which has been extended to others. The case of *The United States* v. *Freeman*, 3 How., 556, has been referred to as expressing the opinion which we *wish to reverse. [*109
But in that case, double rations were allowed under Regulation 1125, at the discretion of the President, and this was said to be done by him by authority of law; and this is just the proposition for which we now contend. It was said on the other side, that the authority of the President does not rest upon acts of Congress. I take issue upon this proposition. The Constitution says, "Congress shall provide rules for the government of the army and navy." What right has the President to do it? The first act passed was in 1806, the 63d article of which was a prohibition against employing the Corps of Engineers on any other duty, and the same is subsequently repeated. (*Mr. Coxe* here went into an examination of the laws and army regulations.)

Until 1824, no branch of engineering was taught except military engineering. Congress has thus exercised its constitutional power, and granted certain restricted powers to the Department. Whence does the Attorney-General derive an unrestrained power in the President, because he is commander-

in-chief? It is true that he is so, but his orders, to be legal, must be confined to military duty. For example, he has no right to command an officer of the army to attend to his (the President's) private business. There is no authority, either, to order a military man to keep accounts, or attend to administrative duties. The President has a general superintending power of seeing all laws executed, but that is altogether a distinct and separate head of authority. This is not in virtue of his being commander-in-chief of the army, but of being President of the United States. Under this, he can employ agents; he may choose anywhere; may select civil engineers, or officers of the army proper, to carry on diplomatic arrangements or negotiate with the Indians. But, then, is not the person so employed to be remunerated for his services? He must be, unless some law forbids such pay, and the President has the power to contract that such pay shall be given. The only claim which the United States had upon General Gratiot was to employ him in civil engineering. The 67th article of the Regulations of 1825, paragraph 888, confines the services of the corps to such works as were authorized by Congress, and whose execution was charged upon the War Department. But many works have been attended to, which were neither specifically charged upon the War Department nor had any natural affinity with it; such, for example, as dredging the Mississippi. The language of the regulation implies that the execution of these works must be charged, by Congress, upon the War Department, at the same time that the appropriation is made. If this is not the case, then their execution falls under the general power of the President to see the laws executed, and he may employ any body for this purpose. The account *110] which we have before us is for the performance of *such extra official duties. Did they properly belong to the office of an engineer? (*Mr. Coxe* here referred to the following works to show that they did not:—1. Dictionnaire de l'Académie Française. 2. Campbell's Military Dictionary. 3. Dobson's Encyclopædia. 4. Encyclopædia Britannica. 5. Brande's Dictionary of Science, Literature, and Art. 6. Rees's Cyclopædia.) We have also the testimony of practical engineers to the same point. We have, in addition, much evidence where officers of all corps have done other duty and been compensated; and even where Congress has especially charged the execution of works upon the War Department, such as the Cumberland road, officers have been paid extra. General Gratiot was not allowed to give evidence of his services, to establish an express or implied contract. Such evidence was put in, and counter evidence taken, and then

the whole ruled out. It is, no doubt, the duty of a court to construe written documents. But if a witness is sick and examined under a commission, does this evidence thereby change its character, and become a written document? If the decision of the court below is assimilated to a demurrer to evidence, then every fact, and every inference from it, must be taken to be true. For these reasons, we think that the court below erred.

Mr. Justice WAYNE delivered the opinion of the court.

This case is now before us upon exceptions, taken upon its trial in the Circuit Court, to the instructions which were given by the court, and such as it refused to give to the jury. We do not think them well founded. When the instructions were given and refused, the only matters in controversy were items 1, 2, 3, 6, 7, 8, 14, 15, in General Gratiot's set-off. The 4th, 9th, 10th, 12th items, and one half of the 11th, had been withdrawn, having been allowed in former settlements. The other half of 11, and the entire 5th item, were admitted by the district attorney, in the course of the trial, to be audits against the demand of the United States. The instructions then are to be considered in reference to the disputed items 1, 2, 3, 6, 7, 8, 14, 15.

The first instruction was given upon item number 1, the second upon item 2, the third upon item 3, the fourth upon items 6 and 7, the fifth upon the 8th item, the sixth and seventh upon item 14, and the eighth instruction upon item 15, comprehending under the last all the particulars in the account attached to Mr. Benjamin Fowler's deposition.

The instructions were intended by the court to be legal conclusions from all the evidence in the cause. Our inquiries will be, Are they so? And, as legal conclusions, were they given in such terms as in no way to encroach upon the province of the jury to weigh the evidence as to the facts in the case?

The first instruction denies the right to commissions upon the *amount turned over to James Maurice. [*111
After another reason in no way material to be here noticed, the court gives as a final reason for rejecting the charge, that the only evidence in support of it was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed for turning over the money to an accounting officer.

The transcript alluded to is the account of General Gratiot with the United States. It was a part of the record in the case reported in 15 Pet., 336, and was used again as evidence

upon the trial of the cause in the Circuit Court, with the consent of General Gratiot.

We learn from it, that between the 27th August and the 20th September, 1821, $46,050 had been remitted to General Gratiot, then a major in the Corps of Engineers and the superintending engineer of fortifications at Old Point Comfort; and that he, within the dates just mentioned, turned over the money to James Maurice, agent of fortifications, on account of Forts Calhoun and Monroe. This is the only evidence bearing upon the item. It is a charge of a commission of $2\frac{1}{2}$ per cent. upon the amount, as it is expressed in the set-off, for safe keeping and the responsibility incurred in receiving and turning it over to the agent, when General Gratiot was not a disbursing agent. It is then established, that the money was received and turned over to Maurice, when he was the agent; and also what were the relations of General Gratiot and of Maurice to the government at Old Point Comfort. Those relations arose from the 67th article of the General Regulations of the Army, published in orders from the War Department in July, 1821. From the detail in that article, particularly that paragraph of it directing in what kind of money the agent should make payments, and in what banks it was to be kept by him, there is no doubt it was intended that he should disburse from remittances made to himself by the government. Such was to be the ordinary nature of remittance. But by another paragraph, the superintending engineer had a general superintendence of the agents' disbursements, and none could be made without his signature. And by a third paragraph in the same article, he could be required to perform the duties of agent, when there was no agent of fortifications, for which service a particular compensation is allowed. Is it not obvious, then, with such a power in the Engineer Department, in the contingency mentioned, to call upon the superintending engineer to perform the duties of agent, that remittances could be made to him to be disbursed by himself, when at the time of the remittance there was no qualified agent to receive it, or to be turned over to an agent when one became qualified? The exact state of the case in that respect we do not know,—the transcript does not show it; but it is because it does not show it, and because the money was not disbursed by General Gratiot, but was paid over by him to *the agent in so short a time after it was received, that we are bound to presume there was not an agent at Old Point qualified to receive the remittances made to General Gratiot, and that intermediately, before the money was turned over, the agent who did receive and dis-

*112]

burse it became qualified. There were only two officers to whom remittances could be made and by whom they could be disbursed,—the superintending engineer and the agent for fortifications. Such, then, must be the inference, as we have stated it, unless we come to the overstrained conclusion, that the money was remitted to General Gratiot for some other purpose than for disbursement, and that the department was experimenting in a third way, as to the manner of making remittances and of disbursement, contrary to the regulations giving to it the direction of fortifications. The money was clearly sent to be disbursed by General Gratiot, or by an agent. If not for such purpose, it would not have been remitted. But having been remitted to the superintendent of fortifications, and not having been disbursed by him, it could alone have been prevented by the supervention of an agent whose duty it became to do it, the regulation not permitting it to be done by the superintendent, except when there was no agent for fortifications. It is not necessary for us to go out of this course of reasoning for the purpose of confirming it, but it is confirmed by the manner in which the charge is made. It is "for the safe keeping of and responsibility for the following sums, placed in the custody of C. Gratiot, from the 27th August up to the 7th and 20th September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the transcript, &c., &c., when General Gratiot was not a disbursing agent." Why for safe keeping, if at the time the money was remitted James Maurice was a qualified agent to whom the remittance could have been made? Why paid over to him, if between the 27th August and the 7th and 20th September Maurice had not become so? The terms in which the charge is made disclose the fact to have been as we have inferred it was; and the error in making it has arisen from its having been supposed that the superintending engineer could be the custodium of government money in any other character or purpose than that in which it could be remitted to him by the Engineer Department, under the 67th article of the Army Regulations of 1821. In this view of the claim, no case of compensation by way of usage can apply to it. Here is a case of an officer with certain duties, absolute and contingent, well ascertained, with a fixed and equally well ascertained compensation for any and every service which he could be called on to render.[1] Compensation by way of usage has never been sanctioned by the court in any case, except for extra official service, which was

[1] Cited. *United States* v. *Buchanan*, 8 How., 102.

within the equity of the act of 1797, ch. 74, as that act was originally construed and applied in the case of the *United States* v. *Wilkins*, 6 Wheat., 135, and subsequently in
*113] *the cases of *McDaniel*, *Ripley*, and *Fillebrown*, in 7 Pet., 1, 18, 28. The instance of commissions having been allowed to General J. G. Swift, for money remitted to him and paid over by him to the military agents, certainly does not apply to the case now under consideration. That was done under a very different state of the law and of army regulations,—when there was neither law nor regulation for making an engineer officer a receiving or disbursing agent, when there was no military agent to receive and disburse government funds. We think, then, that the court did not err in instructing the jury, that the only evidence in support of the first item was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed merely for turning over the money to an accounting officer.

The 2d, 6th, 7th, and 8th items in the set-off, and the instructions given upon them, will be considered in connection, because the transcript proves that the 6th, 7th, and 8th items, upon which commissions are a second time charged, though stated for a different service, are parts of the aggregate of $84,325.58 upon which commissions are charged in the 2d item. The charge is a commission of $2\frac{1}{2}$ per cent. upon that amount, for disbursing it "from the 20th May, 1822, to the 30th September, 1829, on account of the appropriations for fortifications other than those on Forts Monroe and Calhoun." The 6th, 7th, and 8th items are for collections of money made for the United States, from Lewis & Co., Samuel Cooper, and for sales of public property. The first observation which we make here is, that the transcript shows that, within two months at furthest after General Gratiot had paid over the sum mentioned in his first item to Maurice, he had been directed, in addition to his duties as superintending engineer, to perform those also of agent for fortifications, and thus became the disbursing officer of all money applied by the Engineer Department to Forts Calhoun and Monroe. For this agency, a specific compensation is given by the 14th paragraph of the 67th article of Army Regulations, and charged by General Gratiot accordingly, in the 4th and 5th items of the set-off, both of which have been allowed to him; the 4th in a former settlement, and the 5th having been admitted, as has been already said, by the district attorney, upon the trial of the cause, as a proper credit against the United States. Our second observation is, that the transcript proves that the expenditure of $84,325.58 was disbursed upon the fortifica-

tions of which General Gratiot was the superintending engineer and disbursing agent, and not upon other fortifications, as might be inferred from the manner in which the charge is made. The whole sum, except $16,150.81, was remitted to General Gratiot on account of the fortification of which he was the superintending engineer and disbursing agent, and that amount was turned over to him by the quartermaster to be re-expended upon Forts Calhoun and Monroe, upon each in proportion *to the relation which the sales of [*114 public property bore to the sums expended for it out of the specific appropriations made by Congress for those forts distinctively. Or in other words, the property sold had been bought and paid for out of the specific appropriations for each fort,—was resold on account of each of them respectively,—the amount of sales of the property of each fort being kept separately, and were so handed over to General Gratiot to be disbursed again. The transcript shows it was so disbursed. This sum is the amount upon which a commission is charged in the 8th item of the set-off, and which the court said in its fifth instruction could not be allowed, "there being no evidence but the transcript to establish it, which was not sufficient." The transcript also shows that $27,699.43 of the amount of the 2d item in the set-off, denominated in the 6th and 7th items collections from Lewis & Co. and from Cooper, were stoppages out of money remitted to General Gratiot, from payments to be made to those persons, on account of advances which the government had made them on their contracts to supply materials for Forts Calhoun and Monroe. Neither the 6th, nor the 7th, nor the 8th items of the set-off were collections of money by General Gratiot, in the proper sense of that term. The 6th and 7th items were money returned by him out of money remitted to be disbursed by him as agent, and the amount of the 8th item was handed over to him in the same character, and for the same purpose. Thus, the manner in which General Gratiot received more than the half of the 2d item of his set-off, upon which a commission is charged for disbursing and afterwards for receiving, has been shown from the transcript itself. It also shows that the residue of the $84,325.58 were also remittances which had been made to him in his official relation of agent of fortifications. And that the source from which the entire sum was derived was from general appropriations made by Congress for fortifications, which the Engineer Department directed, as it had a right to do, to be applied to Forts Calhoun and Monroe, in addition to the sums expended upon each of them out of specific appropriations which had been made for each. The

manner of making appropriations had been general, without particularizing the fortification to which the sum was to be applied, and also appropriations for designated fortifications. A specific appropriation could not be diverted from its object, but general appropriations necessarily implied an application according to the discretion of the department which had the direction of fortifications. A remittance, then, to General Gratiot from a general appropriation, to be applied to the fortifications of which he was superintending engineer and disbursing agent, falls directly within that paragraph of the 67th article by which he was charged with the latter duty. For which, in addition to his pay and other emoluments, he was
*115] entitled to receive two dollars a day for each fortification for the construction *of which he disbursed funds, provided his per diem did not exceed two and a half per cent. on the sum expended. That sum, as a per diem, amounting to more than $11,000, has been allowed. From this detailed examination of the transcript (and this 2d item is nowhere besides mentioned in the record), it must be obvious that the court did not err in the second, fourth, or fifth instructions which it gave to the jury, by which the 2d, 6th, 7th, and 8th items of the set-off were disallowed. In making the charge, the opinion given by this court in 15 Peters has been misconceived. The case of Lieutenant Tuttle does not apply. That was disbursing moneys of separate appropriations upon works so distant from each other that the allowance was considered no more than an equitable remuneration for extra official services, which involved personal expenditure in getting to places remote from each other and remote from the locality where he had been detailed for duty.

The third instruction of the court upon the 3d item of the set-off may be briefly disposed of. It will be remembered, that, besides general and specific appropriations for fortifications, Congress made appropriations for the repairs and contingencies of fortifications, and it is for the disbursement of such an appropriation that a commission is charged in the 3d item. It is only necessary to look at the transcript again to see that the remittances which were made to General Gratiot out of the appropriation for repairs and contingencies were to be disbursed by him, and were disbursed by him under that head upon Forts Calhoun and Monroe. We confess our inability to disconnect such incidents from the general duty of the superintending engineer of a fortification, so as to make the service in any way extra official. The disbursement of the money is shown by the transcript, and by the manner in which the charge is made, to have been done in General Gra-

tiot's character of agent of fortifications. In the long list of compensation by way of usage furnished to the court by General Gratiot, we can find no instance of any allowance to an agent of fortifications for paying out such an appropriation, and we will not refrain from saying, if it has ever happened it has been carelessly or inconsiderately made. We think that the court did not err in the instruction which it gave upon this item of the set-off.

The sixth and seventh instructions will now be considered. They relate to the 14th item in the set-off; substantially the same charge which this court has said, in 15 Peters, had no just foundation in law. It differs from it only in phraseology, and from compensation being claimed for services under the act of the 14th of July, 1832, "to provide for taking certain observations preparatory to the adjustment of the northern boundary-line of Ohio." It is not necessary to repeat what the court then said upon this charge. But we must say, further examination into the laws and regulations applicable to the subject has strengthened the opinion that all the services for which *compensation is asked in the 14th [*116 item, except that relating to the northern boundary-line of Ohio, were the ordinary special duties appertaining to the office of chief engineer. And with respect to this exception the court did not err in charging the jury that there was no evidence in the cause showing that the defendant had performed any such extra official service. The correctness of every instruction, that there is no evidence to prove a fact, whether such an instruction is asked for or has been voluntarily given by the court, must depend upon the correctness of the assertion. The court did not say in this case such services might not have been a proper subject for compensation, but as there was no proof of what they were, none could be given. We think the court did not err either in the sixth or seventh instruction.

The eighth general instruction relates to the 15th and last item in the set-off, and was referred to by the court as an answer to all of the instructions which were asked except the first and second. The first was given and the second was rightfully refused, not only for the reason given by the court, but because the defendant consented to the introduction of the transcript as evidence, which was a detailed statement of moneys received by General Gratiot before 1839, and could not therefore have been surprised by any item against him or by the proof in support of it. The 8th item is a round charge of $37,127.42 for what are termed extra official services, from the 30th of July, 1828, to the 6th of December,

1838, being the whole time General Gratiot acted as chief of the Corps of Engineers at Washington. It is not necessary and we refrain from making any one of the particulars in this item a subject of remark. General Gratiot came to Washington as chief of the Corps of Engineers, with a bureau already organized, in which, by the regulations of the army, his predecessors had performed every service for which an extra compensation is now asked, except those mentioned in the deposition of Colonel Totten, relating to the direction of the lithographic press, repairs on the northwest executive building, and determining the northern boundary-line of the state of Ohio. The sums expended for those purposes were made under the control of the Engineer Department, and necessarily involved some superintendence by the chief engineer. But supposing it did so, and that such services cannot be included within any of the regulations by which the Engineer Department was organized, or which determines the official duties of the chief engineer, inasmuch as they are not the subjects of a legal charge, it was necessary, before any compensation could be allowed for them under the equity of the act of 1797, ch. 20, that proofs should have been given of what had been the chief engineer's personal as well as official agency in those matters. Merely the amounts expended could afford no rule by which compensation could be graduated. That such services were not liable to be charged *117] for by a commission upon the amounts expended, *or by a per diem allowance, the defendant himself admits by the way in which he has claimed compensation, the largest expenditure being introduced as one of those particulars in his set-off of extra official services, for all of which he made an aggregate charge of $37,127.42. But in truth, with the exceptions just spoken of, all of the enumerated services in the 15th item of the set-off called extra official were the proper business of the Engineer Department, to be done by the chief engineer and his assistants in his bureau.

The jury were so instructed by the court.

But it was urged in the argument, that the court used expressions, in refusing to give the fifth instruction, which had the effect to take from the jury the consideration of the evidence. If, however, the language complained of is taken in connection with the sentence of which it forms a part, and the whole is viewed with reference to the instruction as that is expressed, it will be found to be only introductory to a denial by the court of what counsel had assumed in the instruction, that it was the province of the jury to expound the law applicable to the facts. The instruction asked is, if

from the evidence the jury found, &c., &c., that the services "rendered were out of the limits of the official duties of the chief engineer, that he was entitled to compensation for such extra services." The court answered, that it was its duty to construe and apply the evidence, to ascertain, as matter of law, what were the defendant's duties, &c., and, taking all the evidence and construing it, &c.; none is adduced showing or tending to show that the defendant performed any service not appertaining to his station as chief engineer; and then concludes that the eighth instruction, which it had before given on the 15th item of the set-off, was to govern the jury. In all this we think that the court did not err.

We observe, in conclusion, that there was much ingenious and able argument to maintain General Gratiot's right to claim compensation for extra services by considering the relations which he had borne to the army in three points of view. First as engineer, then as chief engineer, detached from duty at West Point, for service at Washington, and lastly as a brigadier-general in the army of the United States in the line of the army. The whole of the argument, however, was rested upon two misapprehensions. One, that the regulations of the army by which General Gratiot sustained to it the first two relations, and particularly those which had been applied to the second relation, were unauthorized by law. The other misapprehension was, that brevet rank of itself gave a right to additional pay and command, and translated the officer receiving a brevet from the duties of his commission to those of his brevet rank. As to the army regulations, this court has too repeatedly said, that they have the force of law, to make it proper to discuss that point anew, and such of them [*118 as were assailed in the case by *counsel, as not warranted by law the court think are as obligatory as any of the rest. In respect to the promotion of General Gratiot by brevet, it is only necessary for us to say, that it did not release him from any duty or service attached by the regulations and by the usages of the office to his place of chief of the Corps of Engineers at Washington.

We order the judgment of the court below to be affirmed.

Mr. Justice McLEAN dissented.

When the decision in this case was announced, I did not intend to file a written dissent; but as the case is important to the plaintiff in error, beyond the damages recovered, and as the counsel desire the views of all the members of the court on the points ruled, I shall, in a very few words, state the ground of my dissent.

Many depositions were read in this case to show the usage of the government in regard to pay, in the military service, for extra services performed; and also as to what constituted the appropriate duties of the chief of the Engineer Department. A great variety of facts were thus proved, having a direct bearing upon the duties of the plaintiff and the services stated by him as extra, as not appertaining to his office, and for which he claimed a compensation. A number of instances were referred to where pay had been allowed for extra services under the decisions of this court, and a much greater number under the general usage of the government. Among other instructions, General Gratiot's counsel asked the court to instruct the jury, "that if they find from the evidence, that the defendant, by the direction of the President or Secretary of War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official duties as chief engineer, he is entitled to compensation for such extra services as a set-off in this action."

"The court refused this instruction, because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe and apply, and not the jury; and from such evidence to ascertain, as matter of law, what were the defendant's duties and acts; and taking all the evidence and construing it the most favorably for the defendant, none is adduced showing or tending to show the defendant performed any service not appertaining to his duties as chief engineer; and for the proper instruction on the item referred to, the eighth instruction is to govern the jury."

The eighth instruction need not be repeated, as it asserts the same principles contained above, in which the court left nothing for the jury. When this case was before this court, 15 Pet., 371, the court, in referring to the act of 1802, which provided for the organization of the Engineer Corps, cited
*119] the 27th section, which declares, * "that the said corps, when so organized shall be established at West Point, in the state of New York, and shall constitute a military academy; and the engineers, assistant engineers, and cadets of the said corps shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct." The court observe,—"However broad this enactment is in its language, it never has been supposed to authorize the President to employ the Corps of Engineers upon any other duty, except such as belongs either

to military engineering, or to civil engineering." "But assuming the President possessed the fullest power, under this enactment, from time to time to employ any officers of the corps in the business of civil engineering, still it must be obvious, that, as their pay and emoluments were or would be regulated with reference to their ordinary military and other duties, the power of the President to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the War Department.

Gen. J. G. Swift, who was formerly at the head of the Engineer Corps, in his deposition, which was read as evidence, said,—"I have looked over the account hereto attached, amounting to $37,127.42, and am of opinion that the business or functions therein charged do not pertain to the functions of a civil engineer, nor do they pertain to the functions of a military engineer." And he states, that while chief of the Engineer Corps he received additional compensation for extra services.

Major McNeil, a witness, and who is a civil engineer, states, on being requested "to look at the account of Charles Gratiot, hereto annexed or appended, and state whether the services therein charged belong to civil engineering or military engineering, or to either," answered,—"I should say that they would be classed under neither. They do not belong to the duties of the engineer, either civil or military."

Captain Talcott held a commission in the Engineer Corps, from August, 1818, to September, 1836, and he states, that while in the corps for extra services he received extra allowances. And he also says,—"I have examined the account" (of General Gratiot) "appended, and am of opinion that the several items of services charged for do not appertain to either military or civil engineering." And further,—"I do not consider them the appropriate duties of the chief engineer, or of any other engineer."

It is admitted, that so far as the duties of the chief of engineers were regulated by law, or by regulations of the War Department, they may be considered as matter of law for the court, but much parol evidence was heard as to the appropriate duties of that officer, *and to ascertain what part [*120
of the services charged for came within such duties. Now these were matters of fact for the jury, and not for the court. The claim was to be allowed or rejected, according to the usage of the department, and that usage, like every

other fact not established by judicial decision, is a subject of proof.

The depositions above referred to were only a part of those which were read in evidence. Other witnesses differed with those I have cited, as to some of the material facts stated, and to determine this conflict was the peculiar province of the jury. But the whole evidence was ruled by the court, and not permitted to be weighed by the jury. On this ground, I think the judgment should be reversed.

This ruling is attempted to be sustained by the view of the court in the case in 15 Peters, above cited.

The third item charged by General Gratiot, in the account then relied on, was as follows:—"For extra services in conducting the affairs connected with the civil works of internal improvement, carried on by the United States, and referred to the Engineer Department for execution, and which did not constitute any part of his duties as a military officer, from the 1st day of August, 1828, to the 6th day of December, 1838, inclusive, ten years and one hundred and twenty-eight days, at $3,600 per annum, $37,262.46." And in their opinion in that case, the court did say,—"As to the 3d item, constituting a charge of $37,262.46, for extra services in conducting the affairs connected with the civil works of internal improvement, very different considerations may apply. The court are of opinion, that this item has no just foundation in law; and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it." The reason assigned by the court was, that the services specified came within the official and ordinary duties of the office.

Now, the account rendered at the last trial differed in amount, though the difference is small, from the one charged in the first account, and to which the above remarks of the court are applicable. But there is a much greater difference.

The items of service are specified in the last account, spreading over several pages, instead of the general charge cited. And the depositions which I have referred to, and others not named, were taken in the cause subsequently to the delivery of the above opinion. The facts thus thrown into the case gave it a new aspect. They particularized the service, and showed, by distinguished engineers, what did and what did not belong to the duties of General Gratiot, as chief of engineers.

In the opinion of the court, the service, as generalized in the first account, being connected with internal improvements, came within the general regulations of the War Department, and might, therefore, in their opinion, be decided as matter

*of law. However this may be, I hold that the new and numerous facts proved as to usage and the extra duties of General Gratiot were matters for the jury and not for the court; consequently, that there was error in withholding them from the jury.

In his account, General Gratiot charged the government for the disbursement of upwards of eighteen millions of dollars "for fortifications, internal improvement, light-houses and beacons, Military Academy, lithographic piers, northwest executive buildings, and northern boundary of Ohio."

The transcript containing the above charge was regularly certified by the Treasury Department as having been presented by General Gratiot, and disallowed, "as not admissible against the treasury." That the services charged for were rendered was not disputed.

Benjamin Fowler, a clerk in the Engineer Department, testified that the services, as charged by General Gratiot, had been performed.

In their second instruction, the court informed the jury that the defendant was not entitled to any credit for commissions on disbursements on account of appropriations for fortifications, as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished, is not sufficient to authorize the jury to allow the defendant the credit claimed. The same instruction was substantially given in regard to disbursements for fortifications, and for other objects, as charged.

Now it would seem that the transcript above stated, certified by the Treasury as containing General Gratiot's account disallowed, proved the services charged were rendered; and they were also proved by Fowler, whose deposition was taken in 1842, since this case was before us on the former writ of error. And whatever part of those disbursements did not appropriately belong to the office of General Gratiot, under the usage of the War Department and the opinion of this court in the former case, would constitute a fair ground for compensation.

Some of the other instructions might be commented on, in reference to the evidence, but I deem it unnecessary to do so, as in my opinion the judgment should be reversed on the grounds already stated.

*John C. Paige, Plaintiff in error, v. Martha A. Sessions.

The decision of this court in the case of *Price* v. *Sessions* (3 How., 624) reviewed and confirmed.

This case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

The facts in the case bringing it within the principles of the case of *Price* v. *Sessions*, decided at the last term of this court, *Mr. Crittenden*, on behalf of the defendant in error, submitted it without argument.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us a case from the Circuit Court for the Southern District of Mississippi.

At May term, 1840, a judgment was obtained by the plaintiff against J. R. Brown, James Magee, and E. J. Sessions, for two thousand two hundred and sixty-three dollars, on which judgment an execution was issued the 12th January, 1842, which was levied on a large amount of personal property, supposed, as stated in the return of the marshal, to belong to E. J. Sessions. A part of this property was claimed by Martha A. Sessions, the wife of E. J. Sessions, as devisee of Russel Smith, deceased. A bond being given by the claimant, and pleadings being filed, under the statute of Mississippi, the right of property was submitted to a jury, who found the title to it in the said Martha, and that it was not subject to the above execution; on which verdict judgment was entered. On the trial, a bill of exceptions was filed by the plaintiff, in which was set out the record of the original judgment and execution, the will of Russel Smith, and the probate of the same, the inventory and appraisement of the property of the deceased, and other evidence. It is unnecessary to state this evidence in detail, or to consider the legal questions which were raised in the case, as, on the same state of facts, the same legal questions were considered and decided at the last term of this court, in the case of *Price* v. *Sessions*, 3 How., 624. The rulings of the court in that case were sustained, and the judgment was affirmed; and the judgment in this case is also affirmed, with costs.

*Daniel Garrard, Plaintiff in error, v. Lessee of Henry Reynolds et al.

In an action of ejectment, where two of the plaintiff's lessors were married women, and the demise was laid in the declaration to have been on the 1st of January, 1815, it was necessary to establish to the satisfaction of the jury, that the marriage took place before that day, inasmuch as their husbands were stated to have joined in the demise.

Two depositions, taken in 1818, were given in evidence, one of which stated the death of the father of the women to have taken place "upwards of twenty years ago," and the other "about twenty-eight years ago." Both of the depositions, when enumerating the children of the deceased, mentioned the fact of the marriage, without saying when such marriage took place.

In giving its instructions to the jury, the court remarked that "the depositions should be favorably construed." After retiring, the jury returned into court and inquired what was meant by the instruction that "the depositions should be favorably construed," when the court informed them, that "where a suit was brought by A. and B. as man and wife, and a witness proved them man and wife shortly after the suit was brought, without proving the time at which they were intermarried, it might well be inferred that they were man and wife when the suit was instituted; and if there was an ambiguity in the deposition of William Rawle (the witness), it was in the power of the jury to find that the two femes covert had intermarried before the 1st of January, 1815."

The jury were further told, that "the depositions had been referred to the court, on a motion, on the part of the defendant, for a nonsuit, for want of proof of heirship and intermarriage of the daughters of Reynolds, at the date of the demise, 1 January, 1815; and that it seemed to the court that William Rawle (the witness) referred to the persons who were the heirs of Reynolds at the time of his death, and not at the time the deposition was taken, and refused the nonsuit; but the jury were not bound by the construction given by the court, and could give the deposition any construction they saw proper."

No exception having been taken to the opinion of the court overruling the motion for a nonsuit, the question whether, as matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time of the demise laid in the declaration, was not before this court.

And in the submission to the jury of the question of fact, whether or not the evidence proved the marriage before that time, there was no interference with the province of the jury, or violation of any rule of law, the question having been left open for their finding.

There was, therefore, no error in the proceedings of the court below.

The facts in this case are set forth in the opinion of the court.

The case was argued by *Mr. Crittenden*, for the plaintiff in error, and *Mr. Morehead*, for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Kentucky, bringing up for review

certain instructions given to the jury on the trial of an action of ejectment, brought by the defendant in error against the plaintiff in error, and in which the former obtained the verdict.

The action was brought to recover possession of a large tract of land situate and lying in the State of Kentucky, to which the lessors of the plaintiff claimed title as the heirs of James Reynolds, the original patentee of the tract.

*124] *Two of them were daughters of the patentee and femes covert, with whom their husbands, Cutbush and Reese, had joined in the action, and the demises in the several counts in the declaration were laid jointly and not severally, and were of the date of 1 January, 1815.

Several questions of law were raised by the counsel for the defendant below, in the course of the trial, and were disposed of by the court, and exceptions taken, but as they have not been relied on here as grounds of error, it is unimportant to notice them more particularly.

The suit was commenced in the latter part of December, 1815, and continued from term to term, until the November term of the court in 1842, when it was tried, and a verdict found for the plaintiff.

Among other testimony introduced on the part of the lessors of the plaintiff to establish their title to the tract, and right to recover the possession, were the depositions of William Rawle and Thomas Cumpston, both of the city of Philadelphia, duly taken before a competent officer, in May, 1818, the material parts of which are as follows:

William Rawle deposed, "That he was well acquainted with James Reynolds, late of the city of Philadelphia, carver and gilder, who lived many years in a house belonging to the wife of this affiant, as a tenant, in the city of Philadelphia; that, to the best of this affiant's recollection and belief, the said James Reynolds left five children at the time of his death, which was upwards of twenty years ago. The names of the children living at the time of his death were James, Henry, Anne, and Elizabeth, one of whom married Edward Cutbush, and the other James Reese, and Sarah, who, as far as affiant's knowledge extends, was not married; and this deponent believes the said James, Henry, Anne, Elizabeth, and Sarah were the heirs at law of the said James Reynolds, deceased."

Thomas Cumpston deposed, "That he was acquainted with James Reynolds, late of the city of Philadelphia; that he died about twenty-eight years ago; that he left two sons, to wit, James Reynolds and Henry Reynolds, and three daugh-

ters, to wit, Anne Reynolds, now married to Edward Cutbush, Elizabeth, now married to James Reese, and Sarah Reynolds, whom this deponent believes to be the heirs at law."

When the testimony closed, the following among other instructions were prayed for by the counsel for the defendant, namely,—"That the plaintiff cannot recover on the demise of Cutbush, unless the jury shall find from the evidence that he was married to the daughter of the said patentee, Reynolds, on or before the date of his demise, to wit, the 1st January, 1815; nor can the plaintiff recover on the demise of Reese, unless they shall find he was *married to an- [*125 other daughter of the said patentee, at or before the same day; nor can the plaintiff recover on any of the demises in the declaration, unless the jury shall find from the evidence that the lessor, James Reese, was married as aforesaid, on or before 1st January, 1815 (he having joined in the demise as laid in each of the several counts in the declaration)."

The record further states, that the instructions thus prayed for on the part of the defendant were given, "but the court remarked to the jury, that the depositions should be favorably construed."

After the cause was thus submitted upon this branch of it, the jury returned into court, and inquired "what was meant by the instruction, 'but the depositions should be favorably construed,' when the court informed them, that where a suit was brought by A. and B., as man and wife, and a witness proved them man and wife shortly after the suit was brought, without proving the time at which they were intermarried, it might well be inferred that they were man and wife when the suit was instituted; and if there was an ambiguity in the deposition of William Rawle (the witness), it was in the power of the jury to find that the two femes covert had intermarried before the 1st January, 1815."

The jury were further told, "that the depositions had been referred to the court, on a motion on the part of the defendant for a nonsuit, for want of proof of heirship and intermarriage of the daughters of Reynolds at the date of the demise, 1st January, 1815; and that it seemed to the court that William Rawle, the witness, referred to the persons who were the heirs of Reynolds at the time of his death, and not at the time the deposition was taken, and refused the nonsuit; but that the jury were not bound by the construction given by the court, and could give the deposition any construction they saw proper."

This is the substance of the case, as presented on the

record, so far as the questions before us are involved, and upon which we are called upon to decide.

The counsel for the plaintiff in error contends, that the testimony of Rawle and Cumpston, as detailed in their depositions, and which is alone relied on by the defendants in error as proving the intermarriage of Anne and Elizabeth, two of the heirs of the patentee, with Cutbush and Reese, refers, and upon a fair construction should be limited, to the time when they were taken, to wit, the 4th and 2d May, 1818, and cannot be properly regarded as referring to the time of the demise laid in the declaration, to wit, the 1st January, 1815; and that if so, then the testimony did not lay a sufficient foundation to warrant the inference or presumption by the jury of the fact of intermarriage at the latter date, which fact is essential to maintain the action.

*126] Whereas, the counsel for the defendant in error insists that one *or both depositions are open to a construction that affords direct proof of the intermarriage as far back as the time of the death of the patentee, and, of course, before the date of the demise; or, if not direct proof, that the testimony, at least, is sufficiently full and comprehensive to authorize the jury in finding the intermarriage as a conclusion of fact as early as that date.

These are substantially the adverse positions held and maintained by the respective counsel upon the point in question between them.

This court is not called upon to express an opinion, whether, as matter of law, there was any evidence to be submitted to the jury, going to establish the intermarriage at or before the time mentioned; because, although this ground was taken by the counsel in the course of the trial below, on a motion for a nonsuit, and was overruled, no exception was taken to the decision. The point, therefore, is not before us.

Both parties there assumed, that the inference or presumption of intermarriage or not at the date of the demise was one of fact, depending upon the weight of the evidence, such as it was, and belonged properly to the province of the jury, and should be submitted to them. And the only question, therefore, here is, whether the court, in their instruction on the submission of the case to the jury, violated any rule of law, for which error will lie.

We have, accordingly, examined the instructions given on this aspect of the case with attention, and are satisfied, that, upon the strictest analysis to which they may be properly subjected, there is no well founded objection to them.

It is true, after advising the jury in accordance with the

prayer of the defendant below, that it was necessary for the plaintiff to establish the intermarriage at the time of the demise, in order to entitle him to the verdict, the court added, that the depositions given in evidence for this purpose should be favorably construed. But if we were to concede any thing exceptionable in this mode of construing the depositions, the error was sufficiently explained and corrected when the inquiry was made by the jury as to the force and effect to be given to the observation of the court. In effect, they were then told that the depositions, especially Rawle's, left the question at issue open for their consideration, depending upon the weight to be given to the facts therein testified to, and upon which it was competent for them to find for the plaintiff; which, in judgment of law, was nothing more than the assertion of a right in the jury that had already been virtually implied in the case from the concession of both parties, that the question belonged to that tribunal to determine, according to their view of the evidence.

Indeed, instead of improperly interfering with the province of the jury, the court seems to have been particularly guarded against *leaving any undue impression upon [*127 their minds as to the weight and effect of the evidence from opinions that had fallen from it in the course of the trial. For, after referring to the view taken in their hearing on the motion for a nonsuit, in which the court were obliged to express an opinion as to the tendency of the evidence on the depositions, the jury were expressly advised, that they were not bound by the construction given by the court, but could give such construction as, in their judgment, the facts would warrant.

Even if an opinion had been expressed, in the course of submitting the case, more pointedly, as to the bearing and tendency of the evidence, than is to be found in this case in the record, after the jury were advised, that they were not intended as instructions, or to be binding upon them,—that the question was one of fact and construction, which they must consider and determine for themselves,—we are not aware of any ground of reason or authority upon which error could be predicated for an interference with the rights of the jury, but the contrary.

The cases of *Evans* v. *Eaton* (7 Wheat., 426), and *Carver* v. *Jackson, ex dem. of Astor and others*, (4 Pet., 80, 81), need only be referred to in confirmation of the position.

We are of opinion, therefore, that the judgment of the Circuit Court should be affirmed.

Gerard C. Brandon, Plaintiff in error *v.* Ralph W. Loftus and Floyd Whitehead, Defendants.

Under the statutes of Mississippi, providing for the admission of the evidence of a notary public with regard to a protested note, directing the form of proceeding which the notary shall pursue, and providing further that justices of the peace may, in certain cases, perform the duties of notaries public, it was proper to read in evidence the original paper of the acting notary, although the record was made out at a time subsequent to that when the protest was actually made.[1]

This case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

It was an action brought by the indorsee against the indorser of a promissory note, under the following circumstances.

On the 12th of December 1838, the following note was executed:—

Fort Adams, *December 12th*, 1838.

On the first day of January, A. D. 1841, we jointly and severally promise to pay Gerard C. Brandon, or order, the sum of two thousand six hundred and sixty-seven dollars, value received, without plea or offset, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez.

(Signed,) William C. Collins,
John C. Collins.

(Indorsed,) "Gerard C. Brandon," "Loftus & Whitehead."

*128] *The note was passed by the indorser, Brandon, to Loftus and Whitehead, who were citizens of Virginia. It fell due upon the 4th of January, 1841, and was not paid. In February, 1841, Loftus and Whitehead brought a suit against Brandon, and the cause came on for trial in June, 1842. Upon the trial, the plaintiffs offered in evidence the following paper, which was objected to by the defendant; but being admitted, the defendant took a bill of exceptions, which is the only one in the record, viz.:—

The plaintiff then, without any further proof, offered to read to the jury as evidence of the protest of said note, and to show notice, a certificate of James K. Cook, which was

[1] Applied. *Gravelle* v. *Minneapolis &c. R'y Co.*, 3 McCrary, 386. Followed. *Sims* v. *Hundley*, 6 How., 6. Cited. *Gravelle* v. *Minneapolis &c. R'y Co.*, 16 Fed. Rep., 436.

contained in a loose, detached piece of paper, partly written and partly printed, which certificate is in the words and figures following, to wit:—

STATE OF MISSISSIPPI, *Adams County:*

I, James K. Cook, justice of the peace and *ex officio* notary public in and for said county, residing in the city of Natchez, qualified according to law, do hereby certify that, on the 4th day of January, in the year 1841, I went to the Planters' Bank of the State of Mississippi, in Natchez, and then and there presented for payment the original note, of which the following is a true copy, together with the indorsements on the back of said note:

FORT ADAMS, *December 12th*, 1838.

On the first day of January, A. D. 1841, we jointly and severally promise to pay Gerard C Brandon, or order, the sum of two thousand six hundred and sixty-seven dollars, value received, without plea or offset, payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez.

WILLIAM C. COLLINS,
JOHN C. COLLINS.

(Indorsed,) "Gerard C. Brandon," "Loftus & Whitehead."

And I then and there demanded payment of the said note according to its tenor and effect, and was answered by the teller of the said bank that the said note would not be paid, and that no funds were deposited in said bank for that purpose; and the said note was not paid by any person when payment thereof was demanded as aforesaid. Whereupon I protested said note for nonpayment, and notified the parties thereto of said demand, nonpayment, and protest, and that the holder of said note looked to them for payment thereof, which notices were given at the times, and addressed to and directed in the manner following, to wit:—To Gerard C. Brandon, at Fort Adams, Miss. To Gerard C. Brandon, at Pinckneyville, Miss. To Gerard C. Brandon, at Woodville, Miss. To W. C. and J. C. Collins, at Concordia, Louisiana.

All of which notices, directed to the parties respectively as aforesaid, were placed by me in the post-office at Natchez in time to go *out by the first mail of the day next succeeding that on which said note was protested as aforesaid. [*129

Which facts constitute, as herein set forth, a full and true record of all that was done by me in the premises.

In testimony whereof I have hereunto set my hand and [L. S.] affixed my official seal this 27th day of January, 1841.

JAMES K. COOK, *J. P. Notary.*

STATE OF MISSISSIPPI, *Adams county:*

Personally appeared before the undersigned justice of the peace for the county aforesaid, James K. Cook, a justice of the peace and *ex officio* notary public, whose name is signed to the foregoing, and made oath that the same is a true statement, in substance and in fact, of his official acts and doings altogether in relation to the premises.

JAMES K. COOK.

Sworn to and subscribed before me, this 27th day of January, 1841. M. ROBETAILLE, *J. P.*

To the admission of which as evidence to the jury the counsel of defendant objected, but the court overruled the objection, and permitted said certificate to go to the jury as evidence of its contents; to which decision of the court, in then and there admitting said certificate, and permitting it to be read in evidence, the counsel for the defendant excepted, and reserved his exception. He therefore prays that this his bill of exceptions may be signed, sealed, and made a part of the record; which is done accordingly. J. MCKINLEY. [SEAL.]

To review this decision of the Circuit Court, a writ of error brought the case up to this court.

It was argued by *Mr. Mason* (Attorney-General), for the plaintiff in error, and *Mr. Robert J. Brent*, for defendants.

Mr. Justice CATRON delivered the opinion of the court.

The only question in this case is, whether a notarial act of protest was properly admitted in evidence to fix an indorser on a negotiable note payable in bank.

The statute of Mississippi (H. & H. Dig., 609, § 33) provides, that in all cases where it may be necessary to have the testimony of a notary public in any suit touching a protested note, bill of exchange, or other instrument, the official act of such notary, certified under his hand and attested by his notarial seal, shall be deemed, held, and taken to be conclusive evidence of the protest of such note, bill, or other writing on the day it purports to have been made; and the notary shall not be required to go beyond the limits of the county of his residence to give evidence of the facts. The foregoing provision declares the force and effect of the instrument.

*130] *And then, the statute prescribes its form. When a notary shall protest an instrument, "he shall make and certify on oath a full and true record of what shall have been done thereon by him in relation thereto, according to

the facts, by noting thereon whether demand for the sum of money mentioned in the same was made, of whom, and where; when the requisite notice or notices were served, and on whom; where the same were mailed, if such be the case, when mailed, to whom and where directed; and every other fact in any manner touching the same shall be distinctly and plainly set forth in the notarial record; and when so made out and certified, it shall have the same validity, force, and effect in all courts of record in that State, as if the notary were personally present and interrogated in court."

Justices of the peace are authorized to perform the duties of notaries, in particular instances, by another statute of Mississippi; and this notarial act was made by a justice of the peace.

The note on which the protest was founded was due the 4th of January, 1841, payable and negotiable at the Planters' Bank, at Natchez; made by William C. and John C. Collins, to Gerard C. Brandon, and indorsed by him; and who is the plaintiff in error, and was the defendant below. Three duplicates of notice are stated to have been sent by mail to Brandon to different places. An objection was made in the Circuit Court to receiving the notarial act in evidence for any purpose, because it purports to be a record, original and of itself; and not a copy of a record from the notary's book; which, it is insisted, it ought to be, and could only be.

After setting forth the facts of demand at the bank, and the answer of the teller, that the note would not be paid, because no funds had been deposited for such purpose, and that a formal protest for nonpayment had been made, and also the fact of forwarding the notices, the notary says,—"Which facts constitute, as herein set forth, a full and true record of all that was done by me in the premises." To this is affixed the notarial seal, signature, and affidavit of the notary. It was done on a separate paper, partly printed and partly written; and offered in evidence as a record of the notarial act within the meaning of the statute above recited.

In our opinion, the legislation of Mississippi is distinct and certain; it had reference to the usage of notaries public generally, when making protests and giving notices; that usage we understand to be, for the notary to make the demand and give the notice, and after doing so, to write out the facts in his memorandum-book, or to preserve them otherwise; and from these facts the record contemplated by the statutes is made up; and so it was done in this instance, both in substance and form. To the paper having the official seal and affidavit of the notary attached, the legislature refers; and not to any previous writing. 149

*It is supposed the case of *Fleming* v. *Fulton*, 6 How. (Miss.), 473, gives a different construction to the statute. The objection to the record of protest there was, that it had not been made out and sworn to at the time the protest was made; and such is the fact in the case before us; but the court held that the record might well be made subsequently, and this for reasons, as we think, too obvious to require explanation. Nor do we understand either of the remarks made by the High Court of Errors and Appeals of Mississippi in any degree impugned by our construction of the statute. The judgment is therefore ordered to be affirmed with costs.

HUGH A. GARLAND, PLAINTIFF IN ERROR, *v.* GEORGE M. DAVIS, DEFENDANT.

This was an action on the case, brought by Davis against Garland, the former clerk of the House of Representatives. The declaration set out, by way of inducement, a contract between Davis and Franklin, the predecessor in office of Garland, and then charged upon Garland a wrongful and injurious neglect and refusal to furnish a copy of certain laws to Davis, as had been agreed by Franklin.[1]

The plea was "non-assumpsit," and the issue and verdict followed the plea.

This court can notice a material and incurable defect in the pleadings and verdict as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.[2]

When a declaration sounds in tort and the plea is "non-assumpsit," such a plea would be bad, on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails.[3]

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[1] CITED. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 430, 434.

[2] CITED. *Suydam* v. *Williamson*, 20 How., 433; *Pomeroy* v. *Bank of Indiana*, 1 Wall., 600; *Rogers* v. *Burlington*, 3 Id., 661; *New Orleans R. R.* v. *Morgan*, 10 Id., 261; *Barth* v. *Clise*, 12 Id., 403; *Insurance Co.* v. *Piaggio*, 16 Id., 386; *Baltimore, &c. R. R. Co.* v. *Trustees*, 1 Otto, 130; *Storm* v. *United States*, 4 Id., 81. S. P. *Slocum* v. *Pomeroy*, 6 Cranch, 221.

In *Suydam* v. *Williamson*, *supra*, the court say: "It is a mistake to suppose that the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner."

[3] Where a trial has proceeded on the merits, the error not being pointed out below, judgment will not be reversed, even though the form of action was wholly misconceived, and

Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.[4]

The provision by Congress, in relation to amendments, which is found in the 32d section of the Judiciary Act of 1789, is similar to that of 32 Hen. 8, but certainly not broader.[5]

The issue was an immaterial issue.

The opinion of this court in *Patterson* v. *The United States*, 2 Wheat., 221, viewed and reaffirmed, namely,—"Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

This principle applies equally to a plea varying from the substance of the declaration.

In this case, the verdict does not find any of the misfeasance charged upon the defendant.

If the merits of the case were passed upon in the court below, it was illegally done, because no evidence was competent except such as related to the promise described in the declaration.

This court abstains from awarding a repleader, for the reasons stated in the opinion, but remands the case so that the pleadings may be amended.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

*It was an action on the case, brought by Davis, the defendant in error, against Garland, the clerk of the House of Representatives. [*132

The circumstances under which the suit was brought are thus set forth in the plaintiff's declaration, which was filed on the 16th of September, 1839.

"DISTRICT OF COLUMBIA,

Washington county, to wit:

"Hugh A. Garland, late of said county, was attached to answer to George M. Davis, in a plea of trespass on the case, and so forth. And whereupon the said Davis, by H. M. Morfit, his attorney, complains, that whereas the House of Representatives of the United States had, at the first session of the 25th Congress, which was before the committing of the grievances herein complained of, passed a resolution that the clerk of said House be, among other things, directed to cause to be printed a ninth volume of the laws of the United States, after the manner of the eighth volume thereof; and being so directed, in pursuance of such resolution the then clerk of

to the case made by *it* a defence plainly exists. *Marine Bank* v. *Fulton Bank*, 2 Wall., 252.

[4] CITED. *Jones* v. *Van Zandt*, 5 How., 228; *Taylor* v. *Benham*, Id., 277.

[5] CITED. *Phillips, &c. Construction Co.* v. *Seymour*, 1 Otto, 656.

said House, to wit, Walter S. Franklin, in the month of July of the year 1838, at the county aforesaid, had employed the said plaintiff, and, in his capacity of clerk of said House, had agreed and contracted with said plaintiff to print a ninth volume of said laws in the manner as resolved, and to deliver from his office, as clerk of the House aforesaid, a copy of said laws to said plaintiff, to enable him to print the same, and had directed the chief clerk in the office of said clerk of the House of Representatives to prepare the said copy, and deliver the same to said plaintiff; he, the said plaintiff, in consideration thereof, had made ample arrangements, and employed the means to print the said ninth volume of said laws, and was in all respects ready and willing to print the same, after the manner as directed in said resolution, when the said Walter S. Franklin departed this life, and the said Hugh A. Garland was elected his successor as clerk of the House of Representatives aforesaid, and had charge of the laws aforesaid, from which the said ninth volume was to be printed. And the said plaintiff having the contract aforesaid, and in consideration thereof having prepared for the faithful execution of the terms thereof according to said resolution, and having also, soon after the election of said defendant as clerk aforesaid, to wit, on or about the month of December, in the year 1838, at the county aforesaid, and before the committing of the grievances herein complained of, the said defendant was notified of said subsisting contract, and of plaintiff's readiness, and willingness, and preparation to comply with the same, according to the said resolution; all of which notification of contract and preparation, as given aforesaid, the said plaintiff avers, and the said defendant was in *133] duty bound, as clerk aforesaid, to deliver a copy of said *laws to said plaintiff, in consequence and by reason of the said resolution of Congress and the said contract of said plaintiff. And he the said plaintiff afterwards, to wit, on or about the 1st day of February, 1839, at the county aforesaid, asked and demanded of said defendant, who had charge of said laws from which the said ninth volume was to be printed, as clerk of the House of Representatives aforesaid, a copy of said laws under his charge, for the purpose of printing the same according to said contract, and in the manner as directed in said resolution, and without which copy from the office of said clerk the said plaintiff could not print the said laws as directed in said resolution; that the said defendant, contriving and wrongfully and injuriously intending to injure the said plaintiff, and to deprive him of the profits and emoluments, and advantages which he might and otherwise would

have derived and acquired from the printing of said ninth volume of the laws of the United States, and of the profits, emoluments and advantages of the said subsisting contract, well knowing that, without a copy of said laws from his said office, the plaintiff could not print the same as directed in said resolution; and the said defendant being in duty bound to deliver a copy of said laws, as clerk aforesaid, to said plaintiff to comply with said resolution of Congress and with plaintiff's contract aforesaid, afterwards, to wit, on or about the 1st day of February, 1839, at the county aforesaid, and on divers other days and times between that day and the day of the issuing the writ in this behalf, did wrongfully and injuriously refuse to deliver, or furnish or permit to be delivered from said office, or furnished therefrom to said plaintiff, a copy of the laws of the United States for printing the said ninth volume of said laws, as resolved in said resolution; and did also wrongfully and injuriously refuse to allow the said plaintiff to print the said ninth volume of said laws in the manner directed in said resolution, and did prevent and hinder him from printing the same. By means whereof the said George M. Davis lost the printing of said ninth volume of said laws, and the benefit of said contract; and hath been hindered and prevented from making, deriving, and having the profits, emoluments, and advantages of such printing, and of the compliance, upon his part, with the said contract, and hath also lost his time, trouble and money, in preparations for complying with said contract; which profits, emoluments, and advantages [he] hath been so hindered from making, and time, trouble, and money he hath so lost in said preparations, were of great value, to wit, of the value of two thousand five hundred dollars, current money, and which profits and money he, the said plaintiff, might and would have had and received, but for the wrongful conduct of said defendant."

There was another count in the declaration, setting forth the same circumstances in a different manner.

*The plea was "non-assumpsit," upon which issue was joined, and the cause went on to trial. The record, after mentioning the names of the jury, proceeded thus: [*134

"Who being empanelled and sworn to say the truth in the premises, upon their oath do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff above against him hath complained, and they assess the damages of the said plaintiff, sustained by reason of the non-performance of the promise and assumption aforesaid, to the sum of nineteen hundred dollars current money."

A motion was then made in arrest of judgment for the following reasons, viz.:

"1. Because there is no cause of action stated in the first count of the plaintiff's declaration.

"2. Ditto, as to the second count.

"3. Because there is a general verdict, and one count is bad.

"F. S. KEY, *for defendant.*"

This motion was overruled, and judgment entered upon the verdict.

In the course of the trial, two bills of exceptions were taken on the part of the defendant, which were as follows:—

1st Exception. "In the trial of this cause, the plaintiff, having offered the resolution of Congress of 14th October, 1837, proved that in July, 1838, a verbal contract was made between the plaintiff and Walter Franklin, then clerk of the House of Representatives of the United States, for the printing of the ninth volume of the laws of Congress, in which it was agreed that the plaintiff should do the printing thereof on the same terms as had been previously agreed with plaintiff's father, who had died some short time before, and had been paid to said plaintiff's father for the eighth volume of the laws of the United States, and was to be paid for the same at the usual Congress prices,—the printing to be executed under the superintendence and direction of Samuel Burche, chief clerk of said House of Representatives; that no minute or entry of said agreement was made in writing, among the books and papers of said Franklin's office; that it is usual and customary for the contracts made on the authority of the House to be made verbally, and the same have always been received by the House and paid for; and that the said plaintiff frequently, after the making of the said agreement, called on said Burche for the work, stating his readiness to proceed with the work, and did not receive the same, because the said Burche had not prepared the laws for publication.

"And then further proved, that the said Walter Franklin died in September, 1838, and the defendant was elected clerk of the House on the first Monday of December, 1838; that some time afterwards, in December, 1839, the said Burche, *135] not having yet *prepared the said laws for said publication, and the said plaintiff waiting as before for the same, the said Garland was informed, about the 1st of January, 1839, of the contract so as aforesaid verbally made between the said Franklin and the plaintiff, and observed that he had understood such a resolution was passed, and that such a work was to be given out for printing, and that he

considered that as the agreement was a verbal one it was not binding, and that he had the right to give the contract to whom he pleased; that afterwards, in about two months from the beginning of December, 1838, he was again called upon and informed of the said contract, verbally made with the plaintiff by the said Franklin, when he said he had made an agreement or a contract with one Langtree; and that the said Garland did make such agreement with said Langtree, and ordered the work not to be given to the said plaintiff, but to be given to said Langtree to be printed, which was done accordingly, and the plaintiff thereby prevented from doing the work.

"And further proved, that said plaintiff had made considerable preparations for the work, and had engaged Mr. Gideon to do the printing of the work, and had transferred to said Gideon his office and press, valued at $1,000, to be paid for by the profits of the work,—of all which the defendant was informed before he made the contract with Langtree; and that plaintiff suffered considerable loss by the taking away said contract; and that said Gideon, in the prosecution of his preparations for said work, had expended $600 or $700 for paper for that very work.

"And further, that at the time of making said verbal contract with said Franklin, the plaintiff asked him if it was necessary it should be reduced to writing, and was answered that it was not necessary, and was not usual; and also proved that there was no written contract in the office of the clerk for the printing of the eighth volume of the laws of the United States. And that said Franklin knew and assented to the plaintiff's engaging said Gideon to do the said printing at the time of said contract; and that the defendant was advised by the clerks, before he made the contract with said Langtree, to be cautious and not get into difficulties by giving the work to another. And that no written contract with said Langtree, nor any memorandum thereof appears in the office of said clerk.

"And upon the evidence aforesaid of the said plaintiff, the defendant, by his counsel, prayed the court to instruct the jury that if the same was believed by the jury to be true, the plaintiff was not entitled to recover, which the court refused, —to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done this 14th day of April, 1842.

W. CRANCH. [SEAL.]
B. THRUSTON. [SEAL.]
JAS. S. MORSELL. [SEAL.]"

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*2d Exception. "And thereupon the defendant, on the said evidence, prayed the court to instruct the jury as follows:

"If the jury believe from the evidence that the defendant, in making the subsequent contract with Langtree, and causing the compilation to be delivered to him to be printed, acted officially and *bonâ fide*, and not with corrupt motives, and verily believed that the prior contract made verbally with the plaintiff was not obligatory, then he is not liable to damages in this action upon the evidence aforesaid; which also the court refused to give,—to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 14th day of April, 1842.

W. CRANCH. [SEAL.]
B. THRUSTON. [SEAL.]
JAS. S. MORSELL. [SEAL.]"

Upon these two exceptions the case came up to this court.

It was argued by *Mr. Robert J. Brent*, for the plaintiff in error, and *Mr. Coxe*, for defendant.

Mr. Brent, for plaintiff.

The first count is defective in this:—

1st. It does not show any authority in the former clerk (Franklin) to make the contract on which Davis founds his claim, for the averment, that Franklin was "directed to cause to be printed a ninth volume of the laws, &c., after the manner of the eighth volume thereof," does not necessarily imply an authority to contract, inasmuch as that power could be executed by causing the volume to be printed by the regular printer of Congress, who might be entitled to all its printing.

All the facts stated in this count may be true, and yet Franklin have no power to make a contract. (See, as part of this argument, the Reports of House Committee in volume of Reports of Committees, 1840–41, No. 16, Rep. No. 101 and 215). Therefore I conclude that Franklin's authority as a public officer to make the contract with Davis does not sufficiently appear, and if so, it results as a corollary that it was his own unauthorized contract, and not binding on his official successor.

2d. If, however, it was Franklin's official contract, binding on his successor, then it was only binding on the appellant, as the agent of the House of Representatives, and the appellee's remedy should be against the House of Representatives, by appeal to its justice. (See on this, 1 T. R., 674–478; *Hodgson* v. *Dexter*, 1 Cranch, 362; 7 Wend. (N. Y.), 254; 12 id.,

179; 18 Johns. (N. Y), 125; *Chisolm* v. *Georgia*, 2 Dall., 419, 444; 1 T. R., 172; 2 Cow. (N. Y.), 533.)

3d. If binding on Garland as clerk, yet this count shows no act *of his tending to establish any liability on his part to Davis, but a repudiation of the contract utterly. [*137

4th. This count shows no consideration for the contract, for it is nowhere averred that Davis was to be compensated, nor is it sufficiently shown that Davis entered on the performance of this contract. (See *Coggs* v. *Bernard*, 2 Ld. Raym. 919, 920, and *Elsee* v. *Gatward*, 5 T. R., 143.) Merely stating that Davis was prepared to execute the contract does not make a sufficient consideration.

5th. The contract, as herein shown, was to print after the manner of the eighth volume, and the count omits to show the manner of printing the eighth volume, and thus a material term of the contract is not shown.

Again, the second count is, in addition to the above objections made to first count, liable to the further objections: 1st, that it shows by way of recital a contract with Franklin as clerk (the consideration or terms of which are not given), and then sets forth no other ground for Garland's liability, except his being the successor to Franklin, and refusing to give the copy.

Now it is obvious that Franklin may have made a private or unauthorized contract as clerk, and it will not be contended that a clerk's contracts are *ipso facto* binding on his successor, without showing something more than his naked contract, as a ministerial officer is not supposed *ex officio* to be capable of making any contract he may choose.

2d. This count does not show that by the contract the clerk was to furnish the copy, but merely a subsequent promise by Franklin to furnish the copy, and yet the gravamen of it is the refusal of Garland to furnish a copy.

Again, it is manifest, on the face of both these counts, that no liability in defendant is shown, and that the declaration is in material respects uncertain and unmeaning according to the rules of pleading.

If either count is defective, the judgment should have been arrested. (5 T. R. 143.)

The first exception sets forth all the evidence, and I contend its prayer should be granted, because,—

1st. The contract as proved was variant in this, that the printing was to be on the same terms as plaintiff's father had agreed for (8th vol.), and the declaration does not show any such terms in the contract.

2d. The declaration does not set forth the material qualifi-

cation in the contract, that the printing was to be under direction of Burche. (See the statement of evidence.)

3d. The proof is, that payment was to be at usual Congress prices, and they are not averred in the declaration, nor shown in evidence.

*138] *4th. The proof is, that the printing was to be done under direction of Sam. Burche, and that Burche was the party in default in not preparing the laws; how then could defendant give a copy until Burche's compilation was completed, which is nowhere shown in the evidence.

Again, the evidence sets forth as the basis of Franklin's authority the resolution of 14th October, 1837 (which see in House Journal, 14th October, 1837, Extra Session, p. 191.) It appears from the plaintiff's own evidence thus offered, that Franklin's power was *in limine* referable to another resolution which should govern and control his power, and which resolution was not given in evidence, but can be seen in House Journal, 30th June, 1834, page 903; and also see House Journal, 25th June, 1836, page 1098.

Now the whole evidence either shows a complete authority in Franklin to make the contract, or it does not. If it shows his authority, then could Franklin be sued for nonperformance? (See 1 T. R. 172, and 2 Cow. (N. Y.), 533.) If he could not be sued, how can his successor in office? And if his contract was unauthorized, his official successor cannot be bound by it.

Again, here is a public officer bound, we will suppose, to have the laws printed; he finds that his predecessor had never executed his power, and he feels the obligation to discharge his official duty. Is he to be obstructed in that duty by caveats and notices from A., B., and C., that as clerk, he must comply with contracts of his predecessor, of which he has no proof but an assertion or an unsworn statement of a witness? Has he even a discretion to determine whether his predecessor made a contract or not? He finds the duty unexecuted by his predecessor, and he is bound to select either the public printer, if there be one, or to take the matter into his own hands, and perform it with his own agents. How dangerous it would be to suffer a clerk to be intimidated and delayed in matters of such high importance by the notices of every man who might set himself up as entitled by a verbal contract with his predecessor.

Again, it is to be regretted that the record does not contain the fact that there was, at the time of Franklin's contract, a regular printer, duly elected by Congress, and entitled to all its printing (see Report of Committee, *supra*, 1st point); but

though the fact is not in the record, yet the resolution of 14th October, 1837, does not on its face imply any power to the clerk to make contracts for the printing, but only to cause a volume to be printed after the manner of the eighth volume and under a previous resolution, which, if incorporated as it ought to be as part of plaintiff's case, might have shown, that the manner of printing the eighth volume was by the public printer, and not by such person as the clerk might select.

*Again, the former resolution ought to be produced as part of the plaintiff's case, and to fix the terms of the contract, and it is material, as, if shown, it might appear that the contract was not to be executed within a year, and therefore void under statute of frauds. (See *Boydell* v. *Drummond*, 11 East, 142.) [*139

It does not appear from the record that Garland ever received any money to pay for such a contract, or that he acted with fraud or deceit.

On the second exception, I refer to *Stockton* and *Stokes* v *Kendall*, 3 How. 97, 98.

Mr. Coxe, for defendant in error.

The first count in the declaration sets forth the resolution of the House of Representatives, directing the clerk to cause to be compiled a ninth volume of the laws, &c.; that being so directed, the then clerk, Franklin, employed the plaintiff, and agreed and contracted with him in pursuance of said resolution. This being an action for a tort, and the contract referred to being mere inducement, not the gist of the action, such statement of the authority to contract, and of the actual contract, is in accordance with the strictest rules of pleading. Particularly after verdict such averments are sufficient.

The second, third, and fourth objections are founded upon a misapprehension of the nature of the action. It is not a suit brought upon a contract for the purpose of compelling its performance. In this case, Franklin acted as agent of the House in making the contract, and could not be held responsible for its execution. The suit is brought against Garland for an illegal, unauthorized act of his own, individually, in preventing the execution of the contract, and depriving plaintiff of the benefits which were to result to him from it, and remuneration for the expenditures he had made towards its performance. The main grounds of defence now urged were taken in the case of *Freeman* v. *Otis*, 9 Mass. 272.

Another case, *Shepherd* v. *Lincoln*, 17 Wend. (N. Y.), 250, illustrates the distinction. That was a suit brought against

defendant as superintendent of repairs of canal, and he was held responsible for an act of negligence or misfeasance.

Franklin made the contract as a public agent, and therefore never could have been made personally responsible for its non-execution by the House. Garland does not pretend that he was instructed or directed by the House to annul that contract; his interference was unauthorized, and therefore he is answerable.

The general principle is, that when an agent acts within the scope of his authority he is not personally responsible,—recourse must be had to the principal; but if he transcends his authority, he is personally liable.

The declaration is sufficient in averring the actual existence *140] of *a contract. The terms of the contract are unimportant in this suit, and need not be averred. Even in an action brought on the contract itself, it is sufficient to aver it according to its legal effect, and it is unnecessary to set out more of it than suffices to show a cause of action. 2 Wend. (N. Y.), 579; 8 Cow. (N. Y.), 33, 9; 13 Johns. (N. Y.), 224.

2d. The same answer may be given to the objections urged against the second count.

In an action brought for misfeasance, it is unnecessary to aver or prove any consideration for the contract. 20 Johns. (N. Y.), 379.

3d. Upon the bills of exceptions. It is a sufficient answer to these exceptions to say, that they do not profess to be founded on *all* the evidence in the case. The first bill, after stating certain evidence as given by plaintiff on the trial, says (p. 14), "upon the evidence aforesaid of the said plaintiff, defendant prays," &c. It does not allege that this was the whole evidence given. This is a fatal and incurable defect in the case. For aught that appears, other and sufficient evidence may have been given, and the omission of it may have been the very reason why the instruction prayed was refused by the court. Plaintiff in error must establish the error in the judgment complained of; every reasonable intendment should be in favor of the judgment. *Ventress* v. *Smith*, 10 Pet. 161.

2d. The only evidence stated in the bill of exceptions is such as was adduced by plaintiff. The prayer is, then, substantially a demurrer to the evidence. Every fact which it conduced to prove, and every conclusion inferable from those facts, is admitted; *mala fides* and oppression are fairly deducible from the facts proved. The jury has passed upon all the allegations in the declaration; and if they went beyond the testimony, the proper remedy was by motion for a new trial.

The jury took the case without any instruction whatever from the court.

The four specific objections now made imply that all the evidence is embodied in the record, which does not appear; and they are founded upon the misapprehension already adverted to, in supposing this action to be brought upon a contract against a party to it to compel its performance. This has been shown to be an error.

The subsequent exceptions are all fully answered in what has been before said.

After the argument was closed, the court intimated to the counsel the difficulty arising from the irregular plea, issue, and verdict, compared with the declaration, upon which *Mr. Coxe* filed the following supplementary argument.

The difficulty now suggested by the court is understood to be this. The action is brought as for a tort, the plea is non assumpsit. *Issue being joined on this plea, verdict for plaintiff and judgment entered accordingly. Can this judgment be sustained upon these pleadings? [*141

1. The entry of the pleas is, in the Circuit Court, the act of the clerk, the defendant being at liberty to abide by the plea thus entered, or to plead *de novo*. If he does not amend, he adopts and abides by the plea filed by the clerk.

In this case, the plea of non assumpsit, if entirely wrong, is a mere clerical error, which would have been amended had it been brought to the notice of the court. If defendant had refused to amend, the plea would have been regarded as a nullity, and judgment entered for want of a plea. This plea was adopted by defendant, and is therefore to be regarded as his. The fault, if any, is his.

2. The action, though sounding in tort, is founded upon a contract. The existence of this contract was traversable, and on the trial it was necessary for plaintiff to prove it. The plea of non assumpsit may be so moulded as to make it a denial of the contract made between plaintiff and Franklin. As in covenant, the plea of *non est factum* is a good plea, though it merely puts in issue the actual execution of the instrument declared on, and neither denies the breach nor the alleged consequences. A special plea, putting in issue the contract which lies at the foundation of this action, would therefore, not be an immaterial plea.

3. As a general rule, a party shall not be permitted to derive benefit from his own error. If there is fault, it is the defendant's fault, and, at this stage of the case it would be in violation of this principle to allow him to assign it for error.

4. Defendant has not assigned this defect for error,—he has not asked for a reversal on this ground.

5. If the error is fatal, it should have been brought before this court in another form. The Circuit Court should have been moved for a repleader; had they refused, such refusal is assignable for error. No such application was made, and consequently there is no error cognizable by the Supreme Court.

6. Had the Circuit Court refused to award a repleader, and such judgment been reversed as erroneous, the judgment of the Supreme Court would have remanded the cause, with its mandate directing such repleader. But can a court of errors in any other way award a repleader? Gould Pl. 518, § 47.

7. If the Circuit Court might lawfully have refused to award a repleader, then there is no error.

Gould Pl. 509, § 32. A repleader for the immateriality of the issue is never awarded, it seems, for that party who tendered the issue. Cites Doug. 749, *per* Buller. There can be no ground for a repleader, for the plea is substantially bad; there is *no fact alleged in it which it could serve any purpose to deny, or to go to issue upon.

*142]

1 Ld. Raym. 170. It was argued, that if the verdict passes against him who made the first fault in pleading, no repleader shall be granted, but it is otherwise if it passes for him. The court refused to award a repleader, for the issue was not wholly immaterial, and after verdict court will intend that the matter put in issue was material.

1 H. Bl. 644. In assumpsit, declaration had five counts. Defendant pleaded *nil debet* to the first, and left the others unanswered. Judgment for plaintiff. Court held the defect cured by the verdict, and defendant should not take advantage of his own mispleading to defeat plaintiff's suit, when jury had found he owed the debt.

Cowp. 510. Court will not grant a repleader but where complete justice may be answered.

Gould Pl. 510, § 32. Therefore, if verdict is against him who tendered the issue, judgment must also regularly go against him. For, as the fault in the issue commenced on his part, his traverse being bad in law, and it being moreover found to be false in fact, it is deemed unreasonable to grant him the indulgence of a repleader. Yet if the verdict were for the same party, a repleader would regularly be awarded. §§ 33–36.

Ib. § 37. Courts ought never to award a repleader, or arrest the judgment for faults in the issue, when it is apparent that no useful end can be attained in so doing. Citing 1 Str. 198, where Powys, J., said,—"I am of the same opinion, for if

we should grant a repleader, I do not see how we can have any new light in the case."

Gould, Pl. §§ 38, 45. Judgment ought never to be given for, or arrested in behalf of, that party in whose pleading the first substantial defect is found. Ib. § 49.

After verdict for the plaintiff, the defendant shall not take advantage of his own mispleading. *Harvey* v. *Richards*, 1 H. Bl. 644.

The plea of "not guilty" in assumpsit is cured by verdict. The error assigned was, that issue was joined on the plea of not guilty. Verdict cured that. 8 Serg. & R. (Pa.), 441; 2 Str. 1022.

A right defectively alleged is cured by verdict. 6 Vt. 496; 2 Marsh. (Ky.), 254.

A defective statement in the declaration for want of date of the assumpsit, also failure to state the consideration, is cured by verdict. 1 Watts (Pa.), 428; 1 Day (Conn.), 186, *n*.

After verdict in an action by an administrator, a defective allegation in the declaration of the promise to the administrator and the death of the intestate, and an omission to make profert of the letters of administration, cannot be taken advantage of, *though they might have furnished good causes of demurrer. 1 Har. & G. (Md.), 14. [*143

It was held, that in an action of assumpsit and not guilty pleaded, and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. 4 Bac. Abr. 84.

The omission to join in issue to some of the replications is healed after verdict. 3 Har. & J. (Md.), 109.

Departure is cured by verdict. Conn. 252.

Mr. Justice WOODBURY delivered the opinion of the court.

In the examination of this case, a defect has been discovered in the pleadings and verdict, which was not noticed in the court below, nor suggested by the counsel here.

And the first question is, whether, under these circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversing the judgment, and sending the case back for amendment and further proceedings.

There can be no doubt, that exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced.[1]

[1] CITED, *Barrow* v. *Reab*, 9 How. 370.

But it is equally clear, that when the whole record is before the court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. *Roach* v. *Hulings*, 16 Pet., 319.

So it is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel. *Slacum* v. *Pomeroy*, 6 Cranch, 221; *Baird & Co.* v. *Mattox*, 1 Call (Va.), 257; 16 Pet., 319.

In *United States* v. *Burnham*, 1 Mason, 62, the court alone took notice of the defect, which was the sole ground of its opinion.

In *Patterson* v. *United States*, 2 Wheat., 222, it is stated, that "the points made were not considered by the court, and judgment was pronounced on other grounds," and Justice Washington says (p. 24),—"The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it;" and on that account the proceedings below were reversed. See also *Harrison et al.* v. *Nixon*, 9 Pet., 483, 535.

I proceed, then, to consider the nature and character of the difficulty in this case, appearing on the record.

Since discovering it, an opportunity has been given to the counsel for the original plaintiff, which has been improved, to attempt to remove it by argument and authorities. But it still remains, and consists in this.

*144] The declaration is an action on the case, sounding in tort. *It sets out no contract except one by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We are required to take this view of the declaration, not only by the averments in it, but by both the present and past positions of the counsel for the plaintiff, that it was intended to be founded on a misfeasance. The plea, however, instead of being "not guilty," as was proper in such case (Com. Dig. *Pleader*), is *non assumpsit*, and the plaintiff below, not demurring thereto, nor moving for judgment notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue, and merely finds, "that the defendant did assume upon himself in manner and form," &c., and assesses damages, "sustained by reason of the nonperformance of the promise and assumption aforesaid."

Besides the general reasoning in the books, that pleas

amounting to the general issue should traverse the material averments in the declaration, and, where the action is one on the case for a tort, should deny the tort by pleading "not guilty," it is laid down in most elementary treatises that "not guilty" is the proper general issue in such cases. See Com. Dig. *Pleader*.

Beyond this, it has been actually adjudged in an action on the case, after full hearing, that *non assumpsit* was a bad plea. *Noble* v. *Lancaster*, Barnes, 125.

That action was trover, but being still an action on the case, the same principle applied.

Nor is the difference merely formal or technical between actions founded in tort and in contract. 1 Chit. Pl. 418, 229.

Because, when in tort or *ex delictu*, a set-off is not admissible, nor can infancy be pleaded as to one *ex contractu*, nor can a plea in abatement be sustained, that all concerned in the wrong are not joined, as it may be in counts on contracts, and a writ of inquiry must issue to ascertain the damages, which is often unnecessary in suits on contracts. A declaration is bad which unites a count in tort with one in contract. 2 Chit. 229, 230; 1 Chit. 625, *n.*; 4 T. R. 794; 8 Ib., 33.

Various other cases analogous to this might be cited, which tend to show that the present plea is improper, but it is not deemed necessary, in this stage of the inquiry to enlarge on that point; and I proceed to the next and more difficult question, whether such a plea, though bad on demurrer, should not be considered as good after verdict, and cured by the statute of jeofails.

As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a mere form, what may seem to be just. 1 Lev. 32; 6 Mod., 1; Com. Dig. *Pleader*, R. 18; 6 Johns. (N. Y.), 1.

*Here, however, there appears to be no informality in a good plea; on the contrary, it looks more like formality in a bad one. And if it be asked, whether there are no cases of bad pleas which are cured by a verdict, we answer, that several exist, but that they are cases where the pleas, though bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue the material parts of the declaration. That is the test. [*145

In the opinion of a majority of the court, the plea under consideration does not contain enough for that purpose; and my apology for examining this point somewhat more in detail must be found in the circumstance, that the court are divided upon it.

The provision by Congress in relation to amendments is to

be found in the 32d section of the Judiciary Act of September 24th, 1789, and is similar to that in the 32 Henry 8th, but certainly not broader. See the former, in 1 Lit. & Brown's ed. 91, and the latter in 1 Bac. Abr. *Amendment and Jeofail*, B.

Under both of these statutes, it has frequently been adjudged, that defects in substance are not cured by a verdict; "for this," says Bacon (Abr., before quoted, E), "would have ruined all proceedings in the courts of justice;" and a defect in substance, in a plea or verdict, is conceded, in all the books, to exist when they do not cover "whatever is essential to the gist of the action."

The present plea, if tried by this test, seems not to be remedied by the verdict, because, so far from traversing all that is essential, nothing is denied, unless it be the inducement. Thus it traverses a promise simply; but the only promise set out in the declaration is one introductory to those material averments, which, as before stated, are the wrongful and injurious acts of the defendant. So far from denying those acts, the plea entirely passes them by, and they are neither put in issue, nor a verdict returned upon them one way or the other. It is true, that, in some actions for a tort, a promise may be referred to in the declaration, which sometimes will constitute one material fact among several others. But it is only one, and not the whole, nor is it the most material fact; that being, in such cases, the misfeasance of the defendant. Nor does the verdict here find this one fact or promise such as averred in the inducement. There it is stated to be made by Mr. Franklin; but, on the contrary, the verdict finds a promise made by the defendant.

On recurring to precedents, several are found which confirm these conclusions. In respect to pleas they show that, when so imperfect and immaterial as this, they are not cured by verdict. And the reason generally assigned, and which pervades the whole, is that before mentioned, namely, that they do not cover or traverse all the gravamen of the declaration. *Staple* v. *Heyden*, 6 Mod., 10; Willes, 532; Tidd. Pr., 827; Gilb. C. P., 146.

*146] Hence it has been decided that a plea of non assumpsit to an *action of debt is not thus cured (*Brennan* v. *Egan*, 4 Taunt., 164; *Penfold v. Hawkins*, 2 Mau. & Sel. 606), because it covers too little or is irrelevant. While, in pursuance of the same rule, it has been held that *nil debet* to assumpsit (1 H. Bl. 664) and "not guilty" either to assumpsit (Cro. Eliz. 470, and 8 Serg. & R. (Pa.), 441), or to covenant (1 Hen. & M. (Va.), 153), or to debt for a penalty (*Coppin* v.

Carter, 1 T. R., 462, note), are cured by a verdict, because they contain enough to put in issue all which is important in the declaration.

In the present case, the issue manifestly reaches only a part of the case, and is therefore incurable (Hard. 331); and it comes expressly within the definition of an immaterial issue, which is also incurable. Carth., 371; Bac. Abr. *Verdict*, K; 2 Lev., 12; 2 Saund., 319; 2 Mod., 137; Gould Pl., 506, 509.

This is undoubted, from Williams's definition in *Bennet* v. *Holbech*, 2 Saunders, 319, *a*. He says,—"An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and the court is often at a loss for which of the parties to give judgment."

So in *Benden* v. *Manning*, 2 N. H., 291, it is laid down, on circumstances like the present, that "if, instead of assumpsit, a special action on the case had been brought for misfeasance, it is very clear, that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not." 5 T. R., 143; 2 Wils., 359; 1 Saund., 312, *n*. 2.

If we should next compare this plea and issue in their substance with a few others less general, that have been solemnly adjudged to be bad, and not cured by verdict, though found for the plaintiff, the result will be the same.

It may be seen in *Tryon* v. *Carter*, 2 Str., 994, that, in debt, on bond, payable on or before the 5th of December, the defendant pleaded payment on the 5th of December, and issue being joined and found against him, the court still awarded a repleader, as it could not be inferred from these pleadings that payment may not have been made before the 5th.

See another in *Enys* v. *Mohun*, 2 Str., 847, where to covenant on a lease to C., averred to come by assignment to the defendant, the plea was that C. did not assign to him, and verdict was for plaintiff. But the court awarded a repleader, as the issue found does not cover all the important parts of the declaration; namely, that the lease may have come to the defendant not from C. direct, but by mesne assignments. Same case in 1 Barn., 182, 220. See also other cases. Yelv. 154; *Peck* v. *Hill*, 2 Mod., 137; *Read* v. *Dawson*, ib., 139; *Stafford* v. *Mayor of Albany*, 6 Johns. (N. Y.), 1; Com. Dig. *Pleader, R. 1 and 2, V. 5; 1 Chit. Pl., 625, 695; 6 T. R., 462; 1 Saund., 319, n. [*147

In *Patterson* v. *United States*, 2 Wheat., 224, Judge Washington lays down the whole law precisely as we view it, in respect

to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of the declaration. He says,—"Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court or to the appellate court that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict." And on error the proceedings below were reversed.

After all this, it is hardly necessary to state further by way of precedent, that in *Noble* v. *Lancaster*, Barnes's Notes, 125, before cited, this very point was decided. *Non assumpsit* was pleaded to an action on the case (*e. g.* trover), and was held not to be cured by a verdict, but was bad in arrest of judgment.

Looking, then, to many precedents, as well as correct principles in pleading, the issue presented and tried here is not only an improper one for the case; but, not containing enough to cover all that is material in the declaration, and being thus imperfect in substance, it "does not determine the right between the parties," and is not cured by the verdict or the statute of joefails.

A moment as to the defects in the verdict. It is difficult to see how an immaterial and bad plea can be cured by a verdict which, as in this case, is quite as immaterial as the plea. Indeed, in some respects, the verdict here, compared with the declaration, is more defective and irremediable than the plea.

It is laid down in Comyn's Dig. *Pleader*, S., 24, that a verdict is even void if it be "variant from the declaration," and he gives as one illustration from 2 Roll., 703, l. 35, "in assumpsit, if it finds a different promise."

In the present case, the promise is found not only different from that laid in the declaration as inducement, but the verdict varies in other essential respects from the declaration, finding nothing of any of the misfeasance charged in it on the defendant.

The defect here, then, is in the verdict as well as plea, and though a mere informality in the former is cured by the act of Congress as to amendments (16 Pet., 319), yet the defect here is similar in both, and as just shown, being on principle in both a defect in substance no less than form, is uncured. *Stearns* v. *Barrett*, 1 Mason, 170, and 2 ib., 31.

But several arguments have been offered against a reversal of the judgment and further proceedings, and in favor of ren-

dering judgment for the plaintiff, on this record, though the plea, issue, and *verdict are all defective in substance, and do not show which party is entitled to recover, on the real merits in dispute, or that they have been legally tried.

These arguments it is our duty to examine. One is, that the whole merits, according to the evidence reported, may have actually been considered and passed upon in the court below under this plea and issue. But it is a sufficient answer to this, that if so done it was illegally done, no evidence being competent under that issue except the promise described in it, and no opinion of the jury or the court being regular or proper under it, except as to that promise alone. *Harrison et al.* v. *Nixon*, 9 Pet., 484.

There are many cases showing that the evidence must be limited to the plea. *Mar. Ins. Company* v. *Hodgson*, 6 Cranch, 206; 4 Wheat., 64, in case of the *Divina Pastora*. The court say you must "not admit the introduction of evidence varying from the facts alleged." 9 Pet., 484. The *probata* should conform to the *allegata*. *Boone* v. *Chiles*, 10 Pet., 177.

In *Barnes* v. *Williams*, 11 Wheat., 416, it is said,—"Upon inspecting the record, it had been discovered that the special verdict found in the case was too imperfect to enable the court to render judgment upon it." A certain fact was important to the recovery. "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not upon a special verdict intend it."

These illustrations and cases tend to show the difficulties in forming an opinion on any thing not found or apparent on the record; and the impropriety of conjecturing and pronouncing on the real merits, when both the issue and verdict are defective in substance in relation to them. But, in this case, if the promise averred to have been made by Franklin was treated at the trial as one made by Garland, so far as regarded its operation and his duty,—which has been the argument of the original plaintiff's counsel before us, and which may, for aught we now decide, be correct,—then we should be called upon to render judgment against Garland merely on such promise and a breach of it.

That is every thing which the verdict finds or the issue presents, in the most favorable view.

But that being a promise confessedly on the whole evidence made by the original defendant, or his predecessor, as a public agent, if now rendering final judgment, we should probably, in that view of the record (no tort having been put in issue or found by the verdict), be obliged to decide against the

original plaintiff on the merits, because public agents are not usually liable on mere contracts or promises made in behalf of their principals.[1] (See on this *Hodgson* v. *Dexter*, 1 *149] Cranch, 345; *Macbeath* v. *Haldimand*, 1 T. R., 172; *Fox* v. *Drake et al.*, 8 Cow. (N. Y.), *191; 2 Dall., 444; *Osborne* v. *Kerr*, 12 Wend. (N. Y.), 179; Story Agency, §§ 302–308; *Lord Palmerston's case*, 3 Brod. & B., 275; *Freeman* v. *Otis*, 9 Mass., 272, *quære* in part.)

On the contrary, however, if the action is to be considered as brought, not on any promise except as inducement, but on a wrongful act or misfeasance, as the plaintiff sets out his case in his declaration and still contends to be the truth, then it seems manifest that—nothing on that misfeasance, the essential point of the action, having been either traversed in the plea or found by the verdict—there is nothing upon which judgment can legally be rendered for either party on the merits. It will be seen that we come to this conclusion, not because cases are wanting which hold that officers not judicial, nor having any discretion to exercise on a subject (*Wheeler* v. *Patterson*, 1 N. H., 88; *Kendall* v. *Stokes*, 3 How., 98; 11 Johns. (N. Y.), 114; 2 Ld. Raym., 938), are liable in tort for misfeasances, whenever they are violations of public laws or official duties (*Shepherd* v. *Lincoln*, 17 Wend. (N. Y.), 250; 5 Burr., 2709; 6 T. R., 445; *Gidley*, *Ex. of Holland* v. *Lord Palmerston*, 7 J. B. Moo., 91; 15 East, 384; 9 Cl. & F., 251; 1 Bos. & P., 229; *Little et al.* v. *Barreme et al.*, 2 Cranch, 170, 13 Johns. (N. Y.), 141; *Tracy et al.* v. *Swartwout*, 10 Pet., 95), though others consist of unsuccessful attempts to charge persons in tort for matters which originated and existed in fact only as contracts (*Bristow et al.* v. *Eastman*, 1 Esp., 172; *Jennings* v. *Rundall*, 8 T. R., 335), or which were mere nonfeasances (20 Johns. (N. Y.), 379; 12 Mod., 488; 1 Ld. Raym., 466; 4 Mau. & Sel., 27; Story Agency, § 398); but because the issue and verdict present nothing in relation to any such misfeasance, and our opinion is intended to be confined to the questions on the pleadings, without any decision upon the merits. Indeed, it would be difficult to express one on them where we have been unable to agree on one, and where a majority of the court think the pleadings are not in a proper state to enable us to give one satisfactorily.

In this state of things, the most obvious course to assist us to "reach the law and justice of the case" would be to reverse the judgment below and award a repleader. This would

[1] *United States* v. *Buchanan*, 8 How., 105.

not deprive either party of any merits they may have, and may be able hereafter to show on proper pleadings, and costs would indemnify the party who has been delayed by any bad pleading, so far as he ought to be indemnified considering his own fault in this case, in joining and trying an issue immaterial or radically insufficient to settle the cause of action, rather than demurring to the plea seasonably. But such a course is objected to on certain grounds not yet considered, and which it is our duty to notice. One of them is, that when a plea or verdict is radically defective, judgment ought to be rendered, notwithstanding the verdict, for the party *whose [*150 pleadings are right; and another, a branch of this, is, that a court ought in no case to permit the party who commits the first error to have the judgment reversed and be allowed a repleader, unless, perhaps, when the verdict is in his favor.

Though several of the text-books lay down rules like these in broad terms, it is first to be noticed that some state them with a *quære* or doubt. (1 Chit. Pl., note, 522, 633, and Com. Dig. Pleader.) In others, the cited authorities do not support them, as Gilbert, quoted in Tidd, 828. In others, the counsel, rather than the court, recognize them. *Kempe* v. *Crews*, 1 Ld. Raym., 170; *Taylor* v. *Whitehead*, Doug., 749. In others, the court refer to them, but do not appear to have founded their decision on them, as *Webster* v. *Bannister*, Doug., 396, where the issue covered the merits (3 Hen. & M. (Va.), 388), and in others, matters still different existed, which justified the judgment given, independent of these rules.

Thus, if a plea be bad, but still confesses the cause of action without setting out a sufficient avoidance, judgment can with propriety be rendered for the plaintiff on such confession, if the declaration be good. *Rex* v. *Philips*, 1 Str., 397; *Jones* v. *Bodingham*, 1 Salk., 173; Gould Pl., 509; *Simonton* v. *Winter et. al.*, 5 Pet., 141; *Kirtley* v. *Deck*, 3 Hen. & M. (Va.), 388; 6 Mod., 10; Tidd, 827.

So, if the plea be a mere nullity,—putting nothing material in issue,—judgment is at times allowed to be signed as for want of a plea, as if *nil dicit*, provided the declaration be good. 4 Taunt., 164; 2 Mau. & Sel., 606.

So, if the plea be evidently a sham plea, or fictitious, a like course is warranted. 10 East, 237; Tidd, 831.

Or if the plea, though neither of these, still be defective, but sets out such facts as demonstrate that the party has no merits, and that no amendment could be made which would avail him any thing, or, in other words, nothing is left in the

case that can be mended. Gould Pl., 514, § 39; Tidd, 831; *Henderson* v. *Foote*, 3 Call. (Va.), 248.

It is incidental circumstances like these, affecting the merits and not adverted to always in decisions or elementary treatises, which have governed most of the opposing cases, rather than a mere technical, and in some degree arbitrary rule, without reference to the merits, and which would bar a party claiming to possess them from having them tried on a repleader or amendment, on complying with equitable terms.

In the case now under consideration, the plea comes under neither of these categories, neither confessing a cause of action, nor appearing to be a sham or fictitious plea, nor disclosing enough to show the defendant to be without any good
*151] defence. On the contrary, a defence appears, which the original defendant seems always *to have urged with great confidence as being good. Under these circumstances, then, repleading or something equivalent would seem proper to do justice between the parties, and to carry out the principle of the statutes of jeofails, so as not to prevent a judgment on the merits, because some "slip," as Lord Mansfield calls it, has happened on the part of the defendant in his plea. *Rex* v. *Philips*, 1 Burr., 295; Tidd, 828; Gould Pl., 508, §§ 31, 40. If the right be not put in issue and may be, a ruling to permit it seems reasonable. *Staple* v. *Heyden*, 6 Mod., 2.

The true meaning of these technical rules can be made rational and consistent, if they are held to apply to cases where good grounds are apparent for rendering final judg ment. Then it may well be rendered against him who committed the first material fault in the pleadings, and which fault has not afterwards in any way been cured.

But if no such grounds appear, in consequence of the imperfections of the pleas and verdict, final judgment cannot properly be rendered; and the rules are inapplicable; and the judgment below should be reversed, so as to furnish an opportunity to remove those imperfections and reach the justice of the case by amendments or repleaders. And so far from the party not being permitted to enjoy this indulgence who committed the first fault, he is the only one who needs it, and in whose behalf, under the liberal spirit of modern times, all statutes of jeofails are passed. Nor can the opposite party suffer by this course in respect to the merits, as they are left open. Or in respect to cost and delay, as he should be indemnified for them in the manner before mentioned, by equitable terms, for allowing any amendments.

In this view of the subject, it is of no consequence for

which party the defective verdict was found, except at times the fact in it may be an indication of merits in that party who has the *postea*, so far as that fact can affect the merits. But in this case the fact found was immaterial in relation to the merits, as already shown; and the object now is. to prevent such immaterialities from making a final disposal of the case, —to prevent substance from being sacrificed to form,—and where merits may exist, to adopt such a course as will present them to the court intelligibly, for a final adjudication of the real justice of the case.

To all this, in an advanced era of jurisprudence, it will hardly do to repeat from some of the old books, that a party is forever to be barred either for the badness or the falsity of his plea, if it happens to be imperfect and is found against him, though he has not confessed the declaration, nor stated any facts in his plea inconsistent with merits.

Much more, too, is it proper, if not indispensable, in a case like this, so defective on the record as not to justify any decision about the merits, to adopt a course which shall not bar the due consideration *of them in the end, and which [*152
shall be for the benefit and guide of the court, even more than a party, so as to prevent a leap in the dark, and which for these and other reasons shall let the cause be reopened, and prepared and tried in a manner to bring the whole of the merits legally before both the court and the jury. Cro. Eliz., 245; 5 Hen. & M. (Va.), 393; *Baird & Co.* v. *Mattox*, 1 Call. (Va.), 257.

Considering the character and position of this tribunal, as one of the last resort in administering justice, and considering the increased disposition of the age in which we live to eviscerate the truth, and decide ultimately only on the real merits in controversy between parties, or in the words of Justice Story (1 Story, 152, in *Bottomly and the United States*), as to "technical niceties," considering "the days for such subtilties in a great measure passed away," it seems a duty of our own motion to give all reasonable facility to get the record in an intelligible and proper shape before we render final judgment.

As proof that such a course is sometimes deemed proper, to aid a court as well as a party, notwithstanding the technical rules before mentioned, it is stated in Gould Pl. 507, § 28, that judgment may be arrested after verdict, if the issue is immaterial, so that the court cannot discover, from the finding upon it, for which party judgment ought to be given." §§ 23 and 22.

So, though Gould lays down these rules before named, he says (page 514, § 40), if a special plea show there may be a

good justification, though it has been badly pleaded, judgment must be arrested, and a repleader awarded, as it appears a good issue might be formed; and when this is the case, "the ends of justice require that an opportunity for forming such an issue should be afforded." And in respect to objections in such cases to indulgence to a party whose plea is bad, Gould, 508, says in a note:—"The true answer to this inquiry appears to be, that the awarding a repleader in such case was originally rather an act of indulgence to a party who tendered an improper issue, than a matter of strict right. An indulgence grounded on the presumption that the issue was misjoined through the inadvertence and oversight of the pleaders, and that a farther opportunity to plead would probably result in a material issue decisive of the merits of the cause," &c.

There are also some very high precedents against the application of these technical rules in cases and circumstances like those now under consideration. Such was the case of *Rex* v. *Philips*, 1 Burr., 302. The reasoning of Lord Mansfield on this whole subject is directly in point, as well as the case itself, and contains that beautiful correction by him of a much abused maxim, in which he says it is the duty of a good judge to amplify justice rather than his jurisdiction, "*boni judicis est ampliare justitiam, non jurisdictionem.*" There, after verdict for the plaintiff, he allowed an amendment *153] of *the plea on payment of costs, being satisfied that "the ends of justice require that an opportunity for forming a proper issue be allowed."

There are many other cases, some ancient and some modern, which fully support the same conclusion. See *Enys* v. *Mohun*, 2 Str., 847, and S. C., Barn., 182, 220; *Tryon* v. *Carter*, 2 Str., 994; *Love* v. *Wotton*, Cro. Eliz., 245.

In *Serjeant* v. *Fairfax*, 1 Lev., 32, the plea was defective as not taking issue on enough, though it denied part of what was material in the declaration. Verdict was found for the plaintiff. This is in substance the very case now under consideration. Counsel contended,—"When the issue is found against the pleader, judgment shall be for the plaintiff; but if for him (the pleader), not. But Justice Twysden said, that if an improper issue is taken, and verdict given thereon, judgment shall be given thereupon, be it for the plaintiff or defendant. 2 Cro., 575. But an immaterial issue is where, upon the verdict, the court cannot know for whom to give judgment, whether for the plaintiff or for the defendant, as in Hob., 175, and with him the chief justice and Wyndham wholly agreed, and awarded a repleader."

In *Simonton* v. *Winter et al.*, 5 Pet., 141, the verdict was for the plaintiff, and yet, the plea being bad, the court reversed the judgment, as the cause of action was not confessed in the plea, and remanded the case with an order for a *venire de novo*.

See also in point *Green* v. *Baily*, 5 Munf. (Va.), 246, and *Baird & Co.* v. *Mattox*, 1 Call. (Va.), 257.

And in 9 Wheat., 729, the pleadings are not given, but Justice Story said there was great irregularity and laxity in them, and "it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are of themselves sufficient to justify a reversal of the judgment and an award of a repleader," and without "appropriate pleas," "it would be difficult to ascertain what was to be tried or not tried."

See also *Harrison et al.* v. *Nixon*, 9 Pet., 483.

All that remains is to consider the best form of carrying these conclusions into effect.

In some of the cases before cited, the court have not only reversed the judgment, but ordered a repleader. But in others, it is said that this cannot be done after a writ of error. 6 Mod., 102; 2 Keb., 769; Com. Dig. *Pleader* and *Verdict*.

Such, probably, has always been the practice in relation to not ordering it by the court below, after a writ of error is sued out, till the case is again reopened; but it was once not the practice in the higher courts of error in England. See 2 Saund., 319; *Holbech* v. *Bennett*, 2 Lev., 12.

Nor is it the practice now in some of the higher courts in this country. In *Green* v. *Baily*, 5 Munf. (Va.), 251, judgment was reversed *on the writ of error, the pleadings set aside after the plea, and a repleader awarded. [*154

The 32d section of the Judiciary Act, before referred to, expressly empowers "any court of the United States" "at any time to permit either of the parties to amend any defect in the process or pleadings." Litt. & Brown's ed., 91.

All know that a repleader is little more in substance than permitting an amendment.

But most of the precedents in this court allowing amendments after a writ of error are in maritime or admiralty proceedings, and I have found none of those in the form of repleaders. In 4 Wheat., 64 (though one in admiralty, where less strictness prevails in pleading than at common law), Chief Justice Marshall said,—"The pleadings in this case are too informal and defective to pronounce a final decree on the merits"; and the judgment was therefore reversed, and the

cause remanded, with directions to permit the pleadings to be amended.

See also a like order in the *Divina Pastora*, 4 Wheat., 63, and in case of the *Edward*, 1 Id., 264, and case of the *Samuel*, 1 Id., 13; *Harrison et al.* v. *Nixon*, 9 Pet., 483.

In cases at common law, the form is usually somewhat different. In 5 Pet., 141, the form was suited to the case, and judgment not only reversed, but a *venire de novo* ordered, and in *United States* v. *Hawkins*, 10 Pet., 125, Justice Wayne says,—"A *venire de novo* is frequently awarded in a court of error, upon a bill of exceptions to enable parties to amend," —and "amendments may, in the sound discretion of the court, upon a new trial, be permitted."

See further, 2 Wheat., 226; *Barnes* v. *Williams*, 11 Id., 416; *Bellows* v. *Hallowell & Augusta Bank*, 2 Mason, 31; *Peterson* v. *United States*, 2 Wash. C. C., 36.

See the form in England. *Parker* v. *Wells*, 1 T. R., 783, and *Grant* v. *Astle*, Doug., 922.

In *Pollard* v. *Dwight*, 4 Cranch, 432, the court said, let judgment "be reversed and the cause remanded for a new trial."

Mr. Lee prayed "with leave for the defendants below to amend their pleadings."

The court said "that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect." Similar to this was the course in *Day* v. *Chism*, 10 Wheat., 404.

And in *United States* v. *Kirkpatrick*, 9 Vheat., 738, the court not only reversed the judgment, and awarded a *venire de novo*, but gave "directions also to allow the parties liberty to amend their pleadings." So 9 Wheat., 540.

See on this further, *Mar. Ins. Co.* v. *Hodgson*, 6 Cranch, 218; 7 Id., 47, 497; 9 Id., 244; 1 Id., 261, 13; 10 Id., 449; 4 Id., 52; 16 Pet., 319; *Moody* v. *Keener*, 9 Por. (Ala.), 252.

*155] * In conclusion, then, as by several cases in England the allowance of a repleader in courts of error seems to have gone into disuse in modern times, and as the practice in common law cases in this tribunal, though otherwise in some of the states, has usually been, not to direct either amendments or repleaders in cases like these, but to reverse the judgment and remand the cause to the court below for further proceedings there, we shall conform to that practice in the present instance.

Let the judgment below be reversed, and the case remanded for further proceedings.

Lucius W. Stockton and Daniel Moore, Plaintiffs in error, v. Harriet Bishop.

Where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect.[1]

In an action on the case for injury sustained by the oversetting of a stage-coach, although the declaration does not set out the payment of any passage money, nor any promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger for certain rewards to the defendants, and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed, and if the breach was well assigned, and the cause went on to plea, issue, trial, and verdict, the defect in the declaration is cured by the 32d section of the Judiciary Act of 1789.[2]

The "right of the cause and matter in law" being with the plaintiff in the court below, the judgment of that court must be affirmed.

This case was brought up, by writ of error, from the Circuit Court of the United States for West Pennsylvania.

There was no bill of exceptions signed by the judge, and the record presented the following appearance.

Among the rolls, records, and judicial proceedings of the Circuit Court of the United States, in and for the Western District of Pennsylvania, in the Third Circuit, may be found the following words and figures, to wit:—

Copy of Docket Entries.

McCandless, and McClure & Biddle.	Harriet Bishop, a citizen of the State of Ohio,	18
	vs.	
Darragh, Loomis, Mahon & Washington.	Lucius W. Stockton and Daniel Moore, citizens of Penn.	

[1] Cited. *Ewing* v. *Howard*, 7 Wall., 503.

The general rule is, that after verdict, defects in substance in the declaration are cured, where it can be seen that the nature of the issue joined was such as to require proof to be adduced on the trial of the facts defectively or imperfectly stated or omitted; and the appellate court will presume that such defects or omissions were supplied by the proof. *Stanley* v. *Whipple*, 2 McLean, 35; *McDonald* v. *Hobson*, 7 How., 745; *DeSobry* v. *Nicholson*, 3 Wall., 420; *Kemble* v. *Lull*, 3 McLean, 272; *Bank of United States* v. *Moss*, 6 How., 31.

Thus, in an action on a bill of exchange, the want of an averment of the value of foreign money, is cured by a verdict finding its value. *Brown* v. *Barry*, 3 Dall., 365. And where there are mutual promises, an omission to aver performance by plaintiff of his promise, is cured. *Corcoran* v. *Dougherty*, 4 Cranch C. C., 205.

But such defects will not be cured by verdict upon such presumption, where it appears by the record that no such proof was offered. *Washington* v. *Ogden*, 1 Black, 450.

[2] Cited. *Phillips &c. Construction Co.* v. *Seymour*, 1 Otto, 656.

Summons case, exit September 17th, 1842.

1842, November 4th, returned. Served by leaving a copy at the dwelling-house of D. Moore, November 1st, 1842, and personally on L. W. Stockton, November 2d, 1842.

*1843, Jan. 12th. Narr. filed.

*156] 1843, February 6th. On motion of Mr. Darragh, rule for security for costs.

1843, February 7th. Rule for security for costs returned, "Served on Mr. McClure, February 7th, 1843."

1843, April 5th. Consent of attorney for defendants, that a commission issue forthwith to take testimony on part of plaintiff, and declension to file cross interrogatories. (See paper filed).

1843, April 5th. Interrogatories on part of plaintiff filed, and commission issued to Albert G. Westgate, Esq., of McConnellsville, Morgan county, Ohio, commissioner named by plaintiff.

1843, April 10th. Stipulation of John Sarber, as security for costs, filed.

1843, April 18th. Commission, with depositions taken before Albert G. Westgate, Esq., returned and filed.

1843, May 10th. Plea of defendants filed.

1843, May 10th. Agreement of attorneys filed.

1843, May 17th. Continued.

1843, October 5th. Subpœna on part of defendants to Dr. Kennedy.

1843, October 28th. Subpœna on part of defendants to Dr. Campbell.

1843, October 30th and 31st. Subpœnas on part of plaintiff to Dr. A. H. Campbell, James Corbin, James Smith, James Snyder, and Daniel Brown.

1843, November, 20th. Above subpœnas returned.

1843, November 22d, 23d, 24th, and 25th. Tried by jury, and, 25th, verdict for plaintiff for six thousand five hundred dollars ($6,500), with costs of suit.

1843, November 24th. Defendants' points filed.

1843, November 25th. Motion in arrest of judgment, and for a new trial.

1843, November 27th. Plaintiff's bill of costs filed.

1843, November 30th. Reasons in arrest of judgment, and for a new trial, filed.

1843, December 1st. Argument for a new trial commenced.

1843, December 7th. Argument of motion for new trial continued and concluded by Messrs. Mahon and Loomis, for defendants, and Mr. Biddle, *contra*, for plaintiff.

Same day. Affidavit of Jacob Murphy filed.

Same day. After argument, defendants' points overruled, and judgment on the verdict; stay of execution for thirty days.

Same day. Plaintiff's counsel desired the sanction of the court to the following amendment to the verdict, objected to by defendants' counsel. Objections filed by order of the court; after argument, objections overruled, and verdict amended as follows, viz.:—"And now, to wit, December 7th, 1843, inasmuch as the plaintiff, *on the trial of [*157 the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff on the said second count, and for the defendants on the first count."

1843, December 15th. Defendants enter into a bond, which is approved by Judge Irwin, in the sum of thirteen thousand dollars, and sue out their writ of error.

1843, December 15th. Citation issued.

1843, December 15th. Writ of error allowed and issued.

1843, December 16th. Citation returned; served by copy on R. Biddle, Esq., attorney of defendants.

Copy of Declaration.

In the Circuit Court of the United States for the Western District of Pennsylvania.

Lucius W. Stockton, a citizen of Pennsylvania, and Daniel Moore, also a citizen of Pennsylvania, were summoned to answer Harriet Bishop, a citizen of Ohio, in an action on the case. Whereupon the said Harriet Bishop, by McCandless & McClure, her attorneys, complains, for that whereas the said defendants, before and after the time of committing the grievance hereinafter mentioned, were owners and proprietors of a certain line of stage-coaches for the carriage and conveyance of passengers from Baltimore, in the state of Maryland, to Wheeling in the state of Virginia, for hire and reward, to the said defendants in that behalf; and the said defendants being such owners and proprietors of the said line of coaches so as aforesaid, thereupon heretofore, to wit, at the special instance and request of the said defendants, became and was a passenger in the said line of coaches, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from Baltimore aforesaid to Wheeling aforesaid, for a certain fare and reward to the said defendants in that behalf; and the said defendants then and there received the said plaintiff as

such passenger as aforesaid; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed by and upon the said line of coaches on the said journey; yet the said defendants, not regarding their duty in that behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the said stage-coach, on the said journey from Baltimore aforesaid to Wheeling aforesaid, to the damage of the plaintiff twenty thousand dollars.

And whereas also, heretofore, to wit, on the day and year aforesaid, at Baltimore aforesaid, the said plaintiff, at the said special instance and request of the said defendants, became and was a passenger *by a certain other coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from Baltimore aforesaid to Wheeling aforesaid, for certain rewards to the said defendants in that behalf; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed, by the said line of coaches, on the said journey from Baltimore aforesaid to Wheeling aforesaid; yet the said defendants, not regarding their duty in this behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed, by the last mentioned coach, on the said journey from Baltimore aforesaid to Wheeling aforesaid; but wholly neglected to do so, and by reason whereof one of the legs, one of the arms, two of the ribs, [and] the collar-bone of the said plaintiff then and there became and were fractured and broken, and the said plaintiff was then and there otherwise greatly bruised, wounded, and injured; and also by means of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto; during all which time the said plaintiff suffered, and underwent, and endured great pain, and was hindered and prevented from transacting and attending her necesssary and lawful affairs and business by her during all that time to be performed and transacted, and lost and was deprived of divers great gains, and advantages, and profits, which she might, and otherwise would, have derived and acquired from the same; and thereby also the said plaintiff was forced and obliged to pay, lay out, and expend divers other large sums of money, amounting, in the whole, to the sum of one thousand dollars, in and about the endeavoring to be cured of the last mentioned bruises, fractures, and injuries received as last

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aforesaid, to the damage of the said plaintiff twenty thousand dollars; and therefore she brings suit.

McCandless & McClure,
Plaintiff's attorneys.

(Then followed a summons, and a commission to take testimony, under which several witnesses were examined, and the record proceeded).

Copy of Plea.

Bishop *v.* Stockton et al. Circuit Court of the United States for the Western District of Pennsylvania.

The defendants, by Cornelius Darragh, their attorney, come and defend the wrong, when, &c., and for plea say, that they are not guilty of the matters and things alleged against them in the plaintiff's declaration, and of this they put themselves upon the country.

May 10, 1843. C. Darragh, *for defendants.*

**Copy of Defendants' Points.* [*159

Harriet Bishop *v.* Stockton & Moore.

The counsel of the defendants respectfully request the court to instruct the jury as follows:—

1st. That the proprietors of a stage-coach do not warrant the safety of their passengers, in the character of common carriers; and that they are not responsible for mere accidents to the persons of passengers, but only for the want of due care. (Given.)

2d. That they do not warrant the safety of passengers; their undertaking, as to them, goes no further than this; that as far as human wisdom and vigilance can go, they will provide for the safe conveyance of their passengers. (Given.)

3d. That if the jury believe that the accident in this case was caused by the intoxication of James Corbin the driver, but that he was not only not in the habit of drinking intoxicating liquors, but was intoxicated, on this occasion, for the first time in his life; that, in this event, the defendants will have exercised due care in the selection and employment of James Corbin as a driver, and will not be liable in this action. (Refused.)

4th. That if the jury believe that the accident was caused by the intoxication of James Corbin, yet if they also believe that a long course of previous habitual good conduct through a series of years, from his boyhood to the time of this acci-

dent in question, had satisfied the defendants, the tavern-keepers with whom James Corbin boarded, and his associates, that he was a temperate and an abstemious man, that then the defendants, as far as ordinary wisdom and vigilance could go, did provide for the safety of their passengers in the selection and employment of James Corbin as a driver, and that they are not liable in this action. (Refused.)

5th. If the jury believe that, at the time of the accident, the coach was on the upper and safer portion of the road, and that the accident occurred in the effort of Corbin to take up his horses after descending the hill, that the defendants are not liable in this action. (Refused.)

6th. That although the jury may believe that Corbin was, at the time of the accident, partially intoxicated, still, if he was not so much intoxicated as to be incapable of the management and control of this team, and the accident did not arise from that cause, but from the state of the weather, obscurity of the night, and the condition of the roads, that the defendants are not liable in this action; especially if the jury believe that the said Corbin had heretofore sustained an unexceptionable character for skill, care, and sobriety. (Refused.)

7th. If the jury believe that the driver was a person of competent skill, of good habits, and in every respect qualified
*160] and suitably prepared for the business in which he was engaged, plaintiff *cannot recover, unless they were clearly satisfied that, on this occasion, the disaster was attributable to the fault of the driver, and not to the darkness of the night, or other accidental cause, and that said accident would not have occurred but for the fault of the driver. (Given.)

Defendants' Exceptions.

HARRIET BISHOP *v.* STOCKTON & MOORE. In the Circuit Court of the United States.

The counsel for defendants respectfully except to the refusal of the court to instruct the jury as prayed for on all the points presented by them, except the first, second, and seventh.

MAHON & WASHINGTON,
METCALF & LOOMIS,
Attorneys for defendants.

25*th November*, 1843.

Copy of Reasons for a New Trial, and in Arrest of Judgment.

HARRIET BISHOP *v.* STOCKTON & MOORE.

The counsel for defendants move the court for a new trial, for the following reasons, viz.:—

1. The verdict is against the weight of evidence.

2. It is rendered for vindictive damages.

3. It is not the result of the deliberate opinions of the jurors, or of comparison of their several opinions, but the amount was fixed and determined by the average of different sums named by the jurors.

They move in arrest of judgment, because,—

1. No sufficient cause of action is set forth in plaintiff's first count of narr., and the verdict is general on both counts.

2. No sufficient cause of action is set forth in either count; there being no allegation that the amount charged for fare, or passage money, had in fact been paid by plaintiff.

3. General errors.

MAHON & WASHINGTON,
November 27th, 1843. *Attorneys for defendants.*

Copy of Affidavit of Jacob Murphy.

Personally appeared before me, a justice of the peace in and for the county of Fayette, Jacob Murphy, who, being sworn, doth depose and say, that he was a juror in the Circuit Court of the United [States] for the Western District of Pennsylvania, for November term, 1843, and that he was one of the panel who tried the case of *Harriet Bishop* v. *L. W. Stockton and Daniel Moore*, for damages accruing from the upsetting of a stage-coach, and that the method adopted by the jury by which they settled on the amount *of [*161 the verdict was this: it was agreed that each juror should mark the sum he found, and that the total amount, divided by twelve, should, without alteration, be the amount of the verdict; in accordance with their agreement, each juryman put down the amount he thought proper; they then added the whole together, and divided the amount by twelve, and the product was six thousand five hundred dollars, which was reported as the verdict of the jury. JACOB MURPHY.

Sworn and subscribed before me, the 5th December, 1843.
CLEMENT WOOD, *J. P.*

The verdict as ordered to [be] entered by the Court.

And now, to wit, December 7th, 1843, inasmuch as the plaintiff, on the trial of the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff on the said second count, and for the defendants on the first count.

Copy of Defendants' Objections.

In the Circuit Court of the United States, Western District of Pennsylvania.

HARRIET BISHOP *v.* L. W. STOCKTON ET AL.

The counsel for the plaintiff having moved the court to make the following entry of record in the cause, to wit:—"And now, to wit, November, 1843, inasmuch as the plaintiff, on the trial of the cause, offered proof of but a single disaster, and its injurious consequences, as set forth in the second count of the declaration, the verdict is amended accordingly, and judgment entered for the plaintiff, on said second count, and for the defendant on the first count."

The defendants, by their counsel, now, to wit, November 7th, 1843, appear in court, and object to the allowance of said motion by the court, and to any permission by the court that such entry as is above indicated should be made in the cause, and in support of their objection assign the following causes, to wit: that the issue, if any, joined by the pleadings between the parties, was upon the whole declaration; that the jury were sworn to try the issue, if any, joined upon the whole declaration; that the jury returned their verdict in writing in the following words:—

HARRIET BISHOP *v.* STOCKTON, MOORE, & CO.

We, the jurors sworn and empanelled in this cause, do find for the plaintiff six thousand five hundred dollars, with costs of suit, this 25th day of November, A. D. 1843.

*162] Which said verdict was received by the court; and thereupon an *entry was made of record in the cause, in the following words, to wit:

"HARRIET BISHOP *v.* STOCKTON & MOORE.

"Jury find for the plaintiff six thousand five hundred dollars, with costs of suit."

That the verdict so found by the jury was found by them upon the entire issue or issues, if any, between the parties, and upon the whole declaration, embracing both the first and second counts thereof; that said verdict is general; that the testimony given in the cause was as applicable to the first as to the second count of the declaration; that the defendants have as good a right to claim that the verdict of the jury should be amended, by entering it upon the first count of the declaration for the plaintiff, and judgment thereon for the plaintiff, and judgment on the second count for the defend-

ants, as the plaintiff has to claim that the proposed entry should be made. That the jury having given a general verdict for entire damages on both counts of the declaration, which verdict was received by the court, and entered of record without objection from the plaintiff, and the jury having separated, the court have not the legal right, and if they possess the legal right, ought not, in the exercise of a sound discretion, to modify the verdict of the jury in the manner proposed by the plaintiff's counsel; which objections, and reasons in support thereof, are respectively submitted by the defendants, to be filed and entered of record in the cause.

METCALF & LOOMIS,
MAHON & WASHINGTON,
Attorneys for defendants.

United States, Western District of Pennsylvania, ss.:

I, Edward J. Roberts, clerk of the Circuit Court of the United States, in and for the Western District of Pennsylvania, do hereby certify, that the foregoing is a full, true, and complete exemplification of the record in the case of *Harriet Bishop*, a citizen of the state of Ohio, against Lucius W. Stockton and Daniel Moore, citizens of Pennsylvania.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Pittsburg, this twentieth day of December, A. D. 1843, and in the sixty-eighth year of the independence of the said United States. E. J. ROBERTS, *Clerk.*

[L. S.]

A writ of error, sued out on behalf of Stockton & Moore, brought up the record in the form in which it is stated above.

The case was argued by *Mr. Bledsoe* and *Mr. Coxe* for the plaintiffs in error, and *Mr. Richard Biddle* (in a printed argument), for the defendant in error.

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**Mr. Bledsoe*, for plaintiffs in error.

Perhaps no record ever came up to this court in such an imperfect state. There appears to be no issue, no *venire*, no jury empanelled or sworn, no verdict, except where it is incidentally mentioned, no bill of exceptions signed, no judgment of the court for a specific sum. It is true, that there is a verdict spoken of in the docket entries, but these are only to refresh the memory of the clerk. 10 Ohio, 200.

Nothing is a part of the record except the pleadings, or what is referred to in the opinion of the court. 5 Pet., 254.

There is no regular judgment of the court for a specific

sum. How could an action of debt or a *scire facias* be maintained upon such a record? 5 Dane Abr., 221; 1 Ark., 346, 347; 2 id., 390; 1 Rob. Pr., 390; 6 Rand. (Va.), 30–32; 4 Munf. (Va.), 262; Yelv., 107; 4 Leon., 61: 1 Chit. Pl., 356.

The declaration is radically defective. The first count was abandoned, and judgment entered on the second count. This must therefore stand alone, and, taken by itself, it discloses no cause of action. Two reasons exist for this. 1. There is nothing stated from which an implied undertaking can be inferred to carry safely. 2. There is no such express undertaking averred.

1. In order to raise the implication, the fact must be averred, that the other party were common carriers. This is necessary, as a foundation for the implied assumpsit. 1 Wend. (N. Y.), 272; 6 J. B. Moo., 158; 2 Chit. Pl., 356, note. See also Story Bailm., 374, 591.

The declaration was designed to be in tort. It is not averred that any reward was to be paid by the plaintiff, or that there was any promise at all. Lawes on Pleading, under the head of "Promise."

Mr. Biddle, for defendant in error.

Under the 40th Rule of Court, the following remarks are respectfully submitted on behalf of the defendant in error.

No specification of errors having been filed, the points which will be pressed are left to be inferred from what took place in the court below.

First. As to the declaration. It may be alleged that the first count is bad, and that the verdict, being general on both counts, is thereby vitiated. The reply is:—1. The count is not bad. It provides for the event of no special damage being made out. It would, at least, justify nominal damages. It alleges that the defendants were engaged in a duty to the public as carriers of passengers; that they undertook to carry the plaintiff safely, and failed to do so.

Further, it is to be remembered that there was no demurrer to the count, and the objection therefore comes after verdict.

*164] Now it *is a familiar rule, that a cause of action defectively or inaccurately set forth is cured by the verdict, because to entitle the plaintiff to recover, all circumstances necessary, in form or in substance, to make out his cause of action, so imperfectly stated, must be proved at the trial. (9 Wheat., 595; 1 Pet. C. C., 482.) But, 2. This inquiry is unnecessary, as the judgment is entered on the second count. The recent case of *Mathewson's Administrators* v. *Grant's Administrator*, in this court (2 How., 263,), renders superflu-

ous any argument as to the right and the duty of the court to permit the amendment prayed for. The second count is the familiar one in case, not requiring any averment of the payment of money, found in 2 Chit. Pl., 647 (ed. of 1840), and in 2 Chit. Prec., 506 *a*, (ed. of 1839), and was pursued in *Curtis* v. *Drinkwater*, 2 Barn. & Ad., 169, (22 Eng. Com. L., 51.) Had such averment been necessary, the omission would be cured after verdict, on the principle heretofore noticed.[1]

Second. As to any irregularities committed by the jury in making up their verdict, they are not examinable in a court of error. 1 Pet. C. C., 159. All these matters are referred to the sound discretion of the court below. The refusal to grant a new trial is not the subject of a writ of error. 4 Wheat., 233; 6 id., 547.

Nothing, however, can be better settled, than that the Circuit Court was right in refusing to act upon the affidavit of a juror. 2 Tidd Pr., 709; *Vaise* v. *Delaval*, 1 T. R., 11; *Owen* v. *Warburton*, 4 Bos. & P., 326; 4 Wash. C. C., 32; 4 Binn., (Pa.), 150; 5 Conn., 348; 3 Gill & J. (Md.), 473; 2 Green. (Me.), 41; 2 Tyler (Vt.), 13.

That the process resorted to by the jury is not open to just exception, even if established by unexceptionable evidence, see *Grinnell* v. *Phillips*, 1 Mass., 541; *Commonwealth* v. *Drew*, 4 id., 399; *Goodwin* v. *Philips*, Lofft, 71; *Lawrence* v. *Boswell*, Say., 100.

Third. As to the instructions prayed for by the counsel of the defendants below, and refused by the court. The late lamented Judge Baldwin delivered in this case an elaborate and comprehensive charge to the jury, in which the law, as settled by this court in *Stokes* v. *Saltonstall*, 13 Pet., 181, was clearly laid down and enforced. Unfortunately it cannot now be found. To this charge no exception was taken. It covered the whole ground, and the learned judge might well, therefore, have refused to notice any of the points submitted by defendant's counsel. This course was pursued by the circuit judge in the trial of *Stokes* v. *Saltonstall* (see 13 Pet., 185.) Judge Baldwin, however, thought proper to yield his assent to the points submitted, so far as he could do so with propriety. His answers to these points, apart from the *general charge, established the following rules for [*165
the guidance of the jury:—

1. That the proprietors of a stage-coach do not warrant the safety of their passengers in the character of common carriers; and that they are not responsible for mere accidents to the

[1] Cited, *Morsell* v. *Hall*, 13 How., 215.

persons of passengers, but only for the want of due care. (Jury so instructed in conformity to the first proposition submitted by the defendants below.)

2. That they do not warrant the safety of passengers; their undertaking as to them goes no further than this, that as far as human wisdom and vigilance can go, they will provide for the safe conveyance of their passengers. (Jury so instructed in conformity to the second proposition submitted by defendants below.)

3. If the jury believe 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, plaintiff cannot recover unless they were clearly satisfied that, on this occasion the disaster was attributable to the fault of the driver, and not to the darkness of the night or other accidental cause, and that said accident would not have occurred but for the fault of the driver. (Jury so instructed in conformity to the seventh proposition submitted by the defendants below.)

The other propositions submitted are either inconsistent with what was conceded by the defendants themselves to be correct doctrine, or present parts of the subject in a detached, isolated form, calculated to mislead rather than enlighten the jury. Thus the third and fourth propositions ask the court to declare, that although the grossest negligence and incapacity existed on this particular occasion, yet if the driver's past conduct and character had been good, the proprietors were not liable. To have so held would have been in defiance of the decision of the Supreme Court in *Stokes* v. *Saltonstall*, (13 Pet., 181), and would have been inconsistent with the court's assent to the defendant's seventh proposition, where good conduct on the particular occasion is conceded to be indispensable.

The fifth proposition presents a hypothetical statement of facts, and asks the court to instruct the jury that their existence would free the defendants from liability. It is denied that any right exists to force upon the court teasing and endless repetition of points favorable to one or the other side, where the law has been once correctly stated. But here, to have answered the question affirmatively would have been palpably wrong, for all the circumstances mentioned might be true, and yet the disaster have been occasioned by the intoxication of the driver.

So of the sixth proposition. It is to be borne in mind that the court instructed the jury that plaintiff could not recover, "unless they were clearly satisfied that on this occasion the disaster was attributable to the fault of the driver, and not

*to the darkness of the night, or other accidental cause, and that said accident would not have occurred but for the fault of the driver." The question, therefore, was fully answered, without entering into an idle and unseemly dissertation on the several stages of drunkenness.

Mr. Coxe, for plaintiffs in error, in reply and conclusion

As to the errors in pleading which will lead to a reversal, see 9 Wheat., 720.

In this case there is no plea, and of course no replication; docket entries are no part of the record. 10 Ohio, 200; 5 Pet., 254; 12 Wheat., 118, 119.

(*Mr. Coxe* then went into a critical examination of the record).

Whatever would be fatal in the court below is also fatal in the court above. 6 Cranch, 221; 15 Johns. (N. Y.), 403.

If the first count be taken away, the second, standing by itself, does not afford sufficient foundation for the judgment. For example, it speaks of a "day and year aforesaid," but no day is named. It speaks of "passengers in a coach," but it is not averred to be a public coach. If the contract is to be implied, the fact that the stages were public must be averred. The declaration says that the defendants did not perform their duty. How? Was the plaintiff left behind? Or was the driver negligent? The second count does not say.

When the cause of action is inaccurately set out, the defect is cured by verdict; but a mere allegation of omission of duty is not enough. The case must show the facts. 2 Cranch, 389.

Title to property must be alleged. Stephens, 304; 2 Fenwick, 134.

The allegation in this case should have been, that the defendants were common carriers; there is none of a contract for hire. 2 Wash., 187; 2 N. H., 289.

Mutual promises must be averred. 1 Cai. (N. Y.), 583; 5 Serg. & R. (Pa.), 358.

Every material fact must be averred with precision. 9 Johns. (N. Y.), 291.

Will the verdict cure these defects of pleading? The general rule is, that nothing is to be presumed after verdict, except what is stated in the declaration, or necessarily implied. 1 T. R., 145; 7 Id., 521; 1 Tidd Prac., 82.

It is not alleged here that the defendants were owners of the coach, nor that it was a public coach. Doug., 679.

Whatever the law will not imply must be stated in the declaration. 1 Chitty, 365, 358.

The declaration must aver a consideration, and here there

is no averment of any contract whatever. 5 T. R., 150; Latch, 177.

*167] *Mr. Justice CATRON delivered the opinion of the court.

This cause comes here by a writ of error to the Circuit Court of the District of Western Pennsylvania. There is no bill of exceptions in the record; although instructions said to have been given by the court to the jury are certified up as part of the proceedings. These of course we cannot notice. Other supposed errors are therefore relied on as sufficient to reverse the judgment.

1. That the judgment below was rendered for the plaintiff, on the second count of the declaration; and it is insisted that this count is so defective, that no judgment could be rendered on it; and therefore on error the judgment must be reversed. If the assumption be true, the consequence must follow.

The second count refers to the first for the dates of the circumstances, and the injury complained of, and as no time is given in the first count, neither has this any.

The plaintiff in error having pleaded not guilty and gone to trial, the presumption is that the proof supplied the defective statement. Such, we suppose, is the uniform rule, where material dates are left blank.

2. It is insisted that the declaration does not set out the payment of any passage money; nor any promise or undertaking on the part of the defendants below to carry the plaintiff safely. The allegation is, that the plaintiff, at the special instance and request of the defendants, became and was a passenger in a certain coach, to be carried safely, &c., for certain rewards to the defendants; and thereupon it was their duty to use due and proper care, that the plaintiff should be safely conveyed. The breach is well assigned, as it shows the neglect and consequent injury sustained. No demurrer was interposed, for want of form; and this brings the 32d section of the Judiciary Act of 1789 to bear on the proceeding. Not guilty, was pleaded; a trial had on the issue, on which the jury returned a verdict in these words:—"*Harriet Bishop* v. *Stockton, Moore, & Co.* We, the jurors sworn and empanelled in this cause, do find for the plaintiff six thousand five hundred dollars, with costs of suit, this 25th day of November, A. D. 1843." The verdict was received by the court, and stands recorded as found; and afterwards, on motion, it was amended so as to apply to the second count only.

Who the jurors were, or how many found the verdict, does

not appear; nor does it appear that they were sworn to try the issue, further than the jury say in their verdict. Still we are bound to presume in favor of proceedings in a court having jurisdiction of the parties and subject-matter, that justice was administered in the ordinary form, when so much appears as is found in this imperfect record.[1]

The declaration, plea, and finding must be taken together; and *from these, we are bound, by the 32d section, above cited, to ascertain whether, according to the right of "the cause and matter in law," the plaintiff is entitled to her damages; and in so doing, defects of form must be disregarded. Why Congress so provided, in 1789, is obvious. No modes of proceeding were prescribed by the act, in civil causes, at common law, and the modes observed in the English courts left to apply as general rules. These were formal and technical; and forasmuch as by the 35th section all parties to causes in courts of the United States might plead and manage their own causes personally, if they saw proper, technicalities could not be required. That the practice under this privilege has not corresponded to the theory tolerating it may be conceded; yet we cannot for this reason disregard the clause covering jeofails, intended for its protection; and if proceedings, as recorded, in the courts in any part of the Union were as loose in 1789 as this record indicates them yet to be, in one circuit court at least, where the two acts of 1789 continue to govern, it must be admitted that Congress acted wisely in declaring that no litigant party should lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring, that, to save the party's rights, the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance. [*168

According to "the right of the cause and matter of law," appearing to us on the pleadings and verdict, we think the plaintiff is entitled to her damages, and that judgment below ought to have been rendered for her.

But the judgment there given is also assailed, and justly, as being less formal than what precedes it. It is either no judgment, or binding. If it amounts to nothing, then, by the 22d section of the Judiciary Act, no writ of error lay (as one can only be prosecuted on a final judgment), and the case must be dismissed for want of jurisdiction, and the plaintiffs in error be sent to the court below, to quash the execution. We think, however, there was a judgment on the verdict, that

[1] APPLIED. *Townsend* v. *Jemison*, 7 How., 718–721.

warranted an execution for the damages found; and consequently the prosecution of a writ of error. And this being so, for the reasons above stated, such judgment must be affirmed.

Noel Jourdan and Joseph Landry, Plaintiffs in error *v.* Thomas Barrett et al.

Under the former government of Louisiana, the regulations of O'Reilly, Gayoso, and Morales recognized the equitable claim of the owners of tracts of land fronting on rivers, &c., to a portion of the public lands which were back of them, and after the cession, the United States did so also.

The act of Congress passed on the 3d of March, 1811 (2 Lit. & Brown's ed., 662), extended to the front owner a preference to enter the land behind him. That act also provided, that where, owing to a bend in the river, each claimant could not obtain a tract equal in quantity to the tract already owned by him, the principal deputy surveyor of each district, under the superintendence of the surveyor of the public lands south of the State of Tennessee, should divide the vacant land amongst the claimants in such manner as to him might seem most equitable.[1]

The act of March 2d, 1805, had extended the power of the surveyor of lands south of Tennessee over the Territory of Orleans, and the act of April 27th, 1806, had directed him to appoint two principal deputies, one for each district of the Territory of Orleans.

The act of March 3d, 1831, directed the appointment of a surveyor-general of public lands in Louisiana, after the 1st of May, 1831.

In March, 1832, therefore, the surveyor of public lands south of Tennessee had no power to approve a survey.

The act of 1811 reserved for the public all such back lands as were not correctly taken up under that act by the proprietors of river-fronts; and those who did not enter their claims in time did not lose whatever equity they may have had before the passage of the act.

An unauthorized survey by one of the claimants did not confer upon him any additional rights.

In executing the acts of 1820 and 1832, claimants were allowed to pay for the largest amount which they claimed, but the precise amount due on the exact quantity of land to which they were entitled could not appear until the final survey.

When the land was laid out into ranges, townships, &c., the survey of township No. 11, approved by H. S. Williams, surveyor-general of Louisiana, settled the rights of parties in that township.

A possession of any part of these back lands, anterior to this survey, cannot be set up as a defence under the laws of Louisiana, because the lands belonged to the United States, and those persons in possession were trespassers.[2]

This case was brought up from the Supreme Court of Louisiana for the Eastern District, by a writ of error, issued under the 25th section of the Judiciary Act.

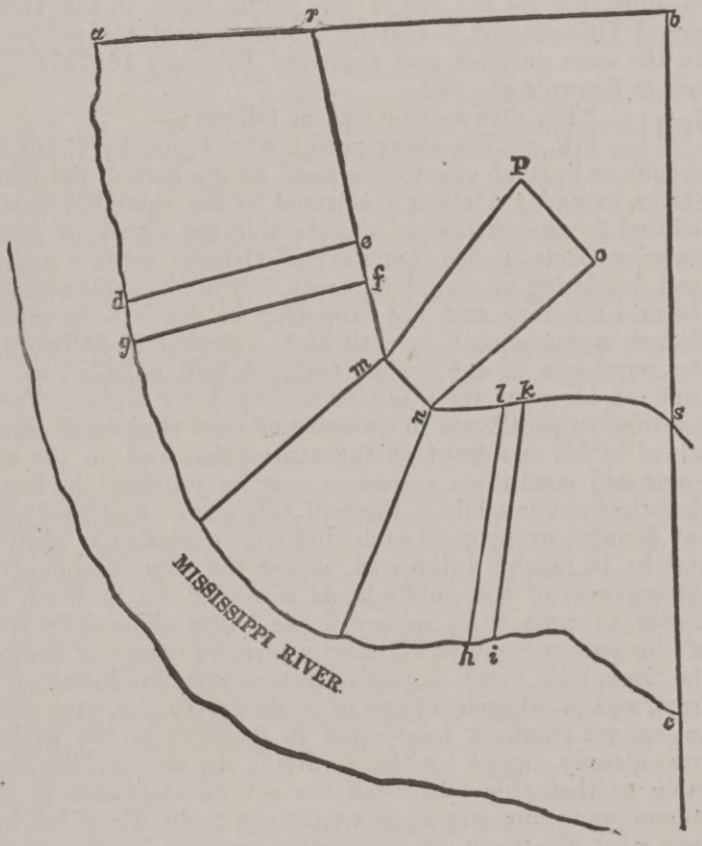
They were petitory actions, according to the practice of

[1] Explained. *Bissell* v. *Penrose*, 8 How., 340.

[2] See also *Mackay* v. *Dillon*, *post*, 421, 448.

Louisiana, brought by the plaintiffs in error against Barrett, to recover some land, and as they involved the same questions of law, they were consolidated in the courts of that state.

By referring to the subjoined diagram it will be seen that Jourdan and Landry were the owners of land fronting on the Mississippi River, and running back about forty arpents.



a b and *b c* are the township lines.

d e f g, land fronting on the river, belonging to Landry.

h i k l, land fronting on the river, belonging to Jourdan.

r e f m n l k s, the boundary-line of all the original grants, showing how far back they extended from the river.

m n o p, the land claimed by Barrett, under Bringier.

By running the lines of Jourdan's and Landry's grants back from the river, it is easy to see how they would respectively clash with Barrett's claim.

There were nearly forty other proprietors similarly situated, between *a* and *c*, whose location it is not necessary to insert. Their lands were all bounded in the rear by a line running nearly parallel with the river, so as to include the quantity called for in their respective grants.

*170] *The facts in the case were these.

On the 3d of March, 1811, Congress passed an act, entitled "An Act providing for the final adjustment of claims to lands, and for the sale of the public lands, in the Territories of Orleans and Louisiana, and to repeal the act passed for the same purpose, and approved February 16, 1811." (2 Lit. & Brown's ed., 662.)

*171] *The fifth section was as follows:—

5th. "That every person who, either by virtue of a French or Spanish grant recognized by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the Territory of Orleans, owns a tract of land, bordering on any river, creek, bayou, or water-course, in the said territory, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions, as are or may be provided by law for the other public lands in the said territory. And the principal deputy surveyor of each district, respectively, shall be, and he is, hereby authorized, under the superintendence of the surveyor of the public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section; and in all cases where, by reason of bends in the river, lake, creek, bayou, or water-course bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants, in such manner as to him may appear most equitable; Provided, however, that the right of preëmption granted by this section shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course. And every person entitled to the benefit of this section shall, within three years after the date of this act, deliver, to the register of the proper land-office, a notice in writing, stating the situation and extent of the tract of land he wishes to purchase, and shall also make the payment and

payments for the same at the time and times which are or may be prescribed by law for the disposal of the other public lands in the said territory; the time of his delivering the notice aforesaid being considered as the date of the purchase. And if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, his right of preëmption shall cease and become void; and the land may thereafter be purchased by any other person in the same manner and on the same terms as are or may be provided by law for the sale of other public lands in the said territory."

On the 11th of May, 1820, Congress passed another act (3 Lit. & Brown's ed., 573), entitled, "An Act supplementary to the several acts for the adjustment of land-claims in the State of Louisiana," the seventh section of which was as follows:

"That the fifth section of the act of the 3d day of March, *1811, entitled, 'An Act providing for the final adjustment,' &c., &c., be, and the same is, hereby revived and continued for the term of two years from and after the passing of this act." [*172

On the 12th of April, 1822, Bringier, under whom Barrett, the defendant, claimed, filed the following application.

To the Register of the Land-office for the Eastern District of Louisiana, at New Orleans.

Sir,—In virtue of an act of Congress, dated 11th May, 1820, I apply to become the purchaser of a tract of land adjacent to and back of a front tract already owned by me, which said front tract contains 27 arpents 13 toises and 2 feet front, and forty arpents in depth, bounded as follows, viz., front on the left bank of the Mississippi, on the upper side by land of Baptiste Loviere, and below by lands of Paul Le Blanc. This land, composed of four tracts, confirmed in the name of Alexis Cesar Bonremy, and in the name of James Melançon. Two arpents, on the lower side, have been sold. The said back land, now claimed by right of preëmption, extends in depth arpents, beginning at the rear of the said front tract, and contains five hundred and ten superficial acres, not being a greater quantity than is contained in my front tract, and does not extend so far back as to include any land fit for cultivation, bordering on any river, creek, bayou, or water-course.

(Signed,) Ml. Doradon Bringier.

New Orleans, April 12th, 1822.

On the 13th of April, 1822, Bringier paid to the receiver $637.50, as the price of the land. 195

On the 17th of May, 1822, Harper, the register, issued the following certificate.

I certify, that from the records in my office, expressing the quantity of land contained in the applicant's front tract (the surveys in this district not having been executed), and in virtue of the laws in this case made and provided, it appears the said applicant is entitled to the quantity of land for which he has applied, viz., five hundred and ten superficial acres, on paying the price of one dollar and twenty-five cents per acre.

(Signed,) SAMUEL H. HARPER, *Register.*

On the 17th of December, 1822, John Wilson, subscribing himself principal deputy surveyor for that district, surveyed the tract of land at the request of Bringier, who took possession of it. It is unnecessary to state the mesne conveyances by which the title was passed, through sundry persons, from Bringier to Barrett, who was in possession at the institution of the present suits.

*173] In 1829, the township and sectional lines were run, for the first *time, over this district, in the mode pursued in running out other public lands of the United States.

On the 10th of June, 1830, a survey was completed, under the authority and with the approbation of A. T. Rightor, principal deputy surveyor of the exterior boundaries of the township and of the lands in question, together with others, which survey was re-examined and approved by Gideon Fitz, surveyor of public lands south of Tennessee, on the 9th of March, 1832. This survey differed in some degree from the one previously made by Wilson, although agreeing with it in substance; and being adopted by Bringier and his grantees as the basis of their title, has been followed in the preceding diagram.

On the 15th of June, 1832, Congress passed another act (4 Lit. & Brown's ed., 539), entitled, "An Act to authorize the inhabitants of the State of Louisiana to enter the back lands." It did not refer to either of the two preceding acts, but in substance, and nearly in the same words, reënacted the fifth section of the act of 1811, limiting the time of making application to three years from the date of the act.

On the 9th of August, 1834, Jourdan, one of the plaintiffs in error, obtained from the receiver the following certificate.

RECEIVER'S OFFICE, SO. EAST DIST. LA., *New Orleans, August 9th,* 1834.

Received from Noel Jourdan, of the parish of St. James,

the sum of three hundred and thirty-six $\frac{80}{100}$ dollars, being in full of the purchase money of his preëmption right by virtue of an act of Congress authorizing the inhabitants of Louisiana to enter their back lands, approved 15th June, 1832, to a tract of land adjacent to and back of his front tract, situate in township No. 11, range No. 3 east, and containing two hundred and sixty-nine $\frac{44}{100}$ superficial acres, at one dollar and twenty-five cents, as per register's certificate, numbered No. 9.

(Signed,) MAURICE CANNON,
Receiver of Public Moneys.

On the 8th of March, 1836, Landry, the other plaintiff in error, obtained the following certificate.

No. 520. RECEIVER'S OFFICE, SO. EAST. DIST. LA., *New Orleans, 8th March,* 1836.

Received from Joseph Landry, of the parish of St. James, the sum of one hundred and ninety-two $\frac{76}{100}$ dollars, being in full of the purchase money of his preëmption rights, by virtue of an act of Congress, authorizing the inhabitants of Louisiana to enter their back lands, approved 15th June, 1832, to a tract of land adjacent to and back of his front tract, situate in township No. 11, range *No. 3 east, and containing [*174 one hundred and fifty-four $\frac{21}{100}$ superficial acres, at one dollar and twenty-five cents, as per register's certificate, numbered 520, and being described as section No. 19.

(Signed,) MAURICE CANNON,
Receiver of Public Moneys.

In February, 1838, Jourdan and Landry filed separate petitions in the District Court for the First Judicial District of the State of Louisiana, claiming their respective back lands. Barrett, who was then in possession of the tract surveyed for Bringier, answered the petition and called in warranty, according to the Louisiana practice, all the intermediate grantors between Bringier and himself and Bringier also. They all responded to the call, and various evidence was taken and filed in the causes, which, as has been already mentioned, were consolidated and prosecuted together.

On the 22d of March, 1838, the court adjudged and decreed that judgment should be entered for Barrett, the defendant; an appeal being made to the Supreme Court of Louisiana, that court, on the 21st of January, 1839, affirmed the judgment, to review which a writ of error brought the case up to this court.

The case was argued by *Mr. Coxe*, for the plaintiff's in error, and *Mr. Crittenden*, for the defendant.

Mr. Coxe referred to the act of 3 March, 1811, chap. 46, 2 Lit. & Brown's ed. 662; 1 Land Laws, 196; the act of 11 May, 1820, chap. 87, 3 Lit. & Brown's ed., 573; Land Laws, 331; the act of 15 June, 1832; Land Laws, 499; and the act of February 24, 1835, and contended that the title claimed by the plaintiffs was not so far forfeited by nonclaim, under the first two statutes, as to become incapable of confirmation under the subsequent legislation of Congress.

Mr. Crittenden, for defendant in error.

This is a suit for land in the State of Louisiana. The controversy arises out of interfering claims, which originate in the acts of Congress granting to the proprietors of lands fronting on the Mississippi River, &c., a right of preëmption of the lands lying back of and adjoining their original or front tracts, and not exceeding the quantity thereof.

The acts of Congress, so far as they affect this case, are three in number; namely, an act of the 3d of March, 1811, 2 Lit. & Brown's ed., 662; an act of the 11th of May, 1820, 3 Lit. & Brown's ed., 573; and an act of the 15th of June, 1832, 4 Lit. & Brown's ed., 534.

The 5th section of the act of 1811, having expired by its *175] own limitation of three years, was revived and continued in force for *two years by the act of the 11th of May, 1820. M. D. Bringier, being of that class of proprietors embraced by the above acts, and owning land bordering on the Mississippi River, and not exceeding in depth forty arpents, French measure, was entitled to the right of preëmption granted thereby; and, intending to avail himself of the preference and privilege given to him, he did, on the 12th day of April, 1822, and within the two years allowed by the said act of 1820, deliver to the register of the proper land-office, a notice, in writing, of the situation and extent of the land he wished to purchase, and did make payment for the same, as required by law, and did thereby become the purchaser of the land, namely, 510 acres.

The land so purchased by Bringier was surveyed for him on the 17th of December, 1822, by John Wilson, principal deputy surveyor for that district. Afterwards, on the 10th of June, 1830, M. F. Rightor, then principal deputy surveyor for Louisiana, undertook to make, and did make, another survey of Bringier's claim, variant but little from the survey of Wilson. This survey of Rightor's was approved by the surveyor-general of the public lands south of Tennessee, on the 9th of March, 1832. And to this later survey, Bringier and those claiming under him have submitted, and limited his claim and posses-

sion, and the land in contest lies within its boundaries. Bringier took possession of the land at the period of his purchase, and the posssession has ever since been continued in him and those claiming under him. Bringier sold and conveyed his plantation, called Whitehall, including the land aforesaid, to the late General Wade Hampton, on the 9th of February, 1825; who, on the 6th of April, 1829, sold and conveyed the same to Leroy Pope, who, on the 18th of March, 1833, sold and conveyed the same to the defendant, Thomas Barrett. At the time of Bringier's purchase aforesaid, no survey had been made of the land, nor was any general survey made of the public lands in that district till long after.

Barrett was thus entitled and in possession under Bringier, and the act of 1820, under which his claim was derived, had long since expired, when the Congress passed the said act of the 15th of June, 1832, reënacting, in substance, the 5th section of the act of 1811, and extended its operation as well to all purchasers from the United States as to French and Spanish claimants, to whom all the previous acts had been confined. Under this act of 1832, Noel Jourdan and Joseph Landry, claiming severally and respectively, under French or Spanish claims confirmed by the United States, lands bordering and fronting on the Mississippi River, and lying contiguous to the aforesaid claim of Bringier, asserted their right of preëmption to the lands back of their original tracts, and purchased, Noel Jourdan 269·44 acres, on the 9th of August, 1834, and Joseph Landry 154·21 acres, on the 8th of March, 1836.

*In his general survey and township map of the litigated and circumjacent lands, made in 1834, Mr. Williams, the surveyor-general for Louisiana, has undertaken to survey and apportion out to the plaintiffs and defendant, respectively, who are all contiguous and front proprietors, the lands lying back of them; and this he does by a prolongation of the side lines of each front tract to the depth of forty arpents from the back line of the front tracts. [*176

These side lines are all perpendicular to the river, and converge as they recede from it, owing perhaps to their being situated within a bend.

This mode of surveying and settling the claims of these preemptioners, by a prolongation of the side lines of their original tracts, was adopted and acted upon by the surveyor (Williams) in his survey of 1834, and seems to have been approved of by the surveying department. The effect of it is, that the claim of Bringier (now held by Barrett) is curtailed, and the subsequent claims of Landry and Jourdan are made to interfere,

the former to the extent of 31 acres, the latter of 33 acres, with the prior claim and survey of Bringier.

For these interferences, Landry and Jourdan respectively brought suit against Barrett, in the District Court for the First Judicial District of Louisiana. Pope, the heirs of Hampton and Bringier, were, in the progress of the suit, cited in warranty, and made defendants.

By consent of parties, the suits of *Jourdan* v. *Barrett* and *Landry* v. *Barrett* were consolidated, and were tried and decided together.

The above statement contains the material and leading facts on which the rights of the parties depend.

Upon the trial in the District Court, judgment was rendered in favor of Barrett; and, upon appeal by the plaintiffs to the Supreme Court of Louisiana, that judgment was affirmed. And the plaintiffs now prosecute their writ of error in the Supreme Court of the United States.

The reasoning of the District and Supreme Courts of Louisiana, on which their judgment was founded, appears to me to be entirely satisfactory and unanswerable.

If the conflicting claims of the parties litigant had been contemporaneous, and connected by having a common origin from the same act of Congress, such an apportionment as that made by the last survey (the survey of Williams), and now insisted on by the plaintiffs, might have been proper. But such a rule can have no application to a case like the present. Bringier had made a legal appropriation of the land under the act of 1820. From the expiration of that act, which gave the right of preëmption for two years only, until the passage of the act of the 15th of June, 1832, there was no right or title of any description conflicting with that *of Bringier. It was not the intention or within the competency of Congress to impair, diminish, or take away, by this latter act, the previously acquired or vested rights of Bringier.

*177]

The land appropriated by him under the act of 1820 was not "vacant" at the passage of the act of 1832; and this latter act gives no more than the preëmptive right to lands "vacant" at the time of its passage.

It is therefore insisted, on the part of Barrett, that the judgment ought to be affirmed.

Mr. Justice CATRON delivered the opinion of the court.

The record brings before us two petitory actions; one of Landry against Barrett; and the other of Jourdan against the same defendant. The State District Court of Louisiana adjudged the title of Barrett the better, and for this reason

decided in his favor in both actions; but in that of Landry it was also held, that the title to the land he claimed was invalid, because he produced no other evidence of claim than the receipt of the receiver above set forth, dated 8th March, 1836; that the act of June 15th, 1832, limited his right to purchase to three years; and not having filed his notice of claim, and paid his money, until the 8th of March, 1836, he came too late, and for this reason, also, the petition must be dismissed. The judgment being affirmed generally by the Supreme Court of Louisiana, and being opposed to the authority exercised by the officers of the United States, acting in virtue of acts of Congress, it becomes our duty to examine whether the judgment below was proper on this ground. We find the District Court overlooked the act of February 24, 1835, which extended the time to the 15th of June, 1836, to owners of front tracts to become purchasers by preference of the back tracts adjacent to those owned by them; so that the purchase made by Landry on the 8th of March, 1836, was in time. It follows, the claims of Landry and Jourdan are alike; and the opposing claim of Barrett, being the same as to each of the petitioners, the controversy may be treated as one suit. It depends on mixed questions of law and fact, both having been submitted to the court below for their judgment, without the aid of a jury; and as the facts giving rise to the controversy call for construction of acts of Congress to give the facts effect, they come before this court for its action under the 25th section of the Judiciary Act. This is the settled doctrine here, as will be seen by the cases of *Pollard's heirs* v. *Kibbie* (14 Pet., 353), *The City of Mobile* v. *Eslava* (16 Id., 234), and *Chouteau* v. *Eckhart* (2 How., 372).

Neither party has a patent; and each comes before us asserting a superior equity to the lands in dispute. Barrett insists that the entry under which he claims title, dated April 12, 1822, was made for a specific quantity of 510 supeficial acres, and designated by *survey and side lines ten [*178 years and more before the opposing claims originated, and therefore his possession cannot be disturbed by their assertion.

On the other hand, it is insisted that Bringier, under whom Barrett claims title, had no preference extended to him by the act of May 11, 1820, to enter so much as 510 acres as back land to the Whitehall tract; that it fronted on the inside of a bend of the Mississippi River, and conformed to Spanish and French forty-arpent concessions made on fronts, in concave bends, in the extension of side lines; which uniformly converged in proportion to the greater or less circle of the bend; that the Whitehall tract was much narrower on the

back than on the front side; that the act of Congress did not permit Bringier to enter any other back land than that within his direct side lines, produced from the river eighty arpents deep; and that Barrett's equity is limited to the "back land," in quantity to forty arpents deep within these lines, although much less than 510 acres. And that, as this mode of surveying the double concession will not include the land entered by either of the petitioners, they are entitled to recover; furthermore, that in this form has Barrett's claim been surveyed by public authority, and in no other.

In December, 1832, Bringier caused Wilson, a surveyor, to run out his claim of 510 acres, in the same form of the front tract; that is, he began at the back terminus of each side line of the old tract, and ran diverging lines so as to make the opposite side of his new survey of the same width with the front on the river, thus making a tract of 1,020 acres, little more than half as wide in the middle as it is at either end. This survey was neither returned to, nor recorded in, the surveyor-general's office; nor recognized by the officers of the United States as a public survey. Bringier, and those claiming under him, however, took and held possession of the land surveyed, and improved the same, assuming that it covered the land entered in 1832, and that it was lawfully made; at least, as against any claim the petitioners can be permitted to set up. This we suppose mainly to depend on the true construction of the act of 1811, which was renewed from time to time.

The surveys of township No. 11, including the lands in dispute, were not made until the fall of 1829 and spring of 1830, and then only in part, both as to the ordinary extension lines, and as regarded the private grants and back lands subject to be attached by preference of entry to front grants. Until these latter were surveyed, they could not be acted on as to specific quantity. By the act of March 2, 1805, section 7, the powers of the surveyor of lands south of Tennessee were extended over the Territory of Orleans. And by the 9th section of the act of April 21, 1806, he was directed to
*179] appoint two principal deputies, one *for each of the districts into which the Orleans Territory was divided; who were to keep separate offices of their own, and to execute public surveys in their respective districts, in conformity to the regulations and instructions of their principal.

By the act of March 3, 1831, a surveyor-general of public lands lying in the State of Louisiana was ordered to be appointed; and on whom, within that State, were devolved the duties formerly imposed on the surveyor of lands south of

Tennessee; that is, after the 1st of May, 1831; and also the duties of the two principal deputies authorized by the act of 1806. The latter offices were abolished, and the duties appertaining to them merged in the surveyor-general's office of Louisiana. That officer took charge of the official records and papers; and on him was imposed the duty of doing equity among those entitled to back concessions under the acts of 1820 and 1832, where it had not been previously done. His own deputies did the field work not done on his coming into office; and in his time were the surveys in township No. 11 completed; and by him were they first approved after their completion. This the government recognizes as the legal survey of the township, by which the United States are bound, and on extracts from which patents and certificates can be founded; and to this end the approved plan of it was filed in the register's office of the Southeastern District of Louisiana, on the 8th of August, 1834; by all those purchasing from the United States, either by preference of entry, or otherwise, are bound to abide, unless legal alterations have been made, or there were existing legal and sanctioned surveys, laying off back lands to particular front owners, independent of the general survey. None such was made for the Whitehall tract, as we think, and its back land, as to extent and form, is governed by the general plan above named. The one made by Rightor's direction, approved by Gideon Fitz, surveyor of public lands south of Tennessee (March 9, 1832), received no additional value from such approval, as the act of 1831 superseded his authority in this respect. Rightor deposes, that at no time had the surveyor south of Tennessee any power of approval or supervision of the surveys made by him, Rightor, as principal deputy; and that the surveys made by Foster and Walker in the spring of 1830, and approved by Rightor, as principal deputy, June 10, 1830, in his judgment bound the United States, as to the form and extent of the land attached to the Whitehall tract. The commissioner of the general land-office thought the survey on its face an unwarrantable proceeding, as it cut off the back lands of Bringier's neighbors, and violated the act of 1811. 2 Land laws, No. 950. And we think the commissioner was right in his conclusion. Claims of double concessions in Louisiana were not new in practice; surveys of such claims were common, and the direct extension of the side lines of the front tract was the *equity, as a general rule, accorded to them, as we apprehend; and so gross a violation of it as is found in Bringier's survey could not be sanctioned. [*180

In April, 1822, when Bringier's entry was made, there can

be no fair pretence to say he acquired by the entry an equity to the extent of Wilson's or Rightor's survey, as against others having at that time equal rights to enter back land, which rights the survey assumed to defeat. By his entry Bringier acquired an equity to certain land, to be laid off in a form not to interfere with his neighbors having equal rights under the law. They did not enter, probably because his unjust, pretended claim deterred them; and failing to do so until the time expired, Bringier assumed that his equity might be enlarged, and was enlarged, to the extent that Rightor's or Wilson's survey goes.

We think this assumption cannot be sustained; what equity Bringier acquired took date with his entry, and his survey ought to have been the same, had no one claiming front lands interfered, as the act of Congress reserved for future sale all the back lands not entered in time; a provision that would have been altogether defeated in this instance, if the assumption was true. For nearly twenty years after the act of 1811 was passed, the government failed to survey the back lands, so as to afford an opportunity to front owners to acquire woodland in the rear (most necessary in a sugar-growing country), and it would be strange had the power to make back concessions been parted with, in so plain a case, by permitting sweeping surveys like that of Bringier.

We say above, claims for double concessions were not new. O'Reilly's regulations of 1770 provide for narrow front grants on rivers, by forty arpens in depth; for embankments in front for the exclusion of high water; for ditches to carry off the water; for roads and bridges. The 17th article of Gayoso's regulations confirms those of O'Reilly. These were made by governors-general, who had the distribution of lands from 1770 to October, 1798; then the authority was restored to the General Intendant of Louisiana and West Florida, Morales; and in this officer the power remained up to the change of governments, in 1804. All the regulations will be found in 2 White's Recopilacion, 228, 244. In article 3d of Morales's, especial duties are prescribed to the owners of front grants, but nearly the same of O'Reilly's. The syndics were bound to enforce the making of such embankments, ditches, roads, and bridges, and the clearing in the three first years, in addition, a certain quantity of land, and putting it into cultivation. The grants were not to exceed six or eight arpens in front; usually not so much was granted; and the lands were to adjoin. Annually the Mississippi overflows, and to prevent an inundation of the country, heavy and expensive embankments are required, and they must be continu-

ous; and are so, for hundreds of miles, on the banks *of the river. The country would be worthless without them. It had been reclaimed from the water by this means and the ditches, by the French and Spanish front proprietors; and on the keeping up of the levees the value of the back lands depended; the great expense, and constant watchings, during a part of the year, to guard against inundation, and that of the whole country, by a break in the levee at any one place, involve public considerations to Louisiana of the highest magnitude; and those whose duty and interest it was to prevent it—the front owners—had extended to them, by the Spanish government, peculiar privileges, and which the United States at an early day recognized.

A board of commissioners was established by the act of March 2, 1805, whose duty it was to examine and report to Congress on French and Spanish claims to lands in that section of country; and by the supplementary act of April 21, 1806, section 5, it was made their further duty, among other things, "to inquire into the nature and extent of claims which may arise from a right to a double or additional concession on the back of grants or concessions heretofore made," "and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress at their next session. And the lands which may be embraced in such report shall not be otherwise disposed of until a decision of Congress shall have been had thereupon."

The commissioners were engaged for some six years in the Orleans Territory in pursuing their investigations, and their reports were laid before Congress by the Secretary of the Treasury early in 1812. But in the meantime it was well known what course had been pursued by the board in regard to all descriptions of claims, and among others of back concessions. Instances in the report will be found in 2 Am. State Papers, 297, 337. Of claim (p. 297) No. 101, the board says,—"Benj. Babin claims a second depth of forty arpents, lying immediately back of a front or first depth, which we have already confirmed to him among the confirmed claims."

"The claimant has no other foundation for his title to the second depth than having occupied the front and first depth, and having occasionally supplied himself with timber from this second depth."

"According to the laws, customs, and usages of the Spanish government, no front proprietor, by any act of his own, could acquire a right to lands further back than the ordinary depth of forty arpents; and although the Spanish government has invariably refused to grant the second depth to any other than

the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore we reject the claim." We give this as an instance of many similar ones reported.

*182] The statement applies to all front tracts, where only the first *forty arpents had been granted by France or Spain. Instead of granting the back lands as a donation, the government of the United States extended to the front owner a preference of entry, by the act of 1811; and if the entry was not made, the land was reserved, as above stated. No question affecting the titles to lands in Louisiana was more interesting to the old inhabitants, than the one concerning the back lands; and, although the former government had granted them in probably but few instances, yet this was quite immaterial to front owners at that time, as they had the privilege of getting wood and timber from them, and the lands were in no danger of being granted to another. That back lands at all times meant those in the rear between the extended front lines in the rear, to the distance of forty arpents (each line being a straight one throughout), we suppose to be undoubted, as a general rule, although there may have been exceptions to it.

Many tracts had no doubt been surveyed for the purpose of having them acted on by boards of commissioners; but the record does not show that any of the front tracts in township No. 11 had been surveyed by public authority; which could only be done, after the passing of the act of February 28, 1800, under the superintendence of the surveyor-general,—and all other surveys were, by the third section of that act, declared to be private surveys, on which no patent could issue for an incomplete claim, after it was confirmed by Congress. And this law applied equally to confirmations by the commissioners, under the act of March 3, 1807, whose adjudications were final, and authorized a patent to issue thereon.

When the first two acts of 1811 and 1820 were passed, it was known that no township surveys had been made in much the greater portion of the country to which the acts applied; in reference to this state of the country Congress legislated, and therefore it was provided by the fifth section of the act of 1811, that the principal deputy surveyor of each district should be, and was, authorized, "under the superintendence of the surveyor of the public lands south of the State of Tennessee," to cause to be surveyed the tracts claimed by virtue of that section, that is, preference rights; and in all cases where there were bends in rivers (as in the case before us), on which the granted tract bordered, and there were adjacent

claims of a similar nature, and each claimant could not obtain a tract of equal quantity with the original front tract, then it should be the duty of the surveyor to divide the vacant land between the several claimants, in such manner as to him might appear most equitable.

Three years were allowed from the date of the act for those entitled to give notice in writing, stating the situation and extent of the tract each wished to purchase; and for which he was to make payment according to the then credit system. But if he failed in either, the right to preëmption should cease and become void; and *the land might be [*183 purchased thereafter by any person, as other public lands. As no public surveys existed, from which it could be ascertained at the register's offices what the back lands of the numerous tracts were; and as entries were contemplated in advance of the public township surveys, some mode of ascertaining the quantity and form each front owner was entitled to was indispensable. And the mode adopted by Congress was to make the principal deputy-surveyor of the particular district the judge of form and quantity; subject, however, to the superintendence of his principal, the surveyor-in-chief of the lands south of Tennessee.

This officer (as well as the principal deputy) was, by the acts of 1812 (April 25th) and 1836 (July 4), subject to the direct control, and bound by the instructions, of the commissioner of the general land-office; and so was the commissioner subject to the control of the President, through the Secretary of the Treasury, as will be seen by the opinion of the Attorney-general of July 4, 1836 (2 Public Lands, Laws, Opinions, &c., 103). So that, in the end, it devolved on the President, by aid of the Secretary, as in other instances, to see the acts of Congress above set forth duly executed; and this was done through the commissioner of the general land-office.

On the 18th of March, 1833 (2 Land Laws, 573, No. 516), the commissioner, by an instruction to the registers and receivers of Louisiana, gave a construction to the act of June 15th, 1832:—1. That where the back lands had been offered for sale and sold, after the passing of the act, still the front owner was to be permitted to enter them. 2. Where the back tracts had not been surveyed and connected with the adjoining public lands, and the quantity could not be ascertained at the time of payment, the party claiming should be required to pay for the maximum quantity to which he could be entitled under the law; and any excess of payment found on actual survey should thereafter be refunded to the party,

on instructions to that effect, to be given from the general land-office.

The form of the receiver's receipt for the payment is there given; showing the land had not yet been surveyed. And the register was instructed not to transmit the certificate of purchase until the survey was completed, whereby the quantity would be ascertained. The commissioner also informed the registers and receivers that the surveyor-general had been directed to advise them as to the course to be pursued by the claimants in cases where the back tracts remained to be surveyed.

In executing the act of 1832, the foregoing instructions were of course pursued, and entries received on such notices of claim as parties saw proper to file, subject to the risk of being curtailed by the proper public surveys, approved by the surveyor-general. And Mr. Harper proves that on these *184] terms notices of claim were received, under the act of 1820, in 1822, when Bringier's claim was *entered. Harper was then the register at New Orleans. It is manifest that in no other way could the acts of 1820 or 1832 be executed, than by general surveys of the back lands, whereby the portion of each claimant was marked out. Nor could any survey in township No. 11 be recognized by the register after the appointment of the surveyor-general of Louisiana, and the extinguishment of the offices of the principal deputies (May 1st, 1831), other than such as were approved by the surveyor-general. None was made of Bringier's claim, so far as we are informed, before that time, which received the sanction of any department of the general land-office, and on which a patent certificate and patent could issue. Of Rightor's survey we have already spoken. Wilson's was a mere private act, at the instance of Bringier, and not recorded anywhere. The instruction of July 25th, 1838 (2 Land Laws, No. 1009), applies to Bringier's case as well as others; the register and receiver are there directed to issue the certificate of purchase in cases where an over-payment has been made for back lands, by "describing each tract by section, township, range, and area, as returned by the surveyor-general,"—assuming the plan approved by him to have settled the equities of parties claiming under the preëmption laws, as to extent and boundary. And our opinion is, that the survey of township No. 11, approved by H. S. Williams, surveyor-general of Louisiana, on the 5th of August, 1834, was made in execution of the acts of Congress, and governs the rights of the parties before this court; that to the land there designated as "back land" of the Whitehall tract, Bringier's equity attached, by his

notice of claim and the payment of his money, in 1822, and to none other. And that, by the same survey, the equities of Landry and Jourdan, acquired by their entries, are established as the better title to the extent of "back land" attached to their respective tracts by the survey. And to that extent they are respectively entitled to recover, as against the claim of the defendant, set forth in the answers.

Some stress, in the argument, was laid on the fact, that possession had been held of the land in dispute, under Bringier's claim, for more than ten years before the suits of Landry and Jourdan were brought, and therefore the petitioners were barred by prescription and limitation in Louisiana. Prescription of ten years' possession is relied on in defence by a direct plea, and made up part of the defence.

To this ground of defence, it is a sufficient answer to say, that Jourdan first acquired his interest in 1834, and Landry his, in 1836; up to that time the lands they claim belonged to the United States, as part of the public domain, and on which the defendant, Barrett, and those under whom he claims, were trespassers; and that no trespass of the kind can give title to the trespasser, as against the United States, or bar the right of recovery; nor had *the operation of time any [*185 effect as against Landry and Jourdan, until they respectively purchased.

By the Constitution, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States"; for the disposal of the public lands, therefore, in the new states, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title.

For the foregoing reasons, we order the judgment of the Supreme Court of Louisiana to be reversed, and that the cause be remanded, &c.

JEREMIAH CARPENTER, APPELLANT, *v.* THE PROVIDENCE WASHINGTON INSURANCE COMPANY.

A policy of insurance contained a stipulation, that if the insured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the company, and the same indorsed upon the

policy, or otherwise acknowledged by the company in writing, in default of which the policy should cease.

A bill was filed in equity by the insured, alleging that notice was given to the insurance company, and praying that the company might be compelled to indorse the notice upon the policy, or otherwise acknowledge the same in writing.

When the answer of the company, sworn to by the then president, denies the reception of the notice, to the best of his knowledge and belief, the question becomes one of fact and of law; of fact, whether the evidence offered by the complainant is sufficient to sustain the allegation; and of law, whether, if so, this court can compel the company to acknowledge it.

The answer being responsive to the bill, and denying the allegation, under oath, the general rule is, that the allegation must be proved, not only by the testimony of one witness, but by some additional evidence.[1]

Several qualifications and limitations of this rule examined.[2]

The circumstances of this case are such that the general rule applies.

Two witnesses are produced, by the complainant, to prove the notice, but neither of them swears positively to it, and the circumstances of the case do not strengthen their testimony.

The rules by which parties are sometimes allowed to introduce parol evidence with reference to a written contract do not apply to this case, where the parol proof is offered by the complainant, seeking to show a fact which, if true, would establish a breach of duty in the defendants, happening after the original contract was made.

The question of law which would arise if the notice were sufficiently proved by the complainant need not be decided in this case.

THIS case was brought up by appeal from the Circuit Court of the United States for the District of Rhode Island, sitting

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[1] S. P. *Pomeroy* v. *Manin*, 2 Paine, 476.

To outweigh such an answer, complainant must produce either two witnesses or one witness supported by corroborating circumstances. *Hughes* v. *Blake*, 6 Wheat., 453; *Union Bank* v. *Geary*, 5 Pet., 99; *Parker* v. *Phetteplace*, 1 Wall., 684; s. c., 2 Cliff., 70; *Tobey* v. *Leonards*, 2 Wall., 423; s. c., 2 Cliff., 40; *Towne* v. *Smith*, 1 Woodb. & M., 115; *Gould* v. *Gould*, 3 Story, 516; *Hough* v. *Richardson*, Id., 659; *Searcy* v. *Burton*, Cooke (Tenn.), 110; *Clark* v. *Hackett*, 1 Cliff., 269; *Delano* v. *Winsor*, Id., 501; *Hayward* v. *Elliott Bank*, 4 Id., 294; *Voorhees* v. *Bonesteel*, 16 Wall., 30; *Godden* v. *Kimmell*, 9 Otto, 206; *United States* v. *Scott*, 3 Woods, 334; *Vigel* v. *Hopp*, 14 Otto, 441. But circumstances alone, where the fact is one which, in the nature of things, cannot be within the personal knowledge of the defendant, will outweigh the answer, if sufficiently strong. *Clark* v. *Van Reimsdyk*, 9 Cranch, 153; s. c., 1 Gall., 630; *Parker* v. *Phetteplace*, 2 Cliff., 70; s. c., 1 Wall., 684; *Jones* v. *Abraham*, 75 Va., 466. And in so far as the answer sets up new facts, or defences, not responsive to the bill, it is not evidence in support of such facts and defences. *McCoy* v. *Rhodes*, 11 How., 131; *Gaines* v. *Hennen*, 24 Id., 553; *Randall* v. *Phillips*, 3 Mason, 378; *Flagg* v. *Mann*, 2 Sumn., 489; *Clements* v. *Moore*, 6 Wall., 299; *Gass* v. *Arnold*, 6 Baxt. (Tenn.), 329.

One witness may disprove the allegations in an answer to an injunction bill, such bill being sworn to by plaintiff. *Searcy* v. *Burton*, Cooke (Tenn.), 110.

In Vermont it is held that the answer is to be regarded as the deposition of one witness; and the complainant must produce evidence sufficient to overcome it. How much this must be depends, not upon the number of witnesses, but upon the nature of, and weight attributable to the answer, and upon the character of the adverse evidence. *Veile* v. *Blodgett*, 49 Vt., 270.

The rule does not apply to a verified answer in an action under the New York code. *Stilwell* v. *Carpenter*, 2 Abb. (N. Y.) N. C., 238.

[2] See *Taylor* v. *Benham*, 5 How., 275.

as a *court of equity. The bill was filed by Carpenter against the insurance company, and referred to an action at law, which he broug ht against said company, in 1839, and which was brought, by writ of error, to the Supreme Court of the United States. It is reported in 16 Pet., 495. The opinion of the court sets forth the facts in the case, and they need not be repeated.

The present bill averred that the Providence Washington Insurance Company did receive notice of the existence of an insurance made at the office of the American Insurance Company, which said notice was given under the terms of the policy, and that it was the duty of said Providence Washington Insurance Company to have indorsed said notice upon said policy, at their office, or otherwise acknowledged the same in writing, by reason of which neglect the complainant lost his right at common law to claim the amount of the insurance, viz., fifteen thousand dollars. It then prayed for a decree to compel the said company to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done, and further to compel the said company to pay the said sum of fifteen thousand dollars, with interest, &c., &c.

By referring to the record in the former suit, it will be seen that Carpenter and his assignors obtained policies of insurance from two companies, as follows:—

Providence Wash. Ins. Co.	American Insurance Co.
1835. September 27.	1836. December 12.
1836. September 20.	1837. December 14.
1837. September 27.	1838. December 11.
1838. September 27.	

Prior to the policy of December 12th, 1836, the then owner of the property insured made an erroneous representation of the value of the property proposed to be insured, which vitiated the policy, and a suit brought upon it was abandoned.

The policy of September 27th, 1838, upon which the suit at law and the present proceeding in chancery were founded, contained, amongst other provisions, the following:—

"And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect."

"And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, nor mentioned in nor indorsed upon this policy, then this insurance shall be void and of no effect."

*187] *Annexed to the policy were the proposals and conditions on which the policy was asserted to be made, one of which was as follows:

"V. Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on this policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon; otherwise the policy made by this company shall be of no effect. And in cases of subsequent insurances on property insured by this company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be indorsed on the policy made by this company, or otherwise acknowledged in writing; in default whereof, such policy shall henceforth cease, and be of no effect. And in case of loss, this company shall be liable for such ratable proportion of loss or damage happening to the subject insured, as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies."

In the suit at law, the court decided,—

1. That the circumstance of the early policies being held by mortgagees did not, of itself, dispense with the necessity of a notice by Carpenter.

2. That the misrepresentation to the American Insurance Company did not, of itself, make the policy absolutely void, so as to dispense with the necessity of notice.

3. That, at law, whatever might be the case in equity, mere parol notice of the insurance made in the American Insurance Company was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect.

Under this decision, the plaintiff, Carpenter, having lost his suit, filed a bill on the equity side of the court, averring that in December, 1836, and December, 1837, and at divers other times, the Providence Washington Insurance Company had notice from Wheeler & Co. of the insurance at the office of the American Insurance Company, and that said notices were given for the purpose of having the same indorsed

on the policy at the office of the Providence Washington Insurance Company, or otherwise acknowledged by them in writing. The bill further averred, that it was the duty of said insurance company to have indorsed said notice upon said policy at their office, or to have otherwise acknowledged the same in writing. The prayer of the bill is recited in the commencement of this statement.

The defendants filed an answer and an amended answer. In the amended answer, they deny that said policies of insurance, or *either of them, executed by the said [*188 American Insurance Company, and bearing date the 12th day of December, A. D. 1836, the 14th day of December, A. D. 1837, and the 11th day of December A. D. 1838, were notified to these defendants in any form, or that these defendants had any knowledge or suspicion of the existence of said policies, or either of them, until long after the execution, by these defendants, of the policy of the 27th day of September, A. D. 1838.

They then aver, that they executed said policy of the 27th of September, A. D. 1838, in entire ignorance of all said policies at the said American Insurance Office, and in the full belief that the said policy by these defendants was all the insurance which the said plaintiff had on the property insured.

They object to the admission of any evidence that said policies by the said American Insurance Company, of the 12th of December, A. D. 1836, and the 14th of December, A. D. 1837, were notified to these defendants, except the mention of said policies in the policy executed by these defendants, or the indorsement of the same thereon; and also object to the admission of any evidence that said policy executed by the said American Insurance Company on the 11th day of December, A. D. 1838, was notified to these defendants, except the indorsement of said notice on said policy of the 27th of September, A. D. 1838, or an acknowledgment by these defendants in writing of such policy.

The answer then sets out specifically the misrepresentation under which the American Insurance Company had executed the policies of 1836, 1837, and 1838, and claims the benefit of it, alleging that if notice had been given to the defendants of these policies, their existence, coupled with the representations which had been made, would have led the defendants to believe that both policies would have left a sufficient proportion of the property at the risk of the owner, and consequently they would have had no objection to executing the policy of the 27th of September, 1838, or to indorsing a notice of the policy of December 11, 1838, upon their policy.

The answer then pleads the former verdict and judgment in bar.

Amongst other evidence taken in the cause were the depositions of Samuel G. Wheeler, a former owner of half the mill, Allen O. Peck, secretary of the American Insurance Company, and Warren S. Greene, the secretary of the Providence Washington Insurance Company from October, 1836, to that time.

Wheeler deposed, that he caused insurance to be effected upon the property in December, 1836, at the American office in Providence; that there was a preëxisting policy in the office of the Providence Washington Insurance Company; that he gave notice, by letter, to the late president of the latter com-
*189] pany, Mr. Jackson, of the insurance effected in the former about the time when it *was done, viz. in December, 1836; that he had no copy of the letter; that the recollection was distinctly on his mind that he did write such a letter; that he was an agent for the Providence Washington office, and well acquainted with the terms and conditions of a policy of insurance, and of the necessity of giving notice.

On his cross examination, he stated the contents of the letter to be a notice of the insurance of $6,000 at the American office, with a request that the necessary entry should be made on the books of the company; that he could find no letter from Mr. Jackson, in reply; that he had not any distinct recollection of having received a reply; that he had no business of his own which required a clerk, and therefore employed none for himself; that his impression was, that he put the letter into the post-office, but could not say positively; and in reply to an interrogatory why he did not take a copy of the letter to Mr. Jackson, answered as follows:

Answer. "The first reason is, which may have operated on my mind, that I did not at that time know that it was necessary to get from the office an acknowledgment in writing that notice had been received. I supposed it only necessary to make the communication in the usual way. And the other was, that after I removed to New Jersey, my correspondence was so limited, that I did not always take copies; sometimes they were copied by members of my family, sometimes I copied minutes only, and sometimes didn't copy at all."

Allen O. Peck being sworn, and shown the letter from Samuel G. Wheeler to him, dated December 13th, 1837, and a copy of his reply, dated December 14th, 1837 (above referred to), testified, that it was the common practice to carry letters of this nature to the Washington office; that he recollected distinctly having an interview with Mr. Jackson, president of the Washington Insurance Company, upon the subject, at the

Washington office; and that he had no doubt that he did carry the letter from Samuel G. Wheeler, of December 13th, 1837, to the Washington office, and show the same to Mr. Jackson; but he had no recollection of so carrying said letter, or handing it to Mr. Jackson; that his impression that he did carry said letter, and present it to Mr. Jackson, is derived from the fact that it was his custom to communicate such information in that way; that whatever communication was made, was made to Mr. Jackson; that the representation referred to in the first letter of Samuel G. Wheeler to the American office, as being in the Washington office, was obtained by him from the Washington office for examination; that whatever communications were made by him were made to Mr. Jackson, he being the active organ of the company; that he had no doubt he did show the letter aforesaid to Mr. Jackson, but that he had no recollection of having *done so, and that the statement he now makes, that [*190 he did so, is founded on the fact that such was his practice in similar cases; that Mr. Jackson died in 1838.

Warren S. Greene deposed that there was no record, memorandum, or notice on the books, records, or papers of the Providence Washington Insurance Company of insurance on the Glencoe Mill by the American Insurance Company; that Mr. Jackson, late president of the office, died on the 18th of April, 1838, having been confined to his house by sickness between two and three weeks; that he was not confined so as to keep him away from his business till his last sickness.

The complainant took the depositions of Joseph Strong, Richard A. Reading, Edward W. Laight, and Lewis Phillips, of the city of New York, and Joseph Balch and Charles W. Cartwright, of Boston, as to the usage and practice of insurance companies, who testified that it was not the practice of their or other offices, after notice of a policy upon the same property at another office, to require notice of the renewal of such policy at such other office. To cross interrogatories, these deponents replied, that notice should be given in the manner prescribed in the policy, and that where such notices were verbal they were not sufficient, unless some memorandum of them was made on the books of the company; that the practice of not requiring notice of the renewal of other insurance was confined to cases where the original notice was given in the mode prescribed in the policy.

At November term, 1843, the cause came on for hearing, upon bill, answer, and the testimony, when the court decreed that the bill should be dismissed, with costs.

From this decree, an appeal brought the case up to this court.

The case was submitted on printed arguments, by *Mr. Whipple* and *Mr. Wood*, for the appellant, and *Mr. R. W. Greene* and *Mr. Sergeant*, for the appellees.

As the decision of the court turned upon the sufficiency of the proof of the fact that notice was given to the company, the arguments of counsel upon other points are omitted.

Mr. Whipple, for the appellant, stated the case, and then proceeded.

The whole case (with the exception of something about the merits having been tried at law) is involved in the above extracts from the answers, and they present two questions. First, Is there sufficient proof of the fact of notice? and, secondly, If there is, will the misrepresentation at the American office have the same effect as if it had been made at the Washington office? The last is in the nature of a preliminary question, and entitled to the earliest attention.

*191] (*The argument upon this point is omitted.)

The great, and I consider the only, question in the case is the sufficiency of the evidence to establish the fact of notice to the Washington office previous to September, 1838 (the date of the last and existing policy sought to be reformed), of the existence of a previous policy at the American office upon the same property. I say a previous policy at the American office, because there never was but one policy at that office, the policy of the 12th December, 1836. No new policy was ever effected, but that policy, that insurance, was renewed on the 14th December, 1837, by a renewal receipt, and again renewed in December, 1838.

The representation of December, 1836, extended to all subsequent renewals, because it was the same insurance.

The clauses in the policy now in dispute require that notice shall be given of "any other insurance" prior to or subsequent. If notice had been given to the defendants of the policy at the American office of the 12th December, 1836, and indorsed upon the policy of the defendants, it would be a strained construction of the words "any other insurance," to extend them to subsequent renewals of the same policy. Without any previous knowledge of their opinions or practice, the plaintiff has taken the depositions of the most experienced underwriters in Boston and New York.

The interrogatories propounded are in page 70 of the record. By the answers of Joseph Balch and Charles W. Cartwright, it appears, 1st, that notices are usually verbal; 2d, that it is the practice for the office to note the notice on the margin of

the policy; 3d, that it has not been the practice to require notice of the renewals of policies.

By the depositions of Strong, Phillips, Reading, and Laight, it appears, 1st, that notices are usually verbal; 2d, that it is considered the duty of the office either to reject the proposition and cancel the policy, or to make the indorsement on the books of the company or on the policy; 3d, that it is not the practice in New York to require notice of a renewal.

It further appears by the depositions, that it is not the practice in New York or Boston to make such a defence, unless in cases of a well grounded belief that fraud has been practised.

The defendants have not attempted to establish any different practice or usage in Providence. Here, as everywhere else, these notices are usually verbal.

Mr. Reading says,—"When notice is given of another policy, we receive or reject it. If we reject it, we cancel our own policy. If we accept it, we require no notice of the renewal."

I have referred to the answers to the cross interrogatories by the defendants. The answers to the direct interrogatories are equally strong and conclusive.

The prayer of our bill is for a "decree compelling [*192 said company *to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done," &c.

In the first place, it is not a bill to reform a written instrument. We do not ask that one line or one letter of the policy of September, 1838, should be altered, or differently interpreted from the usual meaning of the words. We do not say that something was omitted which ought to have been inserted, or something inserted which should have been omitted. The policy reads as both parties supposed it read, and means what both supposed it meant. No accident or mistake has prevented the exact meaning and intention of both the parties from being fully and fairly expressed.

In bills for reforming written instruments, the proof is required to be much stronger than in ordinary cases, because there is always a presumption, a very strong presumption, that an instrument which has received the examination and scrutiny of both the parties fairly embodies the meaning, and the whole meaning, of both the parties. In cases of this sort, says Mr. Justice Story, in his Commentaries on Equity, vol. 1, pages 168 and 169, the rule is, that the fact must be "clearly made out by satisfactory proofs." Relief will be refused, says the same learned writer, "whenever the evidence is loose,

equivocal, or contradictory, or is in its texture open to doubt, or to opposing presumptions."

These and other rules of construction laid down by the same learned writer are all founded in great good sense, and illustrate most fully the wisdom of this branch of the law. As you increase the presumptions against the relief sought, you increase the necessity for proof strong enough to overcome them, just as a head wind and tide require more nerve and vigor at the oar.

Every case cited by the author in relation to insurance were attempts to alter the original policy. Every bill to reform a written instrument or contract is a bill to alter the contract. But the present is more like a bill for the specific execution of a contract. It goes not behind, but in front of, the contract. It requires a party to fulfil what he agreed to fulfil in this very contract. The company agreed that, upon receiving notice of any other insurance, they would assent or dissent. If the former, that they would enter their assent upon the policy or in some other writing. If they dissented, that they would notify us and cancel their policy. Instead of undoing what has been done, the object of our bill is to compel the other party to do what he has left undone. He has contracted to do certain things upon our giving a certain notice. The contract specifies no form of the notice. It may be in writing or verbal. It may be formal or informal. All that the underwriters require is, that in case of any prior or subsequent insurance, the insured will let them know it.

*193] It is like all other liabilities depending upon notice, —the liability *of an indorser or other surety in special cases,—like all other liabilities, throughout the whole range of human transactions, which are dependent upon the happening of some contingency. When the ordinary evidence is given and not contradicted, the evidence which is usually given of such contingency, the liability becomes fixed, unless that proof is opposed by counter proof. I say counter proof, because, unlike the bill to reform a written agreement, there are no counter presumptions. Giving notice is an act *in pais*. The law neither presumes that it was or was not given.

Many a poor wretch has swung upon the gallows without half the evidence that we have presented. Many and many a conviction has been had, directly against the legal presumption of innocence, upon evidence not half as precise and direct, nor proceeding from men of half the character and intelligence.

I do not perceive why this office, with so many years' premiums in their pockets, paid by my unfortunate client, should

be entitled to stronger evidence than is usually given of such facts.

This brings us to the question of the evidence itself. The party who gave the notice was Samuel G. Wheeler, who became a purchaser in October, 1836, and parted with all his interest in the property on the 6th of December, 1837. On that day he conveyed his moiety to Jeremiah Carpenter, the present plaintiff. The policy at the American office was effected by Wheeler on the 12th day of December, 1836.

In the first place, then, it must be admitted that Samuel G. Wheeler was aware of the necessity of giving notice, and that he had no design to conceal the existence of the policy at the American office. In both his depositions, he states that he then was and for a long time had been the agent of the Washington office to procure policies for them in New York and elsewhere.

This agency is admitted, consequently his knowledge of the necessity of notice is admitted.

In the second place, he had no design to conceal the second policy, for in his first application to the American office (see his letter of 14th November, 1836, and letter of Thornton in reply), he refers Mr. Thornton to the Washington office for a description of the property. Mr. Thornton in his reply says, —"The survey at the Washington office was examined." It would be preposterous, after this, to pretend that Wheeler did not intend to give notice of the second policy. Had he intended a fraudulent concealment of an over insurance, he would have applied to an insurance office in a remote state, and not under the very eye of the defendants, referring to them for information.

Two facts, then, must be admitted; 1st, that Wheeler knew of the necessity of giving notice, and that he intended to give it. Accordingly we find the positive testimony of Wheeler,—

*"I gave a notice, by letter, to the late president, Mr. Jackson, about the time the insurance was effected, [*194 in December, 1836."

And again:—

"The recollection is distinctly on my mind at the present moment that I did write such a letter."

In his cross examination he says,—

"It was a notice of the insurance of $6,000 at the American office, with a request that the necessary entry should be made on the books of the company." "My impression is, that I put the letter into the post-office myself."

But this is not all. On the 13th of December, 1837, he wrote to the American office that he had sold his half of the

mill to Jeremiah Carpenter, and requested a renewal receipt to him. He also says,—

"There is insurance on this mill at Providence Washington Insurance Company for $15,000. Will you be so kind as to notify them of the change of owners, and when you write to Mr. Carpenter state to him that you have done so."

On the day succeeding, the Secretary of the American office wrote to Carpenter, that

"I have notified the Providence Washington Insurance Company that Mr. Wheeler has disposed of his interest to you, of which they have made record. This company has made a similar record."

It seems that, out of greater caution, Wheeler, on the same day, 13th December, 1837, wrote a similar letter to the Washington Company.

Mr. Allen O. Peck, secretary of the American Insurance Company, swears,—

"That it was the common practice to carry letters of this nature to the Washington office; that he recollected distinctly having an interview with Mr. Jackson, president of the Washington Insurance Company, upon this subject, at the Washington office; and that he had no doubt that he did carry the letter from Samuel G. Wheeler, of December 13th, 1837, to the Washington office, and show the same to Mr. Jackson; that his impression that he did carry the letter and show it to Mr. Jackson is derived from the fact that it was his custom to communicate such information in that way; that whatever communication was made, was made to Mr. Jackson."

He again repeats, at the close of his deposition,—

"That he had no doubt he did show the letter to Mr. Jackson, but that he had no recollection of having done so."

It seems, also, that Mr. Peck was the man who went to the Washington office in November, 1836, to obtain the representation of the property, and that he borrowed it for the use of the American office.

*195] *Upon this proof, can there be any reasonable doubt that notice was given?

Wheeler swears to the fact unhesitatingly. His whole subsequent conduct was based upon the belief that notice had been given. It is certain that he intended to give notice, for he referred the American office to the representation of the property at the Washington office, in December, 1836. His testimony is not only unimpeached, but it is not even brought into question.

Then it is also certain, that Wheeler wrote the letter of the

13th of December, 1837, requesting the secretary of the American office to notify the Washington office of the change of owners. It is equally certain that Mr. Peck, then a clerk in the American office, did go to the other office, and did have an interview with Mr. Jackson upon that subject. He swears that he recollects the interview distinctly. Suppose he had stopped here, would not the evidence of notice have been sufficient? Was it ever known that an officer of one office went to another to give notice of a change of owners, unless there were policies upon the same property in both? Mr. Peck swears that he very often went upon such errands, but he does not swear to an instance unless both offices were upon the same property.

But Mr. Peck goes further, and swears that he has no doubt that he read or showed the letter to Mr. Jackson, because such was the custom, such his practice. Mr. Peck must mean that such was his invariable custom; for if he sometimes showed the letter and sometimes kept it back, he could not swear that he had no doubt in relation to the fact in this particular case. Do we not all know that it is an invariable custom? When mercantile information is requested to be communicated to others, and the person receiving that information takes the letter with him for the sole purpose of communication, and carries it, not in his pocket-book, but in his hand, are we to suppose that we would depart from an established custom, and neither read nor show the letter?

It must be remembered that all the other statements or facts are certain. That he did go there is certain, because the contemporaneous correspondence shows it. That he had no other business there, that he started with this letter in his hand, that he had an interview with Mr. Jackson upon this business, is all certain; that is, it is legally certain. It is sworn to by an honest and disinterested witness, whom no man has yet doubted.

The court will observe that Wheeler, in his letter to the American office, of the 13th of December, 1837, does not request the secretary to give notice to the Washington office of the existence of a policy at the American office. He acted, in December, 1837, upon the belief that he had given that notice in December, 1836. His not giving that notice a second time is a confirmation of his testimony that he did give it in 1836, because he must have *known that the [*196 fact of an officer of the American office (who had been there before for a statement of the property) going to notify a change of owners would necessarily imply that there was a policy at the American office. This silence about the American policy

proves that Wheeler, in December, 1837, had no doubt that he had given notice in 1836, because this was before any dispute was apprehended.

When the loss took place, in April, 1839, Carpenter had no doubt that notice had been given of the American policy, for in his preliminary proof forwarded to the Washington office, he states that the property was insured by both offices.

It will be remembered that the letter of the 13th of December, 1837, which Peck carried in his hand to the Washington office and showed to Mr. Jackson, contained the statement of the policy at the American office.

How is this evidence met?

The answer is not evidence for the respondents.

The testimony of a single witness prevails against the denia. of an answer sworn to only by a defendant who has no personal knowledge of the facts. *Combs* v. *Boswell*, 1 Dana (Ky.), 474; 3 Eq. Dig., 385–388; *Pennington* v. *Gittings*, 2 Gill & J. (Md.), 208; *Clark* v. *Van Riemsdyk*, 9 Cranch, 153; *Knickerbacker* v. *Harris*, 1 Paige (N. Y.), 209.

The answer, then, is most clearly no evidence for the defendants. It purports to be the answer of the Providence Washington Insurance Company. The first answer states that these defendants answer and say, "They never had any notice in any form" of the three policies of December, 1836, 1837, and 1838, at the American office.

"That the policy of the 27th of September, 1838, was executed by these defendants in entire ignorance of said policy, and of the renewal thereof, executed by the said American Insurance Company."

In the amended answer, they deny that the policies at the American office "were notified to these defendants in any form, or that these defendants had any knowledge or suspicion of the existence of said policies, until long after the execution, by these defendants, of the policy of the 27th of September, 1838."

This amended answer was sworn to on the 7th of November, 1843.

They do not say, "until long after the loss in April, 1839," but long after September, 1838; and before April, 1839, they had notice of these policies at the American office. Then these directors, this company, or some of them, admit that before the loss they had notice of the policy at the American office.

From whom did this notice proceed? At what time? What was the notice to these defendants? Did some one

of their own *company tell them that notice had been given by Mr. Peck to Mr. Jackson, in December, 1837?

Did not the notice, which by their answer they acknowledge they received before the loss, refer back to 1837? Did it not proceed from the agencies which we had established? From the American office, or some of its officers? If it proceeded from the agents, it proceeded from us. Why keep back the time and the source and the extent of this information? If a disclosure of the whole truth would not have injured their case, they would have disclosed the whole.

But the amended answer states that they had no knowledge or suspicion of the policies at the American office, until long after September, 1838.

If such be the fact, it establishes one very important point in the case. It proves that Mr. Jackson was not in the habit of communicating all the transactions of the office, however material to the interests of the whole. If they had no suspicion of policies at the American office, they remained in entire ignorance of the fact, that in November, 1836, the clerk (Mr. Peck, at that time) went to the Washington office, at Wheeler's request, and borrowed the representation of the property made to the Washington office by Egbert Reed & Company, in September, 1835.

Mr. Peck returned that representation. They were ignorant of that also. Mr. Jackson knew of this. Mr. Greene, the witness, knew of this, for he was the secretary at the time and probably delivered the paper. He does not swear that he had no suspicion of a policy at the other office until September, 1838. But this answer shows that none of the other members of the company knew of it.

So far as the answers go, they confirm the testimony of the plaintiffs.

The only testimony on the part of the defendants is filled with the same tendency.

Mr. Greene was the secretary of the office from October, 1836, down to the time of giving his deposition.

He swears that there was no letter on file from Wheeler giving this notice, and no copy of any answer to it; and that it was the usage to file and preserve the letters and copies of the answers.

Dabney swears that such was the practice at a preceding period.

The tendency of the evidence is to lessen the weight of Wheeler's deposition. It creates a counter presumption; how strong the court will judge.

But what is very important is, that Peck's testimony has

been long known to the defendants. He was sworn as a witness upon the trial at law. Greene was subsequently called, and from that day to this they have never asked Greene
*198] whether he was present when Peck carried Wheeler's letter to Mr. Jackson. The secretary *is usually at the office from the time of opening to the time of closing its doors. Peck was there the 13th of December, 1837.

Not a question is put to Mr. Greene in relation to this fact. He is not asked when he first knew of the policy at the American office. If it was important for the new president, Mr. Dorr, who was elected in May, 1838, to state that neither he nor the company ever knew or suspected the existence of these American policies until long after September, 1838, how much more important was it to them that the secretary never suspected their existence at a long anterior period; the man whose ignorance of their existence would have established a most formidable presumption against the plaintiff.

He says nothing about either of Peck's three visits upon this very business. In the first place he went for the representation, in November, 1836. The paper was in Greene's possession, for he was the secretary. He obtained it, no doubt, from Greene. He returned it to Greene. He had a conversation the next year, during business hours, when Greene must be presumed to have been present.

The defendants long since must have seen that Peck's testimony was upon a vital point in the case. They are at great pains to establish the ignorance of Mr. Dorr, who had no connection with the office at that period; so great that Mr. Dorr swears for himself and the company, in his first answer, that he never suspected the existence of these policies; and in the second, that he did not suspect their existence until long after September, 1838; and although their swearing, which is not evidence, is deemed so very important, yet the swearing of the man who was a competent witness, and most likely to have heard of the fact, had notice been given, is deemed of so very little moment, that not a single question is put to him upon the subject!

He has been called three times as a witness, once upon the trial at law, in November, 1839; once upon this bill, on the 11th of November, 1843, when he was asked, whether there was any entry of notice upon the books of their office; and again, as late as the 16th of January, 1844.

Upon neither of these occasions have the defendants hazarded the question, what passed between Mr. Peck and Mr. Jackson, nor the question, when he first knew of the policies

at the American office. He was their witness, and they asked such questions only as would elicit favorable answers.

To be brief, then, in the mere opening of this important case, we do say, and say earnestly, that the answers and testimony of the defendants go strongly to confirm the testimony of Peck.

Our claim to the entry of this notice upon the policy, together *with a claim for relief under this bill, will be more properly enforced in the closing argument. [*199

We suppose the real truth of the case to be, that it was wholly and entirely owing to the neglect of Mr. Jackson that the entry was not made in the books of the company. In December, 1837, he had reached an advanced age. Though he did not wholly retire from business until March, 1838, yet it is well known that he had been out of health for a long period, and consequently more indifferent to all business concerns. Had Mr. Jackson been living and in health in September, 1838, when the policy was renewed, some entry would have been made. When he received notice, he probably deferred any action upon it until more information was obtained. The renewal of the policy found a new president, and the company took a new premium for another year, with notice of a policy at another office. Can this be permitted?

Mr. R. W. Greene and *Mr. Sergeant*, for the appellees.

The bill charges, "that in the month of December, A. D. 1836, and in the month of December, 1837, and at divers other times, the said Providence Washington Insurance Company had notice of the said insurance at the office of said American Insurance Company, and that said notices were given for the purpose of having the same indorsed on the policy at the office of the said Washington Insurance Company, or otherwise acknowledged by them in writing."

The defendants deny that they have received notice of these policies in any form, either by writing or parol; and we will proceed, in the first place, to consider this question upon the evidence which is in the cause, assuming, for the purposes of the present argument, that this evidence is admissible; and not now inquiring whether, even if it were proved, it constitutes a ground of equity upon which this court can proceed.

The only evidence in the cause to prove notice of the policy of December, 1836, is the deposition of S. G. Wheeler. The report of his testimony, contained in the bill of exceptions, is not evidence in the present suit.

He states in answer to the fourth direct interrogatory,—"I gave a notice by letter to the late president, Mr. Jackson,

about the time the insurance was effected at the American office, in December, 1836."

In answer to the ninth cross interrogatory,—"Did you put said letter in the post-office yourself, or send it by some third person?"—he says, "My impression is, that I put it in the post-office myself, but I cannot say positively."

This evidence totally fails to prove even that a letter was *200] deposited in the post-office. The witness says, in terms, that he cannot *say positively that he did put it in the post-office, though his impression is that he did so.

Suppose these defendants were sued as the indorsers of a promissory note, and the defence was want of notice. The rule in such cases is not, that the holder of the note is bound, at all events, to give notice to the indorser, but he must use reasonable diligence to do so; and if, notwithstanding reasonable diligence, the indorser does not receive the notice, that is his misfortune, and constitutes no defence against the note. It has accordingly been decided, that if a holder put a letter in the post-office at the proper time, and properly directed, giving the indorser notice, this is enough, although the letter may never be received. But this deposition of Wheeler does not bring the case even within this rule. The deposit of the letter in the post-office is not proved. The witness merely gives a loose impression, six years after the date of the transaction, and after the loss has happened.

By the clause in the policy of the defendants, requiring notice of prior and subsequent insurance, the insured is bound at all events to give notice to the defendants, and to bring it home to their knowledge. Whether any other evidence except that agreed upon in the policy can be received, that is, whether the contract can be altered from its own express terms, so as to make it a different contract from the one expressly agreed upon, is another question to be considered hereafter; but assuming for the present that the evidence is admissible, it must nevertheless prove actual notice brought home to the defendants. And in a case where the parties have agreed in the policy upon written evidence as the only proof of notice, the court, if they were to admit parol proof at all, would at least require that this proof should be clear and positive. Even if the deposit of the letter in the post-office had been proved beyond all doubt, it would only have furnished a presumption of its receipt by the defendants, liable to be rebutted by counter proof. In the case of a note or bill, the party is only required to use due diligence, which is defined by law. But here, by his own express agreement, he is to give the notice, so that the underwriter may act upon it.

And it is most clear, that nothing is notice, according to the policy, which does not so reach the insurer that he can give it an answer. To send a notice is not enough. No diligence is enough. The contract is not to use diligence, but to give the notice effectually. If a hundred notices were sent, and no one of them reached the insurer, the case of the policy would not be made out.

There are many circumstances connected with this letter, which show that Mr. Wheeler must be mistaken in supposing that he wrote it.

No copy of it was taken. The counsel for the plaintiff says Wheeler was fully aware of the importance of this notice, and was *determined to give it. In answer to [*201 the seventh direct interrogatory, he says:—"After retiring from business, in August, 1836, and removing from New York to New Jersey, I did not always take copies of my letters. I would sometimes take copies of the leading points; and at other times didn't take copies at all."

Here was a letter involving the safety of a policy for $15,000 of property, of the importance of which, it is said, he was fully aware. It must necessarily have been brief, not more than two or three lines. One would suppose that Mr. Wheeler would, at least, have taken a copy of the leading points of so important a communication. When in business in New York, he says he had a clerk who always copied his letters, and when in New Jersey he had no regular clerk for himself. This witness is a shrewd business man, accustomed to business correspondence, aware of the importance of preserving copies of his letters, and was in the habit of taking copies of some of his letters at the time he says he wrote this.

Of this brief but important letter, it seems, he did not think it worth while to take a copy himself, or even minutes, or to request any one of his family to do so for him.

By the twentieth cross interrogatory, he is asked why he did not take a copy of this letter, being the same question which had been put by the seventh direct interrogatory.

He says, in answer:—"The first reason is, which may have operated on my mind, that I did not at the time know that it was necessary to get from the office an acknowledgment in writing, that notice had been received; I supposed it only necessary to make the communication in the usual way." How can this be? The same clause in the policy, which requires the notice, prescribes the mode in which it is to be acknowledged. This reason was discovered between the time of answering the direct and the cross interrogatory. In the policy at the American office, the Washington office policy

is mentioned, in strict conformity to the provision of the American office policy, which is similar to the provision of the Washington office policy.

But aside from this, Wheeler knew that notice was at least important, whether acknowledged in writing or not, and would he not have preserved so important a piece of evidence of the fact of notice as a copy of the letter containing it?

Again, he received no letter from Mr Jackson in reply.

Why did he not write again? He knew that such a letter, if received, would be answered by the Washington office, according to their invariable practice? Again, why did he not inquire of Mr. Jackson, the president of the company, about this letter when he next saw him?

The papers in the case show, that Wheeler was a man of unusual caution and care in business. The changes of property were *all promptly and duly notified to both offices. The sale of his half of the mill to the present plaintiff, Carpenter, was notified to the Washington office by letter, dated December 13, 1837. Not satisfied with this, which was the usual mode, he on the same day, in a letter to A. O. Peck, notifying the American office of the same sale, requests Peck to notify the Washington office of the change of owners, and when he wrote to Carpenter, to inform him that he had done so. All this care is taken for his son-in-law and brother, but for himself he is content to write a letter; he is not certain that he put it in the post-office himself; he takes no copy; although he received no reply, he never wrote again, nor when he met the president, made any inquiry about the matter, and never knew whether it was received or not.

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We think these circumstances show that Mr. Wheeler is mistaken in his recollection, when he says he wrote such a letter. We should have been better satisfied with Mr. Wheeler's testimony, if he had produced to us his letter-book, by which we could see whether copies of letters written at and about this very time were not taken.

But however this may be, we submit to the court there is no proof whatever that such a letter was ever put in the post-office. And we might safely leave the cause upon the plaintiff's proof alone.

But how stands the counter proof?

In the first place, notice is denied in the original and amended answer in the most positive form.

The answers are sworn to by Sullivan Dorr, the president of the company, who was such at the date of the policy of September, 1838, and for some time before. All who know Mr. Dorr will agree with me in saying he is incapable of

making, still less of swearing to, a statement which he does not conscientiously believe to be true.

The plaintiff's counsel cavils at the difference between the two answers in the mode of denying notice.

The amended answer was made for the purpose of setting up the judgment at law as a bar to the plaintiff's bill, and not to alter the allegations of the first answer, denying notice.

Both answers deny that notice was ever given to the defendants, in any form, of said policies, or either of them.

Both these statements are true. They never had notice in the sense of the policy; that is, notice to be indorsed or acknowledged. They never knew or heard of the policy at the American office until after the loss; then the policy at the American office necessarily became public, and in the first proof of loss presented to the Washington Company, the insurance at the American office is stated.

In another part of the amended answer, it is stated that the said *policies at the American office were not [*203 notified to the defendants in any form, or that the defendants had any knowledge or suspicion of the existence of said policies, or either of them, until long after the execution by the defendants of the policy of September 27th, 1838.

This difference was without any design. The counsel who drew the answer supposed it was sufficient to deny notice until long after the policy on which the defendants are sued was executed. If the defendants executed the policy of September, 1838, without ever having received any notice of any policy at the American office, and in entire ignorance of the fact of any such policy, that is fatal to the plaintiff, and it was not material at what time after that the defendants came to the knowledge of the further insurance. It is not pretended that the defendants had any notice or information of the policy at the American office after they subscribed the policy of September, 1838. The plaintiff must have but a slight foundation for his claim of notice, when he attempts to draw aid from such an answer.

But throwing the answer aside, let us consider the proof of the defendants.

Warren S. Greene, a witness on the part of the defendants, states:—"That he had been secretary to the Washington Insurance Company since October, 1836; and that no letter was received from Samuel G. Wheeler, giving notice of the insurance at the American office, and that from the course of business in said office he must have known it, had any such letter been received; that he could find no letter from Samuel G. Wheeler to the Washington Insurance office, giving notice

of the insurance at the American office, and that there is no record at the Washington office of further insurance at the American office, and that there was no copy of a letter acknowledging information of the policy at the American office; that the invariable practice of the office was, when notice was received of any subsequent insurance, for the directors to take the same into consideration, and to give an immediate answer to the insured, whether or not they consented to the indorsement of such subsequent insurance on the policy. That it was also the invariable practice of the office carefully to preserve all letters by them received, and also to keep copies of all letters by them written."

Charles H. Dabney, predecessor of Mr. Greene, confirms his testimony in relation to the usages of the office.

If Wheeler had sworn positively that he put a letter in the post-office, directed to the President of the Washington Insurance Company, at Providence, containing the notice of the insurance at the American office, it would at most but furnish a presumption that the letter was received,—a presumption liable to be overthrown by proof that it was not received. We have, on this point, *the positive testimony of the secretary of the company, whose duty it was to take all letters from the office directed to the company, to file all letters received by the company, and to preserve copies of all letters written by the company. If such a letter had been received, he must have known it. He says:—"There is no record, memorandum, or notice on the books, records, or papers of that office, of insurance on the Glencoe Mill by the American Insurance Company."

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His testimony is confirmed by the fact, that the directors were never called together, nor any consultation had, in relation to any such letter. It is confirmed further by the fact, that no letter was ever written to Mr. Wheeler in reply, either consenting to the further insurance, or objecting to it.

It is, too, utterly incredible that the directors of this company, if such a letter had been received, should not have taken some action upon it. They had already insured the property to the amount of $15,000, the largest amount taken upon any one mill, and they had insured it to within three fourths of the value put upon it by the owner, which, it is well known, is always a liberal estimate, and one they did not exceed. Three fourths is the largest amount which the company insures upon manufacturing property, or deems admissible to be insured upon it, by one or by several companies, as is fully proved.

The usage of the office, like that of every well regulated

institution, was, and is, to insure from two thirds to three fourths of the value. Now it is utterly incredible that these directors should have remained satisfied with a further insurance on this property to the amount of $6,000, both policies exceeding the value of the property as estimated by the owner himself, and making an amount so inconsistent with the policy of the company. And the court will perceive, that when Wheeler applied to the American office, referring them to the representation made at the Washington office for the description and value of the property, they refused to insure at all,—deeming, as they say, the amount insured by the Washington office as much as was safe to underwrite upon the property.

The only supposition which could render it at all credible that these directors would have consented to the further insurance is, that upon the receipt of the letter, they went and examined the representation at the American office, and conferred with the directors of that office, and found that $10,000 additional property were represented to have been put upon the estate. Had this been the case, such conference and examination could have been proved by the directors of the American Company. But the truth is, no such letter was ever written; if written, there is no proof that it was put in the post-office; and, if put in the post-office, we prove most conclusively that it was never received by the Washington Insurance Company.

*We will not, in this stage of the cause, stop to consider the legal question, as to the effect which such [*205 notice would have, if actually received, upon the policy of September, 1838. But we will respectfully ask the attention of the court to the precise agreement of the parties, which is, that all shall be in writing. The court will no more vary the contract on the equity side than on the law side, nor give it an interpretation different from the plain import of the words, when the words are free from ambiguity and doubt. That would be to make a new contract,—a power which a court of equity never assumes. It is not incumbent upon the defendants to show why this part of the contract is in the terms which are used, nor to vindicate its propriety. The fact that it is a part of the contract, is enough, as was said by this honorable court in the judgment at law. Its requirements are not impracticable, nor even difficult to be complied with; but the very precision and accuracy of the terms in which the clause is conceived are evidence of the value set upon it by both the parties, and so is the express, deliberate agreement, that everything shall be in writing, and nothing be trusted to

parol. This court is not, however, insensible to the importance of the clause, nor of the offices it has to perform, which were fully recognized in the opinion at law. In the first place, it makes the law in case of several insurances, between the insured and the underwriter, and between the several underwriters, because it furnishes the evidence upon which the law arises. This evidence, therefore, must be certain and permanent, as the other parts of the policy, and not left to depend upon uncertain recollection, or liable to be affected by motives of interest or bias. In the next place, it is indispensably necessary to protect against fraud, being the only security against excessive insurance, often made with fraudulent intention, and always a temptation to fraud. And, finally, without going into all the numerous considerations connected with the matter, it is to cut off, by the policy itself, such questions as it is attempted here to raise, the tendency of which to produce confusion and embarrassment is so manifest in the present case.

If the evidence were even more satisfactory than it is,—if it were not so completely contradicted,—still what does it tend to prove? Not a compliance, most obviously. It proves, on the contrary, a non-compliance, and asks of this court to dispense with that part of the contract which has not been complied with, upon no other ground than that it has not been complied with.

The next piece of evidence relied upon by the plaintiff to prove notice is the testimony of Mr. A. O. Peck, in connection with the letter of S. G. Wheeler to him, of December, 1837.

This testimony applies to the policy of December, 1837. The argument, on the part of the plaintiff, is, that Mr. Peck showed this letter to Mr. Jackson; that, consequently, Mr. *206] Jackson must *have known there was a policy on the Glencoe Mill at the American office.

In the first place, Mr. Peck states, that he has no recollection of showing this letter to Mr. Jackson, and his statement that he did so is founded entirely upon his practice to do so in like cases. The whole strength of the evidence, then, consists in the presumption derived from Mr. Peck's usual habits of business in this particular. The thing which he was requested to do was no part of his official duty. It was a matter of favor to Wheeler, to be done in a manner most convenient to himself. It would rest, therefore, entirely in his own caprice, whether he would make a verbal communication to Mr. Jackson, or whether he would hand him the letter. Ordinarily he would find it more convenient, perhaps, to hand

the letter, than to make a verbal communication, unless that communication were brief, which was the case with the matter to be communicated here. But the presumption derived from the usage of an individual, in relation to matters of this sort, has none of the strength of a presumption derived from usages in relation to official acts, such as the making record of changes of owners of property insured, or of notices of other insurance, of preserving files of all letters received, and copies of all letters written by the insurance company, and of replying to all letters received which require a reply.

Now we oppose to the presumption derived from Mr. Peck's usages, the usage of Mr. Jackson, President of the Washington Insurance Company, to act upon all notices of further insurance upon the same property; if the further insurance was subsequent, to call the directors together, and decide whether to assent or dissent, and to give prrompt reply to the insured.

Mr. Jackson is well known in this community to have been remarkable for promptitude, sagacity, and fairness in the discharge of the duties of his office, an office which he held for more than thirty years. No one knew the merits of his character more thoroughly, in all these particulars, than the learned counsel who has made the opening argument for the plaintiff. But in this argument, we claim for Mr. Jackson nothing more than the presumption which the law would make in his favor, that is, that the duties of his office would be fairly discharged unless the contrary is shown.

We oppose, therefore, the presumption derived from the usages of the Washington Insurance Company and their officers to the presumption derived from Mr. Peck's habits of business; and we say that the latter is entirely overthrown by the former. The fact, that no consultation was had among the directors, is conclusive to show that they could not have known of this policy at the American office. Mr. Peck states, that he recollects distinctly that he had an interview with Mr. Jackson upon the subject, but the *plaintiff's counsel cautiously abstained from asking him what communication he made to Mr. Jackson. The natural presumption is, that he told Mr. Jackson what Mr. Wheeler requested him to tell, which was, that Wheeler had sold his interest to Carpenter in the Glencoe Mill. He could have had no motive to go beyond this. There is, therefore, no proof of any information given to Mr. Jackson of the policy at the American office, either by the exhibition to him of Wheeler's letter to Peck, or by any verbal communication of Peck himself. The reasonable presumptions are all the other way. [*207

We refer in this connection to the memorandum indorsed upon the record of the policy at the Washington office, under date of December 15th, 1837:—

"Samuel G. Wheeler informs by letter to this company, dated Patterson, December 13, 1837, that he has sold his half of the Glencoe Mill to Jeremiah Carpenter. It is, in consequence thereof, agreed, that the risk assumed by this policy for account of S. G. Wheeler continue for account of said Jeremiah Carpenter. The original policy not being at hand, this indorsement is not put thereon.

"RICHARD JACKSON, *President.*

"WARREN S. GREENE, *Secretary.*"

This memorandum shows that Mr. Jackson acted even with regard to the notice of the change of property from Wheeler to Carpenter, not from any information derived from Peck, but upon the letter from Wheeler himself.

The memorandum also goes to show, that Peck could not have shown Mr. Jackson the letter of Wheeler.

The letter to Peck and the letter to the Washington Company are dated on the same day, December 13th, and on the 14th, Mr. Peck replies by letter to Mr. Carpenter, stating,— "I have notified the Providence Washington Insurance Company that Mr. Wheeler had disposed of his interest to you, of which they have made record."

The record at the Washington office shows that Mr. Peck must have been mistaken. He might have had the interview with Mr. Jackson informing him of the sale from Wheeler to Carpenter, and Mr. Jackson might have told him that he would make a record of it, but receiving the letter from Wheeler, he naturally referred in his memorandum to the letter of Wheeler to the Washington Company as the more authentic source of information. The insured are required by the terms of the policy to notify the company of all sales of the property insured, and the assent of the insurance company is necessary in order to cover the property for the new owner. This is a provision comparatively unimportant. The insurance company do not rely so much *upon their knowledge of the character of the insured, as upon his interest. They leave a material proportion of the property at his risk. The provision, therefore, with regard to prior and subsequent insurance, is one of paramount importance, and yet the court will perceive that the various changes and sales of this property from 1835 to 1838 are all noted upon the books of the Washington Insurance Company with great

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exactness and promptitude, but there is no memorandum or indorsement anywhere of these policies at the American office.

Again, notice of a subsequent insurance must come from the insured, or from an agent authorized to give this notice. It is a notice which binds the insured if assented to by the insurer; and entitles the insurer, in case of loss, to contribution from the subsequent underwriters, each in proportion to the amount of their subscription.

The language of the clause is, "shall with all reasonable diligence give notice thereof to the corporation, and have the same indorsed on the instrument, or otherwise acknowledged by them in writing."

The company would not be authorized to make an indorsement upon rumor, incidental information, or upon any information not communicated by the insured himself, or by his authorized agent, nor beyond what he directs to be notified. Now Mr. Peck was Wheeler's agent, not to notify to the Washington office the policy at the American office, but to notify to them the sale from Wheeler to Carpenter; beyond that he had no authority. He could give no notice which would bind the insured, and could give no notice that would bind the insurer. What authority had he to call upon the Washington Insurance Company to indorse a notice of the American policy on the policy at the Washington office, or otherwise acknowledge the same in writing?

But let us look at the letter itself. It states that the policy at the American office had expired, which was the fact. It is true, he applies on behalf of the new owners for a renewal of this policy, but the letter does not state it was renewed, nor is there any evidence in the cause that information of its renewal was ever communicated to Mr. Jackson, or to any officer or member of the Washington office, by Mr. Peck, or in any other way. The whole extent, then, of the information contained in the letter is, that there had been a policy at the American office which had expired, and that the new owners of the property had applied for a renewal. It may be reasonably inferred from the letter, that the policy at the American office was on a distinct interest; at least it leaves the matter in doubt. The letter states, that the expired policy had been assigned to Epinetus Reed, and requests the company to make the new policy payable to the same individual. Another important fact in relation to this matter is this. The letter *from Wheeler to Mr. Jackson, giving notice [*209 that Wheeler had sold his interest to Carpenter, is dated on the same day with the letter to Peck. Mr. Jackson might well suppose, that if there was any insurance on this property

at the American office, which was to be notified to the Washington office, that Wheeler would have stated it in his letter to him.

Again, the bill charges that the notice given to the Washington Insurance Company was given "for the purpose of having the same indorsed on the policy at the office of the said Washington Insurance Company, or otherwise acknowledged by them in writing."

Was Mr. Peck's communication to Mr. Jackson, whatever it may have been, made for the purpose of having it indorsed on the policy, or acknowledged in writing? If Mr. Jackson read this letter, that part of it which relates to the policy at the American office was not intended by Wheeler for him, or to be read by him;—that part of the letter was intended for the American Company, and the American Company only. If Mr. Peck, therefore, verbally or otherwise, made Mr. Jackson acquainted with that part of the letter which related to the policy at the American office, he did that which he not only had no authority from Wheeler to do, but what Wheeler never intended he should do. If Mr. Peck was a man of business, the presumption is directly the reverse of what is claimed, namely, that he conformed to his instructions, and did not transcend them.

The opening counsel for the plaintiff supposes the real truth of the case to be, that it was wholly and entirely owing to the neglect of Mr. Jackson that the entry was not made upon the books of the company, and attributes his neglect in this particular to his advanced age. He was not much older than the learned counsel himself, and as competent to do business as he ever was in his life. He was careful at this very time to make the proper indorsement of the sale from Wheeler to Carpenter, a matter of no importance compared with the notice of a subsequent insurance. Had Mr. Jackson been living in September, 1838, when the policy sued on was executed, the learned counsel thinks some entry would have been made. Such a presumption is entirely gratuitous. The time to make the entry was when the notice was received. This is proved to have been the invariable practice of the office, and no man was more strict in the observance of its usages than the late Mr. Jackson. Besides, what entry could Mr. Jackson make? He could only copy the letter, and that merely contains a proposal for further insurance for the new owners at the American office. The notice could not be given till the insurance was made, nor could it be taken till then, nor indorsed on the policy. Mr. Jackson would naturally say, if this proposition be acceded to, the owners will of course give

us notice, and as no further information was *given, Mr. Jackson, had he been living when the policy of September, 1838, was subscribed, would have concluded that the proposal for further insurance at the American office had not been assented to. At all events, he had no right to make the indorsement till such notice was given.

The counsel suggests, that when Mr. Jackson received notice, he probably deferred any action upon it until more information was received. This concedes the whole case. Surely notice was not to be of a character which would leave the insurance company ignorant or in doubt. It was to be explicit and certain. If this letter had been read to Mr. Jackson by Mr. Peck, he certainly could not have acted upon it, for the reasons which have been already stated. He must, as a prudent man, have waited for further information. It was not his fault that the information was not more perfect. The further information never came. There is not a title of proof that any information was ever communicated of insurance at the American office, subsequent to the time referred to in Mr. Peck's testimony.

The learned counsel suggests that Mr. Greene, the secretary of the Washington Insurance Company, must have been present at the interview between Mr. Jackson and Mr. Peck, and must have heard what was said by Mr. Peck. Suppose he had been, he could not have heard anything more than Mr. Jackson, and there is no reason to suppose that Peck told Mr. Jackson any thing more than Wheeler requested him to tell. The learned counsel complains because the defendants do not ask Greene in relation to this matter. If he supposed Greene knew anything, or heard anything, of this conversation, it was his place to have inquired in relation to it. The burden of proof is on the plaintiff, to prove notice to us, being affirmative proof; not on us to disprove it. The plaintiff had an opportunity to prove the verbal communication of Peck to Mr. Jackson, by Peck himself, who was the most proper witness for that purpose; and yet he has cautiously abstained from making any inquiry of Mr. Peck in relation to this matter, but complains that we did not examine Mr. Greene, to ascertain if he were present, and if he were, what was said.

Again, the learned counsel complains that we did not ask Mr. Greene when he first suspected the existence of the policies at the American office. We had no right to ask Mr. Greene such a question. The plaintiff might have asked it. This resort indeed establishes, that the ingenuity of the learned counsel, great as it certainly is, was tasked far beyond any man's strength, being required to make a case where none

really existed, by suggesting probabilities where there was neither fact nor probability. All the circumstances that ever took place in relation to this matter are in proof.

*211] The American Insurance Company, in the application of *Wheeler, were referred to the representation at the Washington office for a description and estimate of the property. The plaintiff has not called Mr. Thornton to prove what he said at the Washington office, when he called there to examine the representation. The probable presumption would be, that if he called there for that representation, that he did so with a view to act upon a proposition to underwrite upon the property. But the Washington Insurance Company would take no notice of such a fact, and it would make no impression upon the mind of the officers, because if the American Company should finally agree to underwrite, the assured were bound to give them notice as soon as the policy was executed. If, therefore, Mr. Thornton, when he went to the Washington office to examine that representation, had stated to Mr. Jackson, that Wheeler had applied for further insurance, and that he had examined the representation with a view to decide upon the application, Mr. Jackson would have thought nothing of it, because if the negotiation should finally terminnate in further insurance, he knew that Wheeler was bound to give him notice. It will hardly be contended, at all events, that this was notice of the policy at the American office, or that the Washington office would be at liberty to act upon it. Besides, Mr. Jackson, as an experienced underwriter, and no man was more so, must have felt sure that the American Company would not have made any further insurance upon this property, the Washington Company having already insured the property for more than three fourths of its value.

In point of fact, therefore, if Thornton had specifically stated to Mr. Jackson the purpose for which he called to examine the representation at the Washington office, it would give Mr. Jackson no reason to believe that the American Company would make any further insurance upon the property, and in fact they did refuse to make any further insurance upon that representation. Besides, it would not be notice, being to a different intent and for a different purpose, that is, to obtain information and nothing more.

The learned counsel, while he complains that we have not inquired of Mr. Greene if he recollects that Mr. Thornton came to the office and borrowed the representation, and what was said by him, was careful not to call Mr. Thornton himself. One would suppose Mr. Thornton was the best witness to

tell what he said, as Peck is to tell what he said, and yet no inquiry is made of Peck, and Thornton is not called. The fact that the secretary of one insurance company borrowed of another a representation would make no impression upon the mind of the secretary or president of the other, even if the motive was stated, because they rely upon notice being given them if the policy should be executed, and have no right to act upon anything less. Mr. Greene has been under examination as a witness, and if the plaintiff *thought [*212 he knew or suspected anything with regard to the policy at the American office, it was in his power to have inquired of him. We have asked him all the questions we had any right to ask him. His character is such, as the plaintiff's counsel well knows, that he would have answered every question with the most entire truth and candor.

The truth is, that he, as well as all the other officers at the Washington office, were taken entirely by surprise, when, after the loss of the Glencoe Mill, they found the policy at the American office.

We have now reviewed all the evidence which has been offered on the part of the plaintiff to prove notice of the policies at the American office. We think, from this review of the evidence, that it is quite apparent not only that the plaintiff has failed to prove notice of the policies at the American office, but that the defendants have disproved it. The failure to make out what seems to be proposed is just as signal as the insufficiency of the purpose itself. The whole object seems to be to establish, that Mr. Jackson was to perform the complainant's duty as well as his own, to speak for the complainant where he was silent, to understand for him without being told how he wished to be understood, and to act for him without instruction or authority, because, in the event, it appears to have been for the interest of the complainant that he (Mr. Jackson) should have so spoken, understood and acted.

Mr. Wood, for the appellant, in reply and conclusion.

I propose, in this reply, not to repeat the arguments advanced in opening the case.

I shall attempt to establish the following propositions:—

1st. That the Washington Company, who are the first insurers, had notice of the second insurance in the American office.

2d. That this notice under the circumstances of this case, is sufficient to bind them in equity to pay for the loss under their policy.

There are a few miscellaneous topics discussed in the close of the respondent's argument, which I will first dispose of.

It is said that the complainant had his election of two remedies,—one at law, the other in equity,—and that having first selected the common law remedy, he is precluded from going into equity for relief.

This would be true in a case where the two tribunals have concurrent jurisdiction. But it does not apply to a case like the present, where the common law court has no relief to give, and the party in going there mistook his remedy.

Where a party mistakes his remedy at law, and fails on that ground, he may still, at law, resort to the appropriate remedy and recover.

*213] *It was proper in this case to try the remedy at law first. Because, although the relief sought is strictly equitable, yet of late years common law courts have extended their remedies in many cases so as to embrace what is strictly equitable relief.

This court, however, has shown a disposition to keep the remedies in the respective courts distinct, and we therefore abandon our former ground, and resort to the equity side of the court. The learned justice intimated, in no equivocal language, that we had, in the first instance, mistaken the proper forum.

It is said we can get no relief in equity different from law, on a bill for specific performance. That will depend on circumstances and the character of the relief sought. We do not ask the court to put upon the contract an interpretation different from the common law court. But we seek relief, under the equitable circumstances of this case, against certain requirements, which the rigid rules of the common law will not dispense with, but which in equity will be dispensed with, when, by an adherence to them, they will become an engine of fraud.

If we have made out such a case, equity will relieve us. The court of equity does not interpret the contract differently from the court of law, but relieves against some of the requirements of the contract, and even of the law bearing upon the contract, where the parties have acted in a way which an equity amounts to a dispensation with those requirements.

My first proposition is, that the Washington Company had notice of this second insurance in the American office.

This matter is discussed in the opening argument, from page 193 to page 198. Samuel G. Wheeler proves that he sent the notice to Jackson, the president, by letter, in December, 1836. That he sent such a letter, he is certain and posi-

tive; the impression upon his memory is, that he personally put the letter in the post-office. Such an impression is satisfactory unless overcome. This evidence is corroborated by other facts and circumstances. His letter of the 13th of December, 1837, to the American office, accompanied with the evidence of Peck, is strongly corroborative of the above testimony. A letter informing them of a change of ownership, with a request that he, Mr. Peck, would communicate it to the Washington office, accompanied with Peck's evidence that he is satisfied he communicated this matter to Mr. Jackson, the president, by showing him the letter, because it was his custom to communicate such information in that way, is strong evidence to satisfy the mind that Jackson had such notice.

Would Mr. Jackson receive such information from another office in his immediate neighborhood, and send the representation of the property to the American office in November, 1836, without getting from such circumstances notice that there was another insurance in that office? If he could, it is impossible to consider *him the shrewd [*214 business man that they represent him to be. This evidence, standing unimpeached, is amply sufficient to satisfy a jury, or a court acting in the place of a jury, that notice of this second insurance in the American office was brought home to the respondents.

It remains to consider the views taken of this subject on the other side.

It is said the answer of the defendants is evidence in their favor, that they never had such notice.

An answer by a party who states a fact of his own knowledge which is responsive to the bill, and free from all suspicion, is evidence; but not such an answer as this; the answer is too good to have any confidence reposed in it. It states, positively, that the defendats had no such notice.

On such a point they could only swear honestly to their belief. Notice, in such cases, is usually given to the officers of the company, who have the active management of the concern. Greene or Jackson would have been the persons to receive it, and it would have been their duty, when received, to have it filed or entered on the minutes. It would only come before the board through their instrumentality. Notice to those officers would in law be notice to the company. How could this corporation say that Jackson had not received such notice? How could Dorr, the new president, who came in afterwards, and who was a perfect stranger to all these transactions, swear positively that Jackson, in his lifetime,

had not received this notice. Experience has shown that answers generally, in litigated cases, but more especially such an answer, should be viewed with great jealousy. The remark in page 202 of the respondents' argument may furnish a clue to this answer. It is said they never had notice, in the sense of this policy, that is, notice to be indorsed or acknowledged. If that is the cover under which this positive denial of notice in the answer rests, it must pass for as much as it is worth.

But the respondents have put in a supplemental answer, in which they qualify, to a certain extent, the positive denial in the first answer, by stating that they had not such notice until long after the execution by these defendants of the policy of the 27th of September, 1838. This clearly implies that they did get such notice, though obtained long after that time,—a notice to be indorsed or acknowledged. They surely did not mean to say that they got such notice after the fire. When did they get it? What do they mean by long after? It may mean one month or two months. There is a point of time at which it is somewhat important to know whether they had that notice, namely, in December, 1838, when the American policy was renewed. It was their duty to tell us plainly when they got that notice. The manifest inference is that
*215] they got the notice before or at the time of the renewal of the *policy at the American office, otherwise they would have said they had it not then. This is a circumstance of some importance in the view hereafter to be presented.

It is said that Wheeler has only a loose impression on his mind that he sent the letter to Jackson. He does not give any such epithet. It is the impression on his memory, that he himself put the letter into the post-office. The guarded caution with which he speaks entitles him to the more credit. The reason why Wheeler did not preserve a copy of the letter is sufficiently accounted for.

It is asked why Wheeler did not write again to Jackson, when he received no reply to his letter, and why he did not speak about it to Jackson the next time he saw him. In reply I might ask, Why do merchants and others, when dealing with those in whom they repose confidence, omit to have contracts reduced to writing, when required by the statute of frauds? And when they reduce them to writing, why do it by letter, embracing only the heads, instead of entering into special agreements? We all know, in practice, how these things are done. And perhaps persons dealing with insurance companies are as often as in any other cases inattentive to those niceties and particularities.

To rebut the evidence of Wheeler, much reliance is placed on the testimony of Greene, that no such letter can be found in the Washington office, no memorandum of it on the minutes or elsewhere, and no entry of its having been laid before the board, as usual in such cases.

There can be no doubt that Wheeler meant to give the notice. He could not have been guilty of the absurdity of having two insurances in two offices in the immediate neighborhood of each other, and of attempting to conceal a second insurance. A loss and claim for compensation would inevitably lead to detection. It was the interest of Wheeler to give the notice. It was the duty of Jackson, the president, when the notice was received, to lay it before the board and have it entered in the office. Both Jackson and Wheeler are represented in the respondents' argument to be punctual business men. The inference from the interest of Wheeler is, that he sent the notice. The inference from the duty of Jackson is, that it was not sent. The one is a fair set-off against the other. Then we have the positive evidence of Wheeler and of Peck, which are not overcome. The omission to examine Greene as to his personal knowledge on the subject raises a strong suspicion that this letter was received, but omitted to be placed on the files, and that notice was received through Peck. It is said, on the other side, that we ought to have examined him on this point. We rely on our own evidence; they call this witness to rebut it. They go half way in the inquiry, and tell us that we ought to have pursued that inquiry for them,—that we should have examined their own wit- [*216
ness, called to rebut our evidence, on the *points on which it was all important he should have been examined in order to render such rebuttal of any avail at all. This would certainly be a novel mode of proceeding.

I shall now proceed to the second proposition. This notice ought to bind the Washington Company in equity.

(This part of the argument is omitted).

Mr. Justice WOODBURY delivered the opinion of the court.

This was a bill in equity on a policy of insurance made by the defendants. The original policy, executed September 27th, 1835, for one year, and annually renewed till September, 1838, contained the following clauses:—"And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no

effect. And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." A loss having occurred on the 9th of April, 1839, an action at law was instituted to recover the amount of the defendants, on which final judgment was rendered in their favor in this court, at the January term, 1841. (See *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet., 495). This was chiefly on the ground, that another policy had been effected on the same property at another insurance office, in December, 1836, and renewed yearly till December, 1838, but which had not been "mentioned in or indorsed on this policy," "or otherwise acknowledged by them (the defendants) in writing."

For various other particulars connected with the case, reference can be had to the above case, and the statement which precedes this opinion. Under these circumstances, the complainant next resorted to the bill now in consideration, and alleged, that "in the month of December, A. D. 1836, and in the month of December, A. D. 1837, and at divers other times, the said Providence Washington Insurance Company had notice from the said H. M. Wheeler & Co. of the said insurance at the office of said American Insurance Company, in Providence, and said notices, so given, were given for the purpose of having the same indorsed on the policy at the office of said Providence Washington Insurance Company, or otherwise acknowledged by them in writing. And your orator supposed that the said Providence Washington Insurance Company had performed their part of said contract in this behalf, as in equity and good conscience they were bound to do."

*217] He then added,—"Wherefore, inasmuch as your orator is *remediless at and by the strict rules of the common law, he prays your honors to issue a decree compelling said Providence Washington Insurance Company to indorse said notice on said policy, or otherwise acknowledge the same in writing, according to the terms of their policy, as they long since ought to have done, and to compel said Providence Washington Insurance Company to pay your orator said sum of fifteen thousand dollars, with interest from the time of said loss, and his costs."

The defendants, in their answer, deny that they ever had notice in any form of the additional insurance, or not till long after the execution of the policy now in question, and object

to the admission of any evidence on the subject, except such as is in writing, according to the stipulation in the policy itself. And they further deny, "that the plaintiff has any equity to compel these defendants to indorse a notice of such previous or subsequent insurance on said policy, or to acknowledge the same in writing."

They then aver, that if the additional policy had been communicated to them, and the present insurance still continued, it would have been void, because false representations, material to the risk in respect to the value of the whole property, were made, affecting the additional policy, and that the probability is, the present one would not have been continued on seeing the additional policy, as that is for $6,000, and the present one $15,000, making an aggregate insurance of $21,000, when, in the original statement to the defendants, the whole property was valued at only $19,000, and when it is not the custom of insurance companies to take risks on this kind of property beyond three fourths of its value, in order to keep the insured still interested to the extent of the other fourth, and thus likely to use greater precautions against fire, and lessen the risk of the insurers, compared with what it would be if an additional insurance was obtained covering the whole value.

It will be seen, by this state of the case, that important questions, both of fact and law, are involved in it;—of fact, whether the additional policy was ever made known to the defendants for the purpose of being acknowledged in writing; and of law, whether, in that event, it was their duty so to have acknowledged it, and, not doing so, whether this court can now compel them to do it. There are other considerations which arise in the course of the inquiry that will receive attention, but are incidental, rather than raised directly through the pleadings. The testimony in support of the leading allegation in the bill is not very complicated. But how much of evidence should be required to prove that allegation, under the principles applicable to the circumstances of this case, is one of some difficulty, and is first to be settled. Where an answer is responsive to a bill, and, like this, denies a fact unequivocally and under oath, it must in most cases be proved not only by the testimony of one witness, so as to neutralize that denial *and oath, but by some addi- [*218
tional evidence, in order to turn the scales for the plaintiff. *Daniel* v. *Mitchell*, 1 Story, 188; *Higbie* v. *Hopkins*, 1 Wash. C. C., 230; *The Union Bank of Georgetown* v. *Geary*, 5 Pet., 99. The additional evidence must be a second witness, or very strong circumstances. 1 Wash. C. C., 230; *Hughes* v.

Blake, 1 Mason, 514; 3 Gill & J. (Md.), 425; 1 Paige (N. Y.), 239; 3 Wend. (N. Y.), 532; 2 Johns. (N. Y.), Ch., 92. *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch, 153, says, "with pregnant circumstances." (*Neale* v. *Hagthrop*, 3 Bland (Md.), 567; 2 Gill & J. (Md.), 208.)

But a part of the cases on this subject introduce some qualifications or limitations to the general rule, which are urged as diminishing the quantity of evidence necessary here. Thus, in 9 Cranch, 160, the grounds of the rule are explained; and it is thought proper there, that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So, if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice. 1 J. J. Marsh. (Ky.), 178. So if the answer be evasive or equivocal. 4 J. J. Marsh. (Ky.), 213; 1 Dana, (Ky.), 174; 4 Bibb, Id., 358. Or if it do not in some way deny what is alleged. *Knickerbacker* v. *Harris*, 1 Paige (N. Y.), 212. But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally conusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, the complainant has in several instances been required to sustain his allegation by more than the testimony of one witness. (3 Mason C. C., 294.) In *Coale* v. *Chase*, 1 Bland (Md.), 136, such an answer and oath by an administrator was held to be sufficient to dissolve an injunction for matters alleged against his testator. So is it sufficient for that purpose if a corporation deny the allegation under seal, though without oath (*Haight* v. *Morris Aqueduct*, 4 Wash. C. C., 601); and an administrator denying it under oath, founded on his disbelief, from information communicated to him, will throw the burden of proof on the plaintiff beyond the testimony of one witness, though not so much beyond as if he swore to matters within his personal knowledge. 3 Bland (Md.), Ch., 567, note; 1 Gill & J. (Md.), 270; *Pennington* v. *Gittings*, 2 Id., 208. But, what seems to go further than is necessary for this case, it has been adjudged in *Salmon* v. *Clagett*, 3 Bland (Md.), 141, 165, that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a "corporation aggregate under its seal, without oath," is competent evidence, and "cannot be overturned by the testimony of one witness alone." We do not go to this extent, but see no reason why such an answer,

*219] by a corporation, under its seal and sworn to by the *proper officer, with some means of knowledge on the

subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness. (5 Pet., 111; 4 Wash. C. C., 601.) Here the denial by the corporation is explicit and responsive to the bill, and its truth sworn to by its president, "according to the best of his knowledge and belief." The only difficulty is in respect to the extent of that knowledge. He was not the president of the company at the time the information of the second insurance is alleged to have been given. Nor is it relied on in argument, that he was then a member and lived near, or was for any reason likely to be consulted when such notices were received. But he has since had access to all the files and records, in his official capacity, so as to know if any letter on this subject appears to have been received, and therefore testifies with some means of knowledge. And though it is admitted, that the certainty is not so great against the reception of the notice as if Jackson himself was alive and testified against it, yet, in the nature of the case and by the precedents, the denial is strongly enough made and supported to impose on the complainant the proof of his allegation by something more than the testimony of one witness, though not so much more, it is conceded, as the "pregnant circumstances" before alluded to.

The next inquiry is, whether the material allegation in this case is thus proved? On an examination of the evidence, it will be found that not even one witness swears positively to it; and whatever is sworn in support of it is much impaired by other proof.

The allegation, it will be remembered, is, that in December, 1836, and divers other times, the defendants had notice from the insured of the second insurance, given for the purpose of being indorsed on the policy, or acknowledged in writing.

There is no attempt to prove any such notice except on two occasions,—one in 1836, and one in 1837. The only witness called to support the first is Mr. Wheeler. He testifies, that about the time of the second insurance, in December, 1836, he wrote a letter to the president of the Providence Washington Company, stating that such an insurance had been effected, and thinks he put the letter in the post-office. This is all on that point in behalf of the complainant concerning this notice.

It is to be observed, that the testimony of Wheeler, in its full extent, does not prove the fact that information of the second insurance ever actually reached the defendants for the purpose of being indorsed or acknowledged, but merely that a letter was written for that purpose, and probably put in the post-office.

Though such evidence, standing alone, in the case of notice of non-payment of bills of exchange and promissory notes, is sufficient, under mercantile usage, to raise a presumption that the holder had used due diligence, yet even in such cases it is
*220] not held to prove the actual receipt of notice. *The Bank of Columbia* v. *Lawrence*, 1 *Pet., 582, and *Dickins* v. *Beal*, 10 Id., 581. Much less can it prove the receipt of it where no such usage exists, as in the case of policies of insurance.

When we look for any other proof to sustain or strengthen Wheeler's evidence, thus defective, it will appear to be weakened rather than strengthened by the other testimony and circumstances. Because, first, such a letter, if ever received, would probably be preserved on the files of the office. So would it probably be answered, as that was not only the usage in respect to all letters on official business, but it is shown, specially, to have been the custom of the office to act forthwith and officially on letters like these when received, and to send a reply in conformity to the decision of the company upon them. Yet no answer is stated ever to have been received concerning this; nor is any trace of an answer, or of the original, found in the office, either in the recollection of other officers, or in any files, books, records, or even memoranda.

Again: the insured, if conscious that such a letter had been sent, and reached its destination without being answered, would naturally have written, or called to ascertain, why information of the second insurance was not acknowledged in writing, apprised as the insured must be, both by the published terms of insurance and the policy itself, that the latter was void and ceased to operate without such an acknowledgment, and that it was the duty and interest of the insured to see to this acknowledgment being made. Nor is it a sufficient answer to the last objection, that he might rest quiet without a reply, supposing the acknowledgment had been indorsed on the policy, because the policy was in the possession of the insured, and not of the insurers; and hence it was well known to the insured that no such indorsement had been made on that.

It is difficult, likewise, to discover any adequate motive for not replying to the letter, if it was ever received, unless it be one resting on a gross fraud. If the company, or its president, on a receipt of it, should not choose to continue the policy, as would probably be the case, for reasons before mentioned, they would feel no reluctance to state the fact to the insured, and thus end a risk where the insurance exceeded the value of the property, and differed so much from their usual pru-

dent terms of underwriting. But if they did choose to continue it, they would be likely soon to reply, stating that fact, because, without such a reply, they knew the insured would probably consider the policy terminated, in conformity with the stipulations in it, and would insure elsewhere, and they lose a premium which they had decided it was expedient for the company to retain.

This is all which it is considered necessary to say in respect to the evidence of the notice supposed by the plaintiff to have been given by Wheeler in 1836.

*But it is urged, beside this, that another notice of [*221 the additional insurance at the Providence American Company was given the ensuing year, in December, 1837, through Mr. Peck. It is manifest, however, that this last notice, like the other, must stand or fall by itself, as they are distinct or disconnected in time and circumstances,—not parts of one transaction,—and are attempted to be sustained by testimony not cumulative but entirely different. What is proved on this matter by Mr. Peck? Merely that a letter, written to him for another purpose, contained a statement of the existence of the second insurance, and his impression that he showed the letter to the president of this company for the other purpose. It will be seen that his testimony is rather argumentative from his usual habits of business, than positive, that he showed the letter at all to the president; but if he did, it is conceded that the object was to communicate merely the other fact,—"the change of owners in the property" (see Wheeler's letter). And if he carried the letter in his hands, which contained other matter, mentioning an insurance at the American office, he was not desired, as appears by the letter itself, to communicate that part of it, nor does he say, in his written reply, that he had communicated that part, but only "notified the Providence Washington Insurance Company, that Mr. Wheeler had disposed of his interest to you, of which they had made record."

Beside this, and against any such notice having been given or intended for the purpose set up in this bill, there are most of the collateral considerations which have been enumerated in opposition to the other notice, alleged to have been given the previous year.

It must also be recollected, that a letter was written to the president by Wheeler on the same day he wrote to Peck, saying nothing in it concerning any second insurance; and the president promptly answered it, saying nothing in reply concerning that subject, but all which was expected as to the other. On this, it will occur immediately to ask, if Peck had

given such notice, or been requested to do it, or even if Wheeler had before given it, why Wheeler did not at once write again, stating that an answer had been received as to the notice of a change of property, but none as to the second insurance. In short, a convincing proof that nothing was communicated but the change of owners in the property is, that nothing more seems intended to have been communicated; that nothing more was contained in the letter to the president, and nothing more wished to be stated by Peck, and no witness testifies that the other information was actually read by, or named to, the president, and no collateral fact renders the last circumstance probable. This is the whole evidence in the case, on this point, that is essential. To show more fully that under it none of the material questions of law arise or can be considered, which might otherwise be pre-
*222] sented, it may not be unimportant to discriminate *and examine briefly what those questions are, and what must be proved in order to raise them.

Several precedents exist, where respondents in equity are allowed, by way of defence, to prove, by parol, that the written contract relied on does not contain all the original terms agreed, and in this way entitle themselves to be exonerated under the terms proved by parol. (*Woollam* v. *Hearn*, 7 Ves., 211; 2 Story Eq. Jur., § 770; and Sug. Vend., 125 to 140, and cases cited.) Others exist, of this kind of proof being at times permitted to complainants in relation to separate subsequent terms of agreement modifying the prior ones, and on those subsequent terms being proved by parol, a recovery be allowed. 4 Bro. Ch., 514; 1 Id., 92. There are other precedents of complainants seeking to show by parol a portion of a contract existing when the original was made, but which was omitted from it by accident, and against doing which some of the authorities seem to decide. (7 Ves., Jr., 211; 15 Id., 518; Story Eq. Jur., § 770, and note.) On the contrary, some decide for it. (2 Ves. Sr., § 375; 1 Id., 456; 1 Stark. Ev., 1015–1018.) But neither of these classes of cases can be claimed as embracing this. Here the parol proof is offered by a complainant, rather than by way of defence; and it is not pretended that any omission has happened of a part of the original contract, or that there has been any new separate contract modifying that.

On the contrary, in the most natural aspect of the case, it is one of a complainant attempting to show, by parol, a fact, which, if true, is supposed to establish a neglect or wrong in the defendants,—a breach of official duty happening some time after the contract of insurance was made,—by not

acknowledging then in writing the receipt of information that another policy had been obtained on the property, and saying in reply, under these new circumstances, that the first contract should either continue or terminate.

This presents, it will be seen, a question somewhat novel, namely, whether the specific performance of a duty in private life, not of a contract, can be enforced by courts of equity, and a party compelled, by a sort of mandamus, to acknowledge in writing what he had never promised so to acknowledge.

That question, however, need not now be decided, as such a duty is not claimed to exist except where a notice of the second insurance is actually received. And to prove such a receipt here, the evidence offered is certainly insufficient, whether requiring only one positive witness, unimpaired, or something more than one.

But there is another aspect of the case, which would present a different question of law, if it was set out specially in the bill, and was supported by any stronger proof as to the material fact. It is, that the respondent should be considered as barred or estopped *from setting up the want of an acknowledgment in writing, if that want was the result [*223 of his own neglect of duty. In that view, both the receipt of the information, and a consequent obligation to make an acknowledgment of it in writing, must be satisfactorily established before any neglect of duty can be imputed. But, as already shown, the first fact, the receipt of the information, is not established in that manner; and, if it were, some difficulty might exist as to the second point, in considering a mere omission to reply as a wrong, and such a wrong as to estop the insurers from making an objection expressly provided for and allowed in the policy. Because it is not the insurer, but the insured, on whom the obligation seems to be imposed to have the notice of the further insurance reduced to writing, as a condition precedent to a recovery. It is the insured who by that further insurance increases the risk of the former insurers, and who ought, therefore, to have it both communicated and acknowledged in the manner stipulated, in order to render it sure that a continuance of the first risk is assented to. And though an omission to answer a letter from the insured might incommode him, and be a breach of comity, it is not easy to discover any engagement or promise which it violates.

Supposing, however, the bill to be broad enough in its allegations, and the sending of notice of the second insurance proved, and the duty to acknowledge it, if received, to be clear, we might, in most cases like this, enforce a discovery of

the receipt of it, if coming to hand; and might enjoin the insurers against using, by way of defence, a circumstance caused by their own misconduct. (*Baker* v. *Biddle*, 1 Baldw., 405.) But whether we could go further, and enforce a recovery for the loss on the equity side of this court, when an action had been brought for it on the law side and failed, and other remedies there may still exist for any wrong done, is a question open to doubt, and need not, for the reasons before stated, be now decided. *Le Guen* v. *Gouverneur*, 1 Johns. (N. Y.) Cas., 436; *Simpson* v. *Hart*, 1 Johns. (N. Y.) Ch., 91; *Gordon* v. *Hobart*, 2 Sumn., 401.

Finally, it is urged, that a fraud has been perpetrated here, and that frauds constitute at all times a distinct and sufficient ground for a recovery in chancery. The fraud, if existing here, would not be in failing to answer the receipt of information of the second policy, stating frankly, as convenience and a spirit of courtesy required, whether the original insurance would be continued longer or not; but in omitting to give full explanations on the subject when the insured applied for a renewal of the policy, and in proceeding then to take a further premium, with a covert design to defeat the insurance on account of the second policy, provided any loss should happen.

The rule of equity is very broad to prevent a fraud, which would exist if one was permitted "to derive a benefit from *224] his *own breach of duty and obligation." 2 Story Eq. Jur., § 781. And it has been laid down, that "if by fraud or misrepresentation one prevents acts from being done, equity treats the case as if it were done." 1 Id., § 439; 11 Ves., 638.

In the bill, there is an averment of fraud, and, at the close, a general prayer for any suitable relief; and it seems plausible, that we might, if satisfied of the existence of fraud, estop the party guilty of it from profiting through his own wrong, by preventing him from setting up, as a defence, the want of an acknowledgment in writing, when such want was the result or the instrument of his own misbehavior. But there is still a difficulty in this view of the case, from the circumstance that redress has been and still is open to the plaintiff, at law, for any fraud; and the Judiciary Act provides, that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." (Act of September 29th, 1789, § 16; 1 Story, 59.) And also from another reason, which has affected the previous points,—a want of satisfactory evidence of the facts alleged. The first step in proving a fraud fails.

Neither a neglect nor wrong is shown by the positive testimony of any one witness; and whatever is sworn to by any one in behalf of the complainant is counteracted by opposing circumstances, rather than strengthened, as it should be, after a sworn denial in the bill, and in so grave a charge as fraud, by very satisfactory auxiliaries, though not perhaps by so strong evidence as is necessary in reforming contracts; that is, by evidence which is "irrefragable," and not open "to opposing presumptions." 1 Bro. Ch. 347; 2 Cranch, 419; 1 Ves. Sr., 317; 6 Ves. 332; 8 Wheat., 211; 1 Pet., 13; 2 Johns. (N. Y.) Ch., 595, 630.

It is a matter of regret, that so great a loss, which the plaintiff and those under whom he claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered, that the defendants gave abundant and repeated notice to him in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject.

If the plaintiff, after all this, omitted to comply with so substantial a provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed.

An adherence to such important rules is peculiarly necessary for the protection of absent stockholders, often interested extensively *in insurance companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions. [*225

Let the judgment below be affirmed.

Mr. Chief-Justice TANEY, being sick, did not sit in this cause.

THE AGRICULTURAL BANK OF MISSISSIPPI AND OTHERS, PLAINTIFFS IN ERROR, *v.* CHARLES RICE AND MARY HIS WIFE, AND MARTHA PHIPPS, DEFENDANTS.

A bond for the conveyance of land does not transfer the legal title, so as to serve as a defence in an action of ejectment, and such a bond, when signed by married women, neither confers a legal nor equitable right upon the obligees.

In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee.

If, therefore, the title to land is in married women, and a deed for the land recites the names of the husbands, as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the title of the wives.[1]

Nor is such a deed made effective by its being signed and sealed by the wives. The interest of the husbands is conveyed by it, but nothing more.[2]

A receipt of money, subsequently, by the female grantors, does not pass the legal title, nor give effect to a deed, which, as to them, was utterly void.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

It was an ejectment brought by the defendants in error against the Agricultural Bank and others, to recover two undivided third parts of a lot of ground in the city of Natchez, bounded as follows:—fronting on Main street, between Canal and Wall streets (formerly Front and Second streets), beginning on Main street, at the corner of a lot owned by the heirs of Samuel Postlethwaite, on which a large new cotton-warehouse has been erected; thence along the northwestern side of Main street, west, to the line of the lot bequeathed by Adam Bower, deceased, to his widow, now Mrs. Pendleton; thence north, along the eastern line of the said last-mentioned

[1] S. P. *Meegan* v. *Boyle*, 19 How., 130; *Town of Providence* v. *Manchester*, 5 Mason, 59.

[2] CITED. *Chapman* v. *Miller*, 128 Mass., 270; S. P. *Powell* v. *Monson, &c. Manuf. Co.*, 3 Mason, 347.

A deed executed by the husband of a tenant for life, in which the latter joins in a relinquishment of dower merely, does not convey her estate. *Magness* v. *Arnold*, 31 Ark., 103. Where a wife joins with her husband in a conveyance of lands held in her own right, she is estopped from afterwards setting up any title to such lands. *King* v. *Rea*, 56 Ind., 1; S. P. *Corr* v. *Porter*, 33 Gratt. (Va.), 278. Where land is held by a married woman for her separate use, under a conveyance empowering her to convey "by joint deed with her husband," his signature is sufficient, without any words of conveyance or covenant by him. *Friedenwald* v. *Mullan*, 10 Heisk. (Tenn.), 226. As against one who claims in fraud of a married woman's rights, equity will give effect to her deed in which her husband did not join, where his assent may be assumed. *Dameron* v. *Jameson*, 4 Mo. App., 299. A deed is the instrument of both husband and wife when they are named at the commencement as parties of the first part, and when, afterwards, the parties of the first part are named as grantors. *Thornton* v. *Exchange Bank*, 71 Mo., 221.

[3] See further decision in *Peale* v. *Phipps*, 14 How., 368.

lot, to the back line of the said premises, where the same bounds on the property formerly owned by Elijah Bell; thence along said last-mentioned line, to the line of the lot belonging to the heirs of said Postlethwaite; and along said last-mentioned line to the place of beginning, on Main street; and being the same property now known as the City Hotel, in Natchez.

The plaintiffs below claimed the lot as the heirs and devisees of Adam Bower, deceased, who died seized of the property, and the only question in the case was, whether or not they had conveyed away their title in the manner prescribed by law.

*The circumstances are so fully set forth in the bill of exceptions, that a recital of the bill will be sufficient. [*226
The cause was tried at May term, 1843, when the jury, under the direction of the court, found a verdict for the plaintiffs.

Bill of Exceptions tendered by the Defendants.

Be it remembered, that on the trial of this cause, and while the same was before the jury, the said plaintiffs, by their counsel, to maintain and prove the said issue on their part, gave in evidence and proved that one Adam Bower (now deceased), in his lifetime, previous to the year 1833, was seized in fee of a certain lot or parcel of land in the said declaration, and hereinafter described. That on the 16th of April, 1833, the said Adam Bower, being so seized of said land, died, leaving three daughters, to wit, Martha Phipps, wife of William M. Phipps; Mary Haile, wife of William R. Haile; and Sarah Bower, a feme sole, his heiresses, who took and inherited under the last will and testament of the said Adam Bower the said fee of the said land. That the said Martha, Mary, and Sarah, at the decease of the said Adam Bower, were infants under the age of twenty-one years. That since the death of the said Adam Bower, the said William M. Phipps and William R. Haile have both departed this life, and that since the death of the said William R. Haile, Mary Haile, his widow, has intermarried with Charles Rice, one of the plaintiffs. That at the time of the commencement of this suit, the said defendants were in possession of said premises, holding the same adversely.

The plaintiffs' counsel here rested.

Whereupon, the counsel for the said defendants, to maintain and prove the said issue on their part, gave in evidence, that after the death of the said Adam Bower, and while the fee of the said land was still vested in the said Martha, Mary, and Sarah, the said Noah Barlow and one Henry S. Holton contracted with the said heirs and their husbands aforesaid for the sale

and purchase of the said lands, and in consideration that the said heirs would make and insure to them a good and valid title in fee simple to the said land, they agreed to give and pay to the said heirs for the same the sum of $40,000; $5,000 whereof should be paid in hand on the delivery of possession, and the residue should be secured to be paid in instalments, to be specified, in promissory notes, to be executed by the said Holton, and indorsed by the said Barlow, and by a mortgage on the said land. That the said Holton and Barlow, in pursuance of the said contract, paid the said $5,000 to the said heirs, and delivered to them twelve promissory notes for $2,916.66⅔ each, all bearing date the 16th day of April, 1835, and payable as follows: three of said notes in twelve months, three others in two years, three others in three years, and the other three in four years from the date thereof; all made *227] by the said Henry S. Holton, and indorsed *by the said Noah Barlow. And the said heirs, upon receipt of the said notes and the said sum of $5,000, delivered to the said Henry S. Holton and Noah Barlow possession of the said land, with the tenements and appurtenances, and at the same time executed to the said Holton and Barlow a bond for title, in and by which said bond the said heirs agreed and bound themselves, and their heirs, to make, execute, and deliver, after duly acknowledging the same, a full and complete general warranty deed of all said premises and appurtenances, buildings and furniture, to the said Holton and Barlow, their heirs and assigns, thereby covenanting a good and indefeasible title to said lot of ground to said Holton and Barlow, their heirs and assigns, against all persons, as soon as a surveyor can be had to make a survey of the premises to ascertain the exact boundaries. That the said bond was executed by the said Sarah, as Sarah Gibson, and by her husband, David H. Gibson, the said Sarah having intermarried with the said David H. Gibson between the drafting of the said bond and its execution; which said bond is in the words and figures following, to wit:—

Agreement entered into and executed this day of April, 1835, between William M. Phipps and his wife, William R. Haile and his wife, and Sarah Bowers, parties of the one part, and Noah Barlow and Henry S. Holton, parties of the other or second part; the above named parties of the first part, for the consideration hereinafter named, agree this day to deliver to said parties of the second part full possesion of the tenements, tavern, stables and other buildings occupied and owned by the late Adam Bower, and heretofore also occu-

pied since his death by the said William M. Phipps, and the lot or parcel of ground upon which the same stands, being on the north side of Main street, between Canal and Wall streets, in said city of Natchez; and also the furniture, kitchen and household, as well as that about the stables, and belonging to and in said tavern, buildings, and said premises; and said parties of the first part do further, for the consideration herein after named, agree and bind themselves, and their heirs, to make, execute, and deliver, after duly acknowledging the same, a full and complete general warranty deed of all said premises and appurtenances, buildings and furniture, to said parties of the second part, their heirs and assigns, thereby conveying said lot of ground, appurtenances and buildings, and said furniture, and warranting a good and indefeasible title thereto to said parties of the second part, their heirs and assigns, against all persons, as soon as a surveyor can be obtained to make a survey of said premises, so as to ascertain the exact extent and boundaries of said premises. In consideration of which, said parties of the second part agree to pay this day to said parties of the first part, five thousand dollars, and upon the execution and delivery of the said deed to them as aforesaid, *they, the said parties of the second part, their executors or administrators, will execute and [*228 deliver to said parties their promissory notes for thirty-five thousand dollars, payable in one, two, three, and four years, in the following manner,—to be secured by a mortgage executed by said parties of the second part, and their wives, on said premises, to wit:

Wm. M. Phipps.	[L. S.]
Martha Phipps.	[L. S.]
W. R. Haile.	[L. S.]
Mary Haile.	[L. S.]
D. H. Gibson.	[L. S.]
Sarah Gibson.	[L. S.]

That the said bond, though apparently incomplete, was executed as complete, and the notes were secured by mortgage by said Holton and Barlow, according to said contract. That after the execution and delivery of said bond and notes, and when the said Holton and Barlow were in quiet possession of the premises, they handed said bond to their counsel, with instructions to have a deed drawn in compliance with said bond, and on or about the 14th of September, 1835, received from their counsel an instrument in writing, or deed, without examining the same, all parties supposing it to be correct,

and in conformity with their directions; that the said deed was executed and delivered on the said 14th of September, 1835, by the said heirs and their respective husbands. And it was intended by said heirs to convey to said Holton and Barlow the complete title of the said heirs and their husbands in said land, which said deed is in the words and figures following, to wit:—

This indenture made the 14th day of September, in the year of our Lord one thousand eight hundred and thirty-five, between William M. Phipps in right of his wife Martha, William R. Haile in right of his wife Mary, and David H. Gibson in right of his wife Sarah, legal heirs and representatives of Adam Bower, deceased, of the county of Adams and state of Mississippi, of the one part, and Noah Barlow and Margaret his wife, and Henry S. Holton and Theoda his wife, of the same place, of the other part, witnesseth: that the said parties of the first part, for and in consideration of the sum of forty thousand dollars, to them in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators forever released therefrom, by these presents have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey, and confirm unto the said parties of the second part, their heirs and assigns forever, all that certain
*229] lot or parcel of ground situate in the city of Natchez * and state aforesaid, fronting on Main street, between what were before the confusion of names produced by the wisdom of the city council, Front and Second streets, which said lot is bounded and described as follows, to wit:—beginning on Main street, at the corner of a lot now owned by the heirs of Samuel Postlethwaite, on which a large new cotton-warehouse has been erected by Harriett , along the north-western side of Main street, west to the line of the lot bequeathed to Adam Bower, deceased, to his widow, now Mrs. Pendleton; thence north, along the eastern line of said last-mentioned lot, to the back line of the premises hereby conveyed, where the same bounds on the property of Elijah Bell; thence along said last-mentioned line to the line of the lot belonging to the heirs of said Postlethwaite; and along said last-mentioned line to the place of beginning on Main street; the lot hereby conveyed being the large tavern establishment occupied by said Bower in his lifetime, and since his

death by the said William M. Phipps; also, all the household and kitchen furniture, and apparatus, and utensils about said tavern, stables, or other buildings on said lot; together with all and singular, the appurtenances, hereditaments, privileges, and advantages whatsoever unto the above described premises belonging, or in any wise appertaining; and also all the estate, right, title, interest, and property, and claim whatsoever, either at law or in equity, of them the said parties of the first part, of, in, and to the same; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, forever; and the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, promise, and agree to and with the said parties of the second part, their heirs and assigns, that they, the said parties of the first part, and their heirs, the above described and hereby granted premises, and every part thereof, with the appurtenances, unto the said parties of the second part, and their heirs and assigns, against the said parties of the first part, and against all persons *or* claiming, or to claim said premises, or any part thereof, shall and will warrant, and by these presents for ever defend.

In witness whereof, the said parties of the first have hereunto set their hands and seals, this day and year above written.

WM. M. PHIPPS. [L. S.]
MARTHA PHIPPS. [L. S.]
WILLIAM R. HAILE. [L. S.]
MARY HAILE. [L. S.]
DAVID H. GIBSON. [L. S.]
SARAH GIBSON. [L. S.]

Signed, sealed, and delivered in the presence of

N. W. CALMES, *J. P.*

*THE STATE OF MISSISSIPPI, *Adams county*:— [*230

Personally appeared before the undersigned, justice of the peace for said county, William M. Phipps and Martha his wife, and William R. Haile and Mary Haile his wife, and David H. Gibson and Sarah Gibson his wife, and acknowledged that they signed, sealed, and delivered the within deed on the day and year and for the purposes therein contained. And Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined separate and apart from their husbands, and acknowledged that they signed, sealed, and delivered the

same as their act and deed, free of fears, threats, or compulsion of their said husbands.

Given under my hand and seal, this 15th day of September, 1835. N. W. CALMES, *J. P.*

Received for record, 15th September, 1835.

F. WOOD, *Clerk.*
By S. WOOD, *D. Clerk.*

STATE OF MISSISSIPPI, *Adams county:*

I, Fleming Wood, clerk of the Probate Court for said county, do hereby certify that the within deed is recorded in my office, in book W of the record of deeds, pages 300 and 301.

Witness my hand and seal of office, this 16th day of September, anno domini 1835.

[L. S.] F. WOOD, *Clerk.*
By S. WOOD, *D. Clerk.*

That in the said deed, by a mistake of the draughtsman, the said heirs, Martha, Mary, and Sarah were not named as grantors, but that only their several husbands are so named, although said deed is executed by said heirs and their husbands.

That on the 14th day of September, 1835, on the delivery of said deed, the said Holton and Barlow executed, acknowledged, and delivered to the said heirs and their several husbands a deed of mortgage on said land, to secure the payment of said notes according to said contract, and the said notes and mortages were accepted by said heirs and their husbands. That at the time of the marriage of the said Mary Haile with the said Charles Rice, in the year 1838, the said Holton and Barlow were in quiet and peaceable possession of the said land, and ignorant of any objection to their title. That the buildings on said land, at the time of the purchase, having been destroyed by fire, the said Holton and Barlow rebuilt the same at an expense of $100,000, which improvements were made with the full knowledge of said heirs, and without any objection on their part. And that the said Martha Phipps and Mary Haile, now Mary Rice, by accepting and receiving payments of money from the said Holton and Barlow upon
*231] the said notes and *mortgage, during the time between the death of the said Phipps and Haile, and the last marriage of the said Mary, and when the said Martha and Mary were of full age, which said payments were proved to have been made and received, have further ratified and confirmed the said bond and the said deed.

That said Holton and Barlow, principally by reason of such

expenditures, became largely indebted to the Agricultural Bank and the Planters' Bank, two of the defendants, and to secure that indebtedness, the said Barlow, on the 5th of May, 1838, executed to them a good and valid deed of mortgage, conveying to them his undivided interest in said premises.

That the said Holton, in February, 1839, sold and conveyed his interest in said premises to the said Demon B. Spencer, one of the defendants; that said Spencer, in consideration of the terms of his purchase from Holton, did, on the 27th of July, 1839, convey the same, by a good and valid mortgage, to the said Planters' Bank.

That the said Agricultural Bank and the said Planters' Bank are now in possession of said premises as mortgagees, and by virtue of a good and valid quitclaim deed from the said Sarah Gibson and her husband David H. Gibson.

That the said Holton and Barlow, and those claiming under them, were unmolested in their possession, and unapprised of any supposed objection to their title. That they have paid the whole of said purchase money.

Which testimony, as set forth herein on both sides, was all the testimony in the cause.

The counsel for the said defendants here offered to read in evidence the said bond for title, and the said deed hereinbefore mentioned, in connection with the foregoing proofs.

But to the reading of the same in evidence the said counsel for the said plaintiffs objected, because he says, that at the days of the dates of the said bond and of the said deed the said heirs, Martha, Mary, and Sarah, were under coverture, and were infants under the age of twenty-one years, so that the said bond and the said deed are absolutely void. The said judge did then and there declare and deliver his opinion, that the said objection, so taken by the said counsel for the said plaintiffs, ought to be allowed; that the said bond and the said deed ought not to be admitted in evidence, and did accordingly decide that the same should not be read in evidence on the part of the said defendants; to which said opinion of the said judge, the said counsel for the said defendants did then and there, in due form of law, except, before the jury retired from their box, and prayed that the said exceptions might be signed, and sealed, and made a part of the record. And it is accordingly done.

S. J. Gholson. [L. S.]

May 24th, 1843.

*To review this decision of the court below, the case was brought up to this court. [*232

It was argued by *Mr. Mason* (Attorney-General), for the plaintiffs in error, and *Mr. Thomas J. Johnston* and *Mr. Crittenden*, for the defendants in error.

Mr. Mason, for the plaintiffs in error, stated the case, and then proceeded.

I. The title, bond, and deed were admissible in evidence. The common law imparted to the husband, as a necessary incident to the seisin he acquired of the wife's freehold estate by the marriage, a power, by alienation, of converting her interest in it to a mere right. Hence a conveyance by him of the fee operated a discontinuance, and ejectment would not lie; although, by the statute of 32 Hen. 8, ch. 28, § 6, explained by the statute of 34 and 35 Hen. 8, the act of the husband alone was not permitted to have this effect, and a right of entry was reserved to the wife, and to her heirs, on the death of the husband, it has never been questioned that she might, after the termination of the coverture, confirm her husband's deed. 1 Rop. Husb. & W., 54, 55.

The deed from the husband is only a link in the chain of title, and was necessarily admissible, in connection with other testimony, to establish an act of confirmation by the wife, when sole and free from disability.

The reason assigned by the court below was wholly insufficient; neither the infancy nor the coverture of the femes covert necessarily excluded the deed.

There are many cases in which the deed of a married woman binds her, without confirmation, when sole, although, at its date, she was an infant; and the deed of a husband for his wife's real estate may be confirmed, and pass the title. Doug., 53; Cowp., 202; 2 P. Wms., 126. The deed from the husband is the basis, or first link, in the chain of title, and ought not to have been excluded. If the bond and deed had been admitted as evidence, and no sufficient confirmation by the wife, when sole, had been shown, it would have been competent for the court to charge the jury as to the sufficiency of these instruments in law to bind the wife's interests.

The court erred in excluding evidence which of itself was insufficient, but which, nevertheless, was competent.

II. It is submitted, that it appears on the record, notwithstanding this exclusion of the first link in defendants' paper title, that the female plaintiffs had ratified and confirmed the *bonâ fide* sale of the fee simple property after their disability was removed.

1. They received and gave acquittances of the purchase-money. They cannot be permitted to deny knowledge of the

consideration *for which the payments were thus made. They had signed both bond and deed. The deed was acknowledged by them, and their relinquishment made privily, with full explanation, and the deed was of record.

2. The tenement on the premises was destroyed by fire, and they, free from disability, stood by and permitted the grantees of their husbands and themselves to erect buildings thereon, at a cost far exceeding the purchase-money, without interposing, by any warning that the title made was objected to and its confirmation denied; such acts, on the part of persons free from disability, ought to be regarded as confirmatory of a defective *bonâ fide* conveyance; and the parties, although they be females, will not be permitted to recover the property thus improved without objection on their part, and for which they have themselves received the full payment of the purchase money.

III. The deed is the act of the femes covert; they are parties to it, executed it, and the estate granted and intended to be conveyed was their property. The deed is between the legal heirs of Adam Bower, deceased, of the first part. Martha, wife of Phipps, Mary, wife of Haile, and Sarah, wife of Gibson, were the children and heirs of Bower. They signed the deed, and their renunciation was taken in substantial conformity with the law of Mississippi, and the thing granted was their inheritance. The phraseology employed is not material. A deed by an attorney in fact is valid, whether he signs as B. W., attorney for R. C.; or R. C., by B. W., his attorney. 4 Hen. & M. (Va.), 184.

The claim of title set up by two of these females, now that they are married to other husbands, is sustained by the most refined and technical reasoning. The printed argument of *Mr. Johnston* affords a specimen of this.

It is not denied, that, to bind a married woman by a deed executed with her husband during coverture, she must have acknowledged it in substantial conformity with the terms of the statute. The requisites are,—

1. A previous acknowledgment made by her, on a private examination, apart from her husband.

2. That she signed, sealed, and delivered the same as her voluntary act, freely, without any fear or compulsion of her husband.

3. And a certificate thereof, written on or under the said deed of conveyance, signed by the judge or justice before whom it was taken.

The statute of Mississippi does not prescribe the form of the certificate. The guards thrown around the rights of mar-

ried women are contained in these requisites, and the deed is good and binding, if they have been substantially observed.

In Virginia there is a similar statute, with an additional section, prescribing the form of the wife's acknowledgment. Tucker, in *his Commentaries, vol. 1, tit. *Deeds of Feme Covert*, p. 267, after referring to these provisions of the Virginia statutes, remarks:— *234]

"Here we see that the object of the law is to ascertain, by a privy examination of the wife, apart from her husband, whether, in the execution of the deed disposing of her rights, she exercises that free will which is of the essence of all contracts. This is effected by an examination in court by one of the judges thereof, or in vacation by two justices of the peace." (One is sufficient in Mississippi). "Now, upon well received principles, it is clear that this act must be strictly pursued; for it is an innovation upon the common law; and, moreover, it prescribes the mode in which a person may convey, who was before disabled to convey. That mode must, therefore, be pursued; and as we do not pursue it if we vary from it, so it follows that it should be substantially, at least, complied with."

Acts of justices of the peace, done in the country, are always viewed favorably; and, if substantially conformable to law, are held sufficient.

The certificate in this case is on the ninth page of the record. It is not denied that the justice of the peace was duly authorized to act, and that his official certificate was written on or under the deed. But it is objected, that he has not done or certified what the law requires.

There is no objection that the same certificate embraces two official acts. The first paragraph certifies the acknowledgment of all the parties to the deed, with a view to its record. That was a separate and independent act.

The second paragraph or sentence of the certificate is the subject of dispute. What does the justice certify?

1. That Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined separate and apart from their husbands;

2. Acknowledged that they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands.

3. And these facts he certifies.

Now, is not this a substantial compliance with the statute?

The objection to the grammatical construction of this sentence does not appear to me well founded. Its true reading

is, that the justice certifies his having examined the wives separate and apart from their husbands; and, on that examination, the wives, thus being separate and apart from their husbands, made the acknowledgment. Privy examinations in court and in the country have been long practised. The terms are technical. It is against the influence of the husband that the wife is protected; and an examination is privy or private, within the statute, when he is not present. The casual presence of others would not vitiate it; and *there is no just reason to infer, in this case, that [*235 any one was present. The statute requires a "private examination, apart from the husband." The justice certifies that he made an examination, separate and apart from the husband.

The statute requires a previous acknowledgment that she signed, sealed, and delivered the same as her voluntary act, freely, without fear, threats, or compulsion of her husband. The certificate is, that they acknowledged to have signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their husbands.

This court, in 12 Pet., 345, said, "The law presumes a feme covert under the coercion of her husband." It is against this presumed influence that the privy examination is intended to protect her, when the statute requires, that she shall acknowledge the same as her voluntary act freely, without fear; and it means nothing more than that she shall declare her act to have been done free from such influences. This is done in the certificate, and the effective and essential words of the statute are employed. *Hepburn* v. *Dubois*, 12 Pet., 345; *Shaller* v. *Brand*, 6 Binn. (Pa.), 435; *McIntire* v. *Ward*, 5 Id., 296; 1 Pet., 155.

There is no proof in the record that the femes covert were infants.

IV. It is objected that the acknowledgment of the femes is not recorded. By the record, it appears that the deed, with the certificate, which was an essential part of it, was received for record on the day after the execution; and on the next day, the clerk certifies that the within deed is recorded. It is an unauthorized conclusion, that the certificate was not recorded as a part of the deed.

No such objection appears to have been taken below, and there is nothing in the circumstances of this case to induce the court to presume defects which do not appear to exist in favor of the plaintiffs. But no question arose as to the record of the certificate. If the fact were so, it was sufficient; but the court, by refusing to allow the deed to be read, deprived the

defendants of the right to exhibit the proof, which, it is confidently asserted, was at hand to perfect their case, so far as the record of the certificate was required by law.

The defendants, *bonâ fide*, bought and paid for the property of the femes. They united in a bond and conveyance of the property; when relieved from disability, they received the purchase money, and they stood by and permitted the innocent purchasers of this property to put on it improvements at a cost of more than one hundred thousand dollars, without interposing objection or assertion of title; they have not proposed to return the purchase money, or to indemnify against the enormous expenditure for improvements. It can hardly be, that, under such circumstances, the claim *of title set up by their subsequent husbands can be successfully maintained by the refined and technical reasoning resorted to.

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Mr. J. J. Johnston, for defendants in error.

The exceptions to the decision of the court below were taken and were confined to the rejection of two instruments of writing, which were offered in evidence on behalf of the defendants, now the appellants; and, if they were properly rejected, the judgment must be affirmed.

The first of these was a bond, and the second a deed, in alleged pursuance of it, both purporting to have been executed, under coverture, by Mrs. Haile (now Mrs. Rice) and Mrs. Phipps, to persons under whom the appellants claim. The question of the title depends solely upon the validity of these conveyances.

I. 1. As to the bond, it is only necessary to refer to the case of *Hickey's Lessee* v. *Stewart et al.*, which was decided, upon able debate and ample deliberation, at the last term of this court, wherein it was held, that an equitable title could not be set up either to sustain or to defeat an action of ejectment. 3 How., 760. Hence, had the bond been acknowledged by these married women, and otherwise valid, it was properly rejected by the lower court.

2. The same ceremony of an acknowledgment, on a private examination, is required, by the statute of Mississippi, in the alienation of equitable as in that of legal estates, both kinds of estate being within the terms and meaning of the statute:—"No estate of a feme covert shall hereafter pass by her deed or conveyance,"&c. (quoted hereafter). How. & H., 347. So, in Ohio, leases by femes covert must be acknowledged. 6 Ohio, 313. In this case, there is no certificate or acknowledgment whatever of the bond.

3. The bond of a married woman is, upon the general prin-

ciples of the law, utterly void. 2 Kent, 168, 5th ed.; 6 Wend. (N. Y.), 1; 1 Bail. (S. C.), 184; 2 Story Eq., 617; 5 Day (Conn.), 492; 7 Conn., 128.

II. The deed was properly rejected upon three grounds:—

1. Its intrinsic defect. Phipps, Haile, and Gibson grant, "in right of their wives," but these wives are not parties to the deed. It is true, their signatures are affixed, but their names are not in the body of the deed. Now, it is rather trite learning to say, and to say here, that there must be a grantor, a grantee, and a thing granted, to every deed that grants land; that a grantor is as necessary as a grantee or thing granted; or that there is a place in a deed for the name of the party who grants, and that this place is not the bottom of the deed. This is a good conveyance of the life estates of Phipps, Haile, and Gibson; the two former being *dead, and [*237 their wives never having been made parties to it by apt words, are not bound by it.

A deed of land, executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land, nor her right of dower. 3 Mason, 347.

Where there are no grantors, there is no remedy even in equity. 10 Ohio, 305.

A deed is invalid, though the feme covert be named in the premises, and her signature be affixed, if not named elsewhere. 7 Ohio, 195.

2. The deed was properly rejected, because of the defective certificate of examination and acknowledgment.

The statute of Mississippi is as follows (How. & H., 347):—

"No estate of a feme covert in any lands, tenements, or hereditaments, lying and being in this state, shall hereafter pass by her deed or conveyance, without a previous acknowledgment made by her, on a private examination, apart from her husband, before a judge, &c., that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under said deed or conveyance, and signed by the judge or justice before whom it was made; and every deed or conveyance so executed and acknowledged by a feme covert and certified as aforesaid shall release and bar her right of dower in the lands, tenements, and hereditaments mentioned in such deed of conveyance."

It does not appear from the certificate in this case, that the acknowledgment of the married women was taken on a private examination, which is required by the statute.

In the first sentence of the certificate, the husbands and their wives all appear and act together; in the second, the

wives all appear and act together. For it is stated,—"And Martha Phipps, Sarah Gibson, and Mary Haile, wives of William M. Phipps, William R. Haile, and David H. Gibson, having been examined, separate and apart from their husbands, and acknowledged that they signed," &c. If grammatical construction require the insertion of the word "having" before the word "acknowledged," it is questionable whether there be any affirmative statement of the acknowledgment at all. If the word "separate," which is not in the statute, and imparts no vigor to its phraseology, be stricken out, the certificate will be,—"And Martha Phipps, Sarah Gibson, and Mary Haile, wives, &c., having been examined apart from their husbands," &c. It is in vain to call this an "acknowledgment made by her (them) on a private examination;" for it eviscerates the very vitals of the statute. The examination may have *been not only apart and separate from their husbands, but private, or in the language of Coke, solely and secretly, and yet the acknowledgment may have been made not only in the presence of the relatives and friends, and dependents of their husbands, but in that of the husbands themselves. The interpolation of the word "separate" imparts no strength to "apart," nor are they, separate and apart, or united, equivalent to *private; separate* having reference to the position of husband and wife, while *private* indicates the position of the magistrate and the wife in reference to the whole world besides. The two houses of Congress are separate and apart, but not very private; the chief-justice and his associates are separate and apart, yet together constitute one public bench. The examination of married women, separate and apart from their husbands, though in the company of each other, would not be regarded as a compliance with the statute; yet it is obvious from the face of the certificate, that the three sisters, Mrs. Phipps, Mrs. Gibson, and Mrs. Haile, were all of them together, acting, acknowledging, and being examined; and, for aught that appears to the contrary, may have been surrounded, at the time of the acknowledgment, by the friends, relatives, and dependents of their husbands, and of their grantees, against whose arts and influences, if it do not appear by the certificate that the rights of the married women have been shielded and protected, the statute becomes a dead letter, and the private examination a mockery. The case of *Jones* v. *Maffet and wife*, 5 Serg. & R. (Pa.), 534, was decided upon the ground that the Pennsylvania statute did not require a privy examination, but that it was sufficient if the feme covert were examined "separate and apart from her husband." There is a mutilated quotation, I

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believe, in the same case, of the maxim, "*omnia presumuntur rite esse acta*," which is severed from *donec probetur in contrarium*. The certificate annihilates the presumption.

The disability of coverture can only be overcome by the precise means allowed by law for the alienation of the real estate of married women (2 Story Eq., 617), of which an essential part is a private examination, derived from the English mode of conveyance by fine, and rescued from its wreck. Lord Coke thus discourseth of the same:—

"The examination must be solely and secretly, and the effect thereof is, whether she be content of her own free good-will, without any menace or threat, to levy a fine of these parcels, and name them to her, every thing distinctly contained in the writ, so as she perfectly understand what she doth; and if the judge doubteth of her age, he may examine her upon her oath." 2 Inst., 515; 6 Wend. (N. Y.), 12.

It is a general principle of American law, that all deeds of married women, without a privy examination, are void; [*239
2 Lomax's *Dig., 18; and that all acts not conformable to acts of Assembly are void; Id., 52. Some states provide, simply, that there shall be a private examination upon the execution of a deed by a feme covert, and leave everything else to the integrity and intelligence of the officers authorized to conduct it; others prescribe the acts to be performed by the officer, such as reading the deed, making known its contents, or explaining its effects (12 Leigh (Va.), 464; 1 Binn. (Pa.), 477; 6 Serg. & R. (Pa.), 50), without the performance of which the deed is inoperative and void. But it is obvious that the requirement of the private examination alone, and the requirement of the acts which constitute it, are the same thing,—the object of both being to remove the disability which results from the matrimonial connection, while they throw an intrenchment around the rights of the feme covert, who is hardly considered, in contemplation of law, to have a separate legal existence, her husband and herself constituting but one person. The sacred injunction, Whom God hath joined together, let no man put asunder, is, *pro hac vice*, disregarded, and the minister of the law is clothed with a confidence which is denied to the husband. The inefficient or negligent discharge of the duties of the office, which tend to its degradation, will neither be sustained by subtle construction, nor receive the countenance of courts of justice.

The words of the certificate are, that "they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands;" the language of the statute is, that "they signed, sealed, and delivered the

same as their *voluntary* act and deed, *freely*, without any fear, threats, or compulsion of their said husbands." The omission of two words of such pregnant import, emphatically reiterated, as if to stamp freedom of volition not only on the act itself, but the manner of the act, is, I humbly submit, so utterly fatal to the certificate, as to render any further remarks unnecessary, except that, though an act done by a person capable of contracting would be presumed to have been voluntary, yet this is not that case; and that each word of the certificate may be perfectly true, yet the deed may have been signed reluctantly and not voluntarily, sealed reluctantly and not voluntarily, and delivered reluctantly and not voluntarily.

III. The acknowledgment of the femes is not recorded, the certificate of the clerk embracing the deed only.

Be it remembered, that the deed was not proved as an original; to be read otherwise than as such, both the acknowledgment and the certificate must be recorded. How. & H., 343.

It is not the fact, but the recording of the fact, that makes the deed effectual. Tate Dig., 170; 1 Pet., 138, 140.

It is in the nature of a judicial proceeding, of which there must be a record.

*240] *IV. *Confirmation.* It may yet be contended, that the bond, or the deed, or the mortgage, was confirmed, after disability removed, and that the mode of confirmation was the receipt of money upon the notes given for the property for which suit was brought.

Void instruments are incapable of confirmation (Story Cont., § 47; Plowd., 397), which must be by an instrument of as high a nature. 8 Taunt., 36; 10 Pet. 59.

A lease, which is void as to a remainder man, cannot be set up as a defence to an action of ejectment brought by him, although it be proved that he received rent, or suffered the tenant to make improvements. Law Lib., Oct., 1845, p. 300; Doug., 50.

Confirmation cannot be, unless with a knowledge of their rights. 5 Ohio, 255.

To make an act amount to re-delivery, there must be clear knowledge. 5 Dana(Ky.), 234.

It must be known that receipt of money made good the re-delivery. 9 Dana (Ky.), 477.

The act relied on here was the receipt of money upon the notes, without any reference whatever to the bond, deed, or mortgage, by payor or payee.

Upon the mortgage, which was not offered in evidence, no

question was raised in the court below; of course, none can raised or considered here. 11 Wheat., 199.

The time when, and the character in which, this money was received will shed light upon the intention with which it was received, and the effect of its receipt.

The defects in the deed had not been ascertained when the payments were made. The bond was understood to be merged in the deed, and the deed was believed to be valid; hence there could have been no intention to confirm what was already considered as obligatory. Suit was brought as soon as the deed was discovered to be defective. The effect of the receipt of money in a fiduciary character cannot prejudice the private rights of Mrs. Rice or Mrs. Phipps. By law, they could only receive it thus, since they had no right to the personalty of their respective husbands; upon which, moreover, there was a statutory lien for their debts. The law will not put them in the predicament of saving their private rights by faithlessness to their trust, or losing their private rights by a faithful performance of the duties of executorship or administration.

There was neither instrument, act, nor intention of confirmation, nor knowledge of their rights, till suit was brought.

Mr. Crittenden, on the same side.

It might be dishonorable for any parties except married women to try and get this property back; but the law is not friendly to their rights, and in nine cases out of ten, they do not know what they *are conveying away when [*241 they execute deeds. In this case, the property belonged to the wife, but she is not named as a grantor in the deed, and therefore is not bound by it. 3 Mason, 347.

(*Mr. Crittenden* then examined the certificate of the magistrate, which he contended was not sufficient.)

It is argued that a subsequent acceptance of money by these wives, after the death of their husbands, reacts upon the original contract and confirms it. But it cannot make a deed good which is intrinsically void. Instruments may be confirmed in some cases, it is true, but only when they are valid for some purposes, and not where they are wholly void. And besides, the confirming act must be performed with the intention and purpose of producing such a consequence. It cannot be effected incidentally. The mere receipt of money is not sufficient.

Mr. Chief-Justice TANEY delivered the opinion of the court.

This being an action of ejectment, the only question between the parties is upon the legal title.

It is admitted in the exception, that Mary Rice and Martha Phipps, lessors of the plaintiff, were each of them, as heirs at law of Adam Bower, entitled to an undivided third part of the premises mentioned in the declaration, in fee simple. In order to show title out of them, the plaintiffs in error relied upon the bond of conveyance and deed, mentioned in the statement of the case, both of which were signed and sealed by these lessors of the plaintiff, but were executed while they were femes covert.

As regards the bond, it would not have transferred the legal title, even if all the parties had been capable of entering into a valid and binding agreement. But as to the femes covert who signed it, it was merely void, and conferred no right, legal or equitable, upon the obligees.

The deed, also, is inoperative as to their title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part,—the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

*242] *It is unnecessary to inquire whether the acknowledgment of the femes covert is or is not in conformity with the statute of Mississippi. For, assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.

The judgment of the Circuit Court is therefore affirmed.

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CHARLES CLIFTON, CLAIMANT, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

Upon the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, and the United States had shown sufficient ground for an opinion of the court that probable cause existed for the prosecution, and notice had been given to the claimant to produce his books and accounts relating to those goods, it was proper for the court to instruct the jury, that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his cause.[1]

The doctrine laid down in 2 Evans's Pothier, 149, cited and approved, namely, "That if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed, that if the more perfect exposition had been given, it would have laid open deficiences and objections which the more obscure and uncertain testimony was intended to conceal."[2]

The principle established in the case of *Wood* v. *The United States* (16 Pet., 342), reviewed and confirmed, namely,—"That if goods are fraudulently invoiced, they are not exempted from forfeiture by having been appraised in the custom house at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon such increased valuations."[3]

If the information contains several counts, founded on the following acts, namely, the sixty-sixth section of the act of 1799, the fourth section of the act of 1830, and the fourteenth section of the act of 1832, the defectiveness of the counts upon the acts of 1830 and 1832 would be no ground for reversing a judgment of condemnation, provided the count is good which

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[1] DISTINGUISHED. *Chaffee* v. *United States*, 18 Wall., 545.

[2] APPROVED. *Goshorn* v. *Snodgrass*, 17 W. Va., 771. S. P. *Tayloe* v. *Riggs*, 1 Pet., 591, 596; *United States* v. *Laub*, 12 Id., 1; *Jones* v. *Knause*, 4 Stew. (N. J.), 609.

Where a party withholds evidence in his possession applicable to the case and calculated to clear up a doubt, or difficulty, the jury may properly draw the inference that the evidence if given would militate against him. *United States* v. *Distilled Spirits*, 9 Int. Rev. Rec., 9; *United States* v. *Chaffee*, 11 Id., 110; *The Silver Moon*, Id., 118; *United States* v. *Mathiot*, Id., 158.

Where a witness refuses to explain what he can explain, the presumption is that the explanation would be to his prejudice. *Heath* v. *Waters*, 40 Mich., 457. The fact that a party declines to testify as to facts which he knows to be pertinent to his cause is a circumstance for the consideration of the jury. *Jackson* v. *Blanton*, 58 Tenn., 63. But the omission of a party to a civil action to call a presumably material witness does not warrant a presumption that the testimony of such witness would have been adverse to him. *Bleecker* v. *Johnston*, 69 N. Y., 309. Compare *Cramer* v. *Burlington*, 49 Iowa, 213. And the maxim, *omnia præsumuntur in odium spoliatoris*, is not to be resorted to where there is positive evidence of the contents of an instrument destroyed. *Bott* v. *Wood*, 56 Miss., 136.

[3] CITED. *Henderson's Distilled Spirits*, 14 Wall., 57. See *Cliquot's Champagne*, 3 Id., 143; *Caldwell* v. *United States*, 8 How., 367.

is founded upon the act of 1799; because one good count is sufficient to uphold a general verdict and judgment.[4]
The difference between these sections explained.
In this case, therefore, it is unnecessary to decide what averments are required in counts resting upon the acts of 1830 and 1832, or whether the counts are or are not void from generality.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for East Pennsylvania.

The facts are fully set forth in the opinion of the court.

*243] The case was argued by *Mr. Meredith*, for the plaintiff in error, *and *Mr. Cadwallader* and *Mr. Mason* (Attorney-General), for the United States.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error from the judgment of the Circuit Court for the Eastern District of Pennsylvania, affirming a judgment of the District Court of the same district.

The original suit was a libel of information, *in rem*, founded upon a seizure on land in the said district of some seventy-one cases of cloths and cassimeres imported into the United States, and alleged to have been forfeited.

The libel contained thirteen counts, resting upon different sections of the several acts of Congress regulating the collection of duties on imports and tonnage; but it will be material to notice particularly those only which are founded upon the sixty-sixth section of the act of 1799 (ch. 22, Lit. & Brown's ed.), the fourth section of the act of 1830 (ch. 147), and the fourteenth section of the act of 1832 (ch. 227), which provide against the making up of false invoices and false packages of the goods imported, with the intent to evade or defraud the revenue.

Various pleas were put in by the claimant, but as no questions are raised upon them, they need not be stated.

On the trial of the cause, it appeared that the goods in question had been originally imported into the port of New York, and were there duly entered and landed, and the duties paid upon the invoices produced by the claimant to the collector. The goods were appraised at the custom-house, at a valuation of ten per cent. above the invoice prices, and no appeal taken. They were afterwards transported to the city of Philadelphia, and were there seized by the custom-house officers, under a warrant issued for that purpose, in the stores of certain persons having the custody of them in that city for the claimant.

[4] CITED. *United States* v. 67 *Packages, &c.*, 17 How., 94.

A good deal of evidence was given on the part of the United States, tending strongly to establish the fact, that the several invoices upon which the duties had been paid at the custom-house in New York, and which invoices were produced before the court, had been made up greatly under the actual cost and value of the goods in England, the place of exportation, and with the intent to evade and defraud the revenue; and in the progress of the trial, the counsel for the government, in pursuance of a notice given some months previously, called upon the claimant for the production of his ledger containing entries of each of the several invoices of the goods thus imported; also, for the production of his cash-book for the years 1838 and 1839, embracing the period within which the goods had been imported, and for the entries therein relating to the said importations; also, for the charges of the payment of freight upon said goods;—to each of which *calls the counsel were answered, that the claimant had no such book in court. [*244

The counsel for the government, like previous notice having been given, also called upon claimant for the production of the accounts in the ledger, for the years 1838 and 1839, with each of the houses in England who had sold and invoiced the said goods to him, and for his letter-book for said years, and the correspondence with each of the said houses respectively, and also for his day-book; to which calls the counsel answered, that neither of them were in court.

When the testimony closed, the court below instructed the jury that it was alleged, on the part of the United States, that the goods in question had been forfeited, from having been imported into New York by false invoices, with intent to evade the payment of part of the duties to which they were subject. That it was incumbent upon the government to show upon the trial that there was probable cause for the prosecution; and if that had been shown, of which the court was to judge, the burden of proof was on the claimant, who must then satisfy the jury that the goods were invoiced at their actual cost.

That with a view to show probable cause, the government relied mainly upon the evidence, that the actual value of the goods in England exceeded the prices per yard mentioned in the invoices and that after the testimony which had been produced on the part of the government of the value of the goods at the time and place of exportation, as compared with the prices fixed in the invoices, it was material to notice the negative evidence, arising out of the absence of testimony on the part of the defendant of the actual cost of the goods; and

to consider whether its absence had been accounted for. That there was evidence that one of the persons, by whom a portion of the goods in controversy appeared to have been invoiced to the claimants, was within the reach of a subpœna, and it was reasonable to presume that it was in the claimant's power to have produced evidence of the real state of his accounts and transactions with all the parties in England from whom the goods had been received, as the correspondence showed that two years ago his counsel had advised him to procure proof on this subject, which had not been produced; that the claimant knew from whom he had bought the goods, and what their actual cost was, and yet he had not produced the evidence, nor accounted for its absence; that to withhold testimony which was in the power of a party to produce, in order to rebut a charge against him, where it was not supplied by equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge; that if the claimant had withheld proof which his accounts and transactions with these parties afforded, it might be presumed that if produced they would have operated unfavorably
*245] to his case; that the government *had shown probable cause, and that the next inquiry was, whether the claimant had relieved himself from the burden of the proof, &c.

The court further instructed the jury, that in respect to some of the invoices, the government and claimant relied upon the same circumstance, namely, that goods included in the information, in passing through the custom-house in New York, were appraised at amounts exceeding the invoice prices, and that the claimant, without appealing, had paid the duties assessed upon the increased value, and received the goods from the custom-house.

The counsel for the government contended that this acquiescence implied an admission that the invoices were untrue, while the counsel for the claimant contended, that by this appraisement, assessment, and payment of duty, the government were precluded from alleging or enforcing a forfeiture of these goods. The court expressed the opinion, that the question of liability to forfeiture was so far distinct from questions connected with the ascertainment and payment of duties, that the passing of goods through the custom-house, under such circumstances, was not, in a legal point of view, decisive of any question before the jury. That the question was, whether the goods were falsely invoiced, with intent to defraud the revenue, &c.

The counsel for the claimant excepted to that part of the charge in which the jury were instructed, that, if the claimant

had withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his case; and also to that part in which the jury were instructed, that, if the goods in controversy were fraudulently invoiced, they were not exempted from forfeiture by having been appraised in the custom-house at valuations exceeding the prices in the invoices, and delivered to the importer on payment of the duties assessed upon the amount of such appraisement; and also to that part of the instructions in which the jury were advised that probable cause had been shown by the government in support of the prosecution.

A general verdict was rendered for the United States.

As to the instructions given to the jury first excepted to, in which the court below expressed the opinion, "that if the claimant had withheld proof which his accounts and transactions with the parties afforded, it might be presumed that, if produced, they would have operated unfavorably to his case;" in order to comprehend fully the appropriateness and legality of the instructions, it is material to refer to the posture of the case at the time they were given, and to the question then under the consideration of the court.

The counsel for the government had furnished proof tending strongly to the conclusion, that the invoice prices of the goods in question were greatly under the actual cost at the place and in the *country whence they were [*246 imported. This proof rested mainly upon the testimony of several merchants, importers and dealers in the particular article, who had examined the goods and estimated their cost.

The average estimate exceeded the invoice prices some fifty per cent.

The counsel also, with a view of further strengthening their case, and in pursuance of previous notice for that purpose, called upon the claimant for the production of his books and papers containing an account of the several importations, and of his dealings in respect to them with the foreign houses, together with his and their correspondence concerning the same. Neither were produced, nor any account attempted to be given for the non-production.

Upon this the government rested. Probable cause for the prosecution having been thus sufficiently established, the claimant went into his defence; and, instead of furnishing evidence of the prices actually paid by him to the houses abroad from whom the goods were purchased, as he might have done, either by executing a commission to take their tes-

timony, or by persons concerned in making the purchases, or by the production of the books of account that had been called for, as the call afforded him an opportunity to put them in evidence, he placed the defence altogether upon the judgment and opinions of merchants and other persons acquainted with this description of goods, as to the value and cost of the article in the home market, tending thereby to confirm and support the correctness of the valuations as fixed in the invoices.

The burden of the case was upon the claimant, and it was in this stage and posture of it that the instructions were given which are the subject of the exception; and in which the court stated, "that the claimant knew from whom he had bought the goods, and what was their actual cost, and yet had not produced this testimony, or accounted for its absence; that to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, where it is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge. And that if the claimant had withheld testimony of his accounts and transactions with these parties (meaning the foreign houses from whom he had purchased the goods), the jury were at liberty to presume that, if produced, they would have operated unfavorably to his case."

The instructions had a direct reference to, and are to be construed as intended to bear upon, the matters of defence, probable cause having been shown; and upon the nature and species of the evidence relied on by the claimant in support of it; and in this aspect of the case, at least, without now referring to any other, we think they were not only quite pertinent to the question in hand, *but founded upon the well established rules and principles of evidence. *247]

The prosecution involved in its result, not only the forfeiture of a considerable amount of property, but also the character of the claimant, both as a merchant and an individual. He was charged with a deliberate and systematic violation of the revenue laws of the country, by means of frauds and perjuries, and the court, as was its province, under the seventy-first section of the act of 1799, had pronounced the proof sufficient to establish the offence, unless explained and rebutted by opposing evidence.

Under these circumstances, the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defence the very best evidence that was in his possession, or under his control. This evidence was certainly within his reach, and probably in his

counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evidence, but even refused to furnish it on the call of the government; leaving, therefore, the obvious presumption to be turned against him, that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence.

One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.

This is the reason given for exacting, in all cases, the primary evidence, unless satisfactorily accounted for. 1 Phill. Ev., 218, C. & H.'s notes, 414, 418, and cases.

For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher; and the inferior is, therefore, admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially *when it appears, [*248
or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled.

It is well observed by Mr. Evans (2 Evans's Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may

well be presumed, if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.[1]

We will only add, that practical illustrations of this application of the rule are witnessed daily in the administration of justice in criminal cases, and are too familiar to every lawyer to require a more particular reference.

We are satisfied, therefore, that no error was committed by the court below in giving the instruction first excepted to.

The second exception was to that part of the charge in which the court instructed the jury, that, if the goods were fraudulently invoiced, they were not exempted from forfeiture by having been appraised in the custom-house at New York at valuations exceeding the prices in the invoices, and delivered to the importers on payment of the duties assessed upon the amount of such appraisement.

In respect to this instruction, it is only necessary to refer to the case of *Wood* v. *The United States* (16 Pet., 342), in which a similar one had been given, and came up for review, and the correctness of which was affirmed by the court.

The third and last exception taken was to the instruction, that probable cause had been shown by the United States for the prosecution, which was virtually given up on the argument. There can be no doubt as to its correctness.

In addition to the foregoing exceptions, the counsel for the plaintiff in error insisted, on the argument, that the fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth counts in the information, all of which are founded upon the fourth section of the act of 1830 (ch. 147, Lit. & Brown's ed.), and the fourteenth section of the act of 1832 (ch. 227), were substantially defective, by reason of the generality and uncertainty of the averments in each and every of the said counts; and that, for this reason, the judgment should be reversed.

It was not denied but that the fourth count, which is founded upon the sixty-sixth section of the act of 1799 (ch. 22), was good in form and substance, and sufficient, if it stood alone, to uphold *the recovery; but it was insisted, as the verdict and judgment were general upon all the counts in the information, that, if one or more were bad, an error existed upon the record for which the court was bound to reverse the judgment.

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[1] QUOTED. *United States* v. 3880 *Boxes, &c.*, 12 Fed. Rep., 406; s. c., 8 Sawy., 134.

The sixty-sixth section of the act of 1799, vol. 1, p. 677 (Lit. & Brown's ed.), provides, "that if any goods, wares, or merchandise, of which an entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., shall be forfeited."

The same section also provides for seizing the goods on suspicion of fraud, and detaining them for examination. This section condemns the goods to forfeiture in cases where they are invoiced below their actual cost at the place of exportation, with intent to defraud the revenue.

The fourth section of the act of 1830 provides, that the collector shall cause at least one package out of every invoice, and one package, at least, out of every twenty packages of each invoice, and a greater number if deemed necessary, of the goods imported, which package or packages he shall first designate on the invoice, to be opened and examined; and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected, and if subject to an ad valorem duty, the same shall be appraised; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited.

This section condemns the goods to forfeiture,—

1. If the package is found to contain any article not in the invoice; and,

2. If it shall be found that the package or invoice is made up with intent to defraud the revenue by a false valuation or otherwise.

The fourteenth section of the act of 1832 provides, that whenever, upon opening and an examination of any package or packages of imported goods, composed wholly or in part of wool or cotton, in the manner provided for by the fourth section of the act of 1830, the goods shall be found not to correspond with the entry at the custom-house, and the package shall be found to contain any article not entered, such article shall be forfeited; or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited, and so much of the said fourth section as prescribes a forfeiture of the goods found not to correspond with the invoice is repealed.

This section condemns to forfeiture,—

*1. The article in the package which it is found does not correspond with the entry; and,

2. The package which it is found has been made up with intent to defraud the revenue; and,

3. Repeals that part of the fourth section in the act of 1830 which forfeits the package in which an article is found not corresponding with the invoice.

The fourth section of the act of 1830, and fourteenth of 1832, enlarge the grounds of forfeiture beyond the sixty-sixth section of the act of 1799; but the frauds provided against in those sections, and upon which the forfeiture proceeds, appear to be limited to cases where the detection takes place in the course of the examination at the custom-house.

The sixty-sixth section limits the forfeiture to the case of fraud in making up the invoice prices below the actual cost of the goods, but leaves the time and place of detection unrestricted. Under this section, whether the discovery of the fraud be made by the custom-house officers while the goods are passing inspection, or afterwards, is immaterial. In either case condemnation follows, as has already been held by this court in the case of *Wood* v. *The United States* (16 Pet., 342).

As already stated, it is not denied but that the condemnation is well supported under the count founded upon the sixty-sixth section; but it is insisted, that all the counts founded upon the fourth section of the act of 1830, and the fourteenth of the act of 1832, are substantially defective for their generality and want of averments setting forth the special circumstance of the examination and detection of the fraud under the authority of the collectors. Whether this be so or not, it is unimportant to determine in this case, as it was held, at an early day, in this court, that one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad, the information being regarded in the nature of a criminal proceeding.[1] (*Locke* v. *The United States*, 7 Cranch, 339; 1 Johns. (N. Y.), 320; Doug., 730; 8 Bac. Abr., 114.)

The same must have been virtually held in the cases of *Wood* v. *The United States*, already referred to, and *Taylor and others* v. *The same* (3 How., 197.)

We will merely add, as to the sufficiency of the counts upon the fourth section of the act of 1830 and fourteenth section of 1832, that, by the sixty-sixth section of the act of 1799, the collector was authorized, in case he suspected fraud in the invoice prices, to seize the goods and detain them for

[1] CITED. *United States* v. *Emholt*, 15 Otto, 416.

examination as fully as is provided for in the two sections of the acts of 1830 and 1832. There is no substantial difference, in this respect, except that the latter makes it the duty of the collectors, in all cases, to direct an examination before the goods are allowed to pass through the custom-house, whereas *the sixty-sixth section left it as matter of discretion, depending upon suspicion of fraud in the invoices. [*251

Upon the whole, we are satisfied that the judgment of the Circuit Court, affirming that of the District Court, is legal, upon all the grounds which have been urged against it, and should be affirmed.

JAMES BUCKLEY, CLAIMANT OF THREE BALES AND EIGHT CASES OF CLOTH, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

In the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, it was proper to allow to go to the jury, as evidence, appraisements of the goods made either by the official appraisers or appraisers acting under an appeal, they being present to verify the papers. The objection that the appraisements had not been made in presence of the jury was not sufficient.

Such papers are documents or public writings, not judicial, and may be used as evidence, under the rules which regulate all that class of papers.

Other invoices of other goods imported by the party are admissible. The decision on this point in *Wood* v. *The United States* (16 Pet., 359, 360) confirmed.

It was proper to show, in such a case, that the agent of the claimant had sold goods for him at prices which yielded profits, which other persons, engaged in the same trade, averred could not fairly have been made in the then state of the market.

The court is the tribunal to determine, from the evidence, whether or not there was probable cause for the seizure.

In order to sustain counts in the information, founded on the acts of 1830 and 1832, it is not necessary that they should contain averments of the special circumstances of the examination of the goods and detection of the fraud under the authority of the collector. The language of the court in Wood's case re-examined, explained, and controlled.

The court below was right in instructing the jury, that, under such an information, they were not restricted in the condemnation of the goods to any entered goods which they found to be undervalued, but that they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, provided they should find that such package or invoice had been made up with intent to defraud the revenue.[1]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On the 16th of August, 1839, Patrick Brady, a resident of

[1] CITED. *Cliquot's Champagne*, 3 Wall., 143.

the city of Philadelphia, presented to the custom-house in that city an entry of certain goods which had arrived from Liverpool, in the ship Franklin. Accompanying the entry was the oath of James Buckley, the present claimant, taken at Liverpool, on the 8th of June, 1839. It was what is called the manufacturer's oath as contradistinguished from the purchaser's oath, and stated the value, the purchaser's oath stating the actual cost, of the goods. The bill of lading was for three bales, marked P. B., 810, 811, 812, and eight cases, marked P. B., 813 to 820, which were consigned to the said Patrick Brady.

*252] These goods were ordered to be appraised by the two regularly *appointed appraisers for the port of Philadelphia, namely, Thomas Stewart and Henry Simpson. The examination was not finished until the 25th of September, 1839; the result of which was an appraisment of £1,917, the invoice being £1,647.

On the 15th of February, 1840, the claimant, being then in England, made out a copy of the invoice of the goods in question, to which he annexed a purchaser's oath, stating the goods to have been purchased on the 28th of May, 1839, from William Buckley and Company.

On the 25th of May, 1840, the claimant appealed from the decision of the official appraisers, in the manner pointed out in the act of Congress providing for an appeal, when Samuel Ross and A. J. Lewis were appointed to make an appraisement. On the 22d of June, 1840, they took the oath required by law, and proceeded to make the valuation.

About this time, but the record does not state exactly when, the agent of the claimant filed in the custom-house at Philadelphia the purchaser's oath just spoken of.

On the 22d of June, 1840, the appraisers, Ross and Lewis, who had been appointed under the appeal to appraise the goods, took the necessary oaths and proceeded to execute the duty. The result was, that their appraisement was seventeen per cent. higher than the value as stated in the invoice.

On the 28th of September, 1840, an information was filed against the goods in the District Court for the Eastern District of Pennsylvania. It consisted of four counts.

The first was founded on the sixty-sixth section of the act of 1799.

The second, upon the fourth section of the act of 1830, and charged that the invoice was made up with intent, by a false valuation, to evade and defraud the revenue of the United States.

The third, upon the same section of the same act, charging that each of the several packages was made up with intent, &c.

The fourth, upon the fourteenth section of the act of 1832, charging that the goods were composed wholly, or in part, of wool or cotton, and that all and each of the several packages in the invoice were made up with intent, &c.

As these counts are the subject-matter of a part of the decision of the Supreme Court, it is proper to insert them *in extenso*.

In the District Court of the United States of America, in and for the Eastern District of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, *ss.:*

Be it remembered, that, on this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and forty, into the District Court of the United States of America, in and for the Eastern District of Pennsylvania, comes John M. Read, attorney *of the said [*253 United States of America, prosecuting in their name and on their behalf, and gives the said court here to understand and be informed, that, on the twenty-fourth day of June, in the year aforesaid, at the city of Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this court, the following goods, wares, and merchandise, to wit:—

Three bales of cloths, marked P. B., 810, 811, 812, and eight cases of cloth, marked P. B., 813, 814, 815, 816, 817, 818, 819, 820, were seized on land by Calvin Blythe, Esq., collector of the customs of the port and district of Philadelphia, in the said Eastern District of Pennsylvania, and are now in his custody, as being forfeited, for the causes hereinafter mentioned, to wit:—

1. That the aforesaid goods, wares, and merchandise are of the growth, produce, and manufacture of some foreign place or country, to the said attorney unknown; and were heretofore, to wit, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, brought or imported in a ship or vessel, being a ship called the Franklin, from a foreign port or place, to wit, the port of Liverpool, to the port of Philadelphia, in the collection district of Philadelphia, in the Eastern District of Pennsylvania, which said goods, wares, and merchandise are subject to the payment of duties to the United States, on being brought and imported as aforesaid.

That an entry of the aforesaid goods, wares, and merchandise, duly signed, was, at the time of said importation there-

of, made at the office of the collector of the customs of the said port and district of Philadelphia; and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in such entry was produced, and left with the said collector of the customs of the port and district of Philadelphia.

And the said attorney further avers, that the aforesaid goods, wares, and merchandise, which were so entered as aforesaid, and of which an invoice was so produced and left as aforesaid, were not invoiced according to the actual cost thereof at the place of exportation, but, on the contrary, were in fact invoiced at less sums than the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or some part thereof, against the form of the act of Congress in such case made and provided.

2. That the aforesaid goods, wares, and merchandise, being subject to the payment of *ad valorem* duties to the United States, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs of the said port and district of Philadelphia, and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in such entry was produced and left with the said collector of the customs of the said port and district of Philadelphia.

*254] *And the said attorney further avers, that the said invoice, so produced and left as aforesaid, was made up with intent, by a false valuation, to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

3. That the aforesaid goods, wares, and merchandise, being subject to the payment of *ad valorem* duties to the United States, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs of the said port and district of Philadelphia; and that, on such entry being made as aforesaid, an invoice of the goods, wares, and merchandise included in the said entry was produced and left with the said collector of the customs of the said port and district of Philadelphia.

And the said attorney further avers, that all and each of the said several packages contained in the said entry so made, and in the invoice so produced and left as aforesaid, in which the aforesaid goods, wares, and merchandise were so imported and entered as aforesaid, was made up with intent, by a false valuation, to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

4. That the aforesaid goods, wares, and merchandise, being composed wholly or in part of wool or cotton, an entry thereof, duly signed, was, at the time of the importation thereof, made at the office of the collector of the customs for the port and district of Philadelphia; and that, on the said entry being made as aforesaid, an invoice of the said goods, so as aforesaid composed wholly or in part [of] wool or cotton, included in such entry, was produced and left with the said collector of the customs of the said port and district of Philadelphia.

And the said attorney further avers, that all and each of the several packages in the said invoice so produced and left as aforesaid, and in the said entry so much as aforesaid, in which the aforesaid goods were so imported as aforesaid, were made up with intent to evade and defraud the revenue of the United States, against the form of the act of Congress in such case made and provided.

By reason of all which the premises and the acts of Congress in this behalf made and provided, the said goods, wares, and merchandise have become and are forfeited.

Wherefore, the said attorney prays the aid and the advice of the said court here in the premises, and due process of law for the condemnation thereof.

JOHN M. READ,
United States Attorney for the Eastern District of Pennsylvania.

The acts of Congress upon which these counts are founded are as follows:—

*The sixty-sixth section of the act of 1799, chapter [*255 22, provided,—

"That if any goods, wares, or merchandise of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited."

The fourth section of the act of 1830, chapter 147 (4 Lit. & Brown's ed. 410), provided,—

"That the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number should he deem it necessary, of goods imported into the repective districts, which package or packages he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall

order, forthwith, all the goods contained in the same entry to be inspected; and if such goods be subject to *ad valorem* duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revene, the same shall be forfeited;" (then follows a repeal of the fifteenth section of the act of 1823, and of any act which imposes an additional duty or penalty of fifty per cent. upon goods appraised above their invoice price); "and no goods liable to be inspected or appraised as aforesaid shall be delivered from the custody of the officers of the customs, until the same shall have been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector; provided," &c., &c., &c.

The fourteenth section of the act of 1832, chapter 224 (4 Lit. & Brown's ed. 593), provided,—

"That whenever, upon the opening and examination of any package or packages of imported goods, composed wholly or in part of wool or cotton, in the manner provided by the fourth section of the act for the more effectual collection of the impost duties, approved on [the] 28th day of May, 1830, the said goods shall be found not to correspond with the entry thereof at the custom-house; and if any package shall be found to contain any article not entered, such article shall be forfeited: or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited; and so much of the said section as prescribes a forfeiture of goods found not to correspond with the invoice thereof be, and the same is, hereby repealed."

*256] On the 7th of October, 1840, Buckley filed his claim, and on *the 13th of December, 1842, the cause came on for trial. In the course of it, the counsel for the claimant took nine exceptions to the admissibility of certain evidence offered in support of the prosecution, which may be stated as follows:

1. The first exception was to the admissibility of Thomas Stewart to prove an appraisement of the goods made by him as one of the official appraisers of the port; to which testimony the counsel for the claimant objected, that the appraisement was not made in presence of the court and jury.

2. Was to the admissibility of the appraisement.

3. Was to the admissibility of the testimony of Felix A. Huntingdon, an importer and experienced judge of goods, to prove what was the value, in his belief, of the goods in the

British market at the date of the invoice upon which they were entered; the ground of the objection being, that the appraisement was not made in the presence of the jury.

4. Was to the admissibility of the affidavits of Samuel Ross and A. J. Lewis, who had appraised the goods under an appeal, taken by them before entering on the performance of their duty as appraisers under the appeal.

5. Thereupon the counsel of the United States gave in evidence their appraisement; and to this the claimant excepted, that the appraisement had not been made in the presence of the jury.

6. The counsel for the United States having produced the invoices of two importations—one into Philadelphia, and the other into New York—of goods exported from England by the claimant, whose affidavit was in each case annexed, dated 23d May, 1839, and 12th June, 1839, the counsel for the claimant excepted to the reading of these two affidavits.

7. Several other invoices, affidavits, and entries were offered on the part of the United States, after being verified in the same manner as those mentioned in the last exception; and to their admission in evidence the counsel for the claimant excepted.

8. The counsel of the claimant also excepted to any evidence being given of certain importations made by the claimant into New York, per Republic and United States, in which cases the value of the goods were appraised at a higher value than the invoices.

9. The counsel for the United States proved that the claimant's factors in Philadelphia had received goods from him to be sold for his account, and had sold the same at prices more, by one hundred and twenty per cent., than the prices entered upon the invoices upon which they had been entered; and to the admissibility of this testimony the counsel for the claimant excepted.

The evidence being closed on both sides, the counsel for the United States prayed certain instructions, and the court proceeded to charge the jury. The two following appear to be the passages to which the counsel for the claimant excepted.

*The United States allege that the appraisements and [*257
the affidavits, and the fact of Mr. Buckley's acquaintance with the different forms of oaths, show his fraudulent intent in this importation;—other invoices of the claimant are also given in evidence to show the same fraudulent design. Fraud is to be judged of by various circumstances. If this were the only case, the presumption might be that there was a mistake; but the United States have presented these various

invoices to show that there was no mistake. They have further shown the appraisements and the sales of these other importations by James Buckley at an advance from one hundred and fourteen to one hundred and forty per cent. in the invoice. Whereas eighty-five per cent. advance is a fair profit according to the testimony. These circumstances go to show intention; because, though the goods may be under invoiced, yet, unless fraud was intended, the under-valuation will not work a forfeiture. The United States are only bound in the first instance to prove to the court probable cause. I have no difficulty in saying that the United States have abundantly shown probable cause; the burden of proof is hence thrown upon the claimant.

It is said, that, although some of the goods were undervalued, some were not so, and should not be condemned. The law is this: if in any particular package the prices of some of them are undervalued, and some of them are fair, if the whole package has been made up by a false valuation with intent to defraud the revenue, the whole is forfeited. The same is the case with an invoice. Although it may be composed of some packages fairly made up, yet, if the whole invoice has been made up with intent to defraud, the whole invoice will be forfeited. If the cost of the whole invoice offered for entry is made up with intent to defraud, the whole of the goods contained in it are forfeited.

The first question for your decision then, is, whether the goods were put in the invoice under their cost or value; if so, whether such under-valuation was with a view to defraud; if this were so, then as to those goods there can be no difficulty; whether the other goods in the invoice are to be forfeited must depend on the intent of the party making up the invoice.

1st. And thereupon, the counsel for the claimant did except to so much of the said charge as decided upon the question of probable cause as a question of law, taking it entirely from the jury.

2d. And to so much of the said charge as decided that, under the present information, the jury should not be restricted in their condemnation to any restricted goods which they found undervalued; but find, first, either the whole package, or second, the invoice in which they were imported, forfeited, though containing other goods correctly valued; if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

*258] *And forasmuch as the exceptions aforesaid do not appear of record, the said defendant prayed that the

court will sign and seal this his bill of exceptions, which is done accordingly.

ARCHIBALD RANDALL.

Mr. Justice WAYNE delivered the opinion of the court.

Nine exceptions were taken, upon the trial of this cause, to the admissibility of the testimony which was offered on the part of the United States.

The first, second, third, fourth, and fifth are objections to the introduction of the appraisements which were made of the goods entered by the claimant, to the introduction of the persons who made them, to the affidavits of Ross and Lewis, the appraisers upon the claimant's appeal from the official valuation, and to the admissibility of an experienced judge and importer of goods, who was put upon the stand, to prove the value of the goods in the English market, at the date of the invoice, upon which they were entered. The objection in each instance is, that the appraisements had not been made in the presence of the jury. The goods were subject to *ad valorem* rates of duty. The collector, having cause to suspect that they were invoiced below their true value or actual cost, with an intent to evade or defraud the revenue, directed them to be appraised by the official appraisers. From their valuation, the claimant appealed. Ross and Lewis acted as appraisers upon the appeal, and made their estimate of the value or cost of the goods. The originals of both appraisements were returned to the custom-house. It is not denied, that they were made according to the provisions of the acts of Congress. They were so made. From the character of those papers, we think they were admissible. They are documents or public writings, not judicial. As such they may be used as evidence, subject to the rules applicable to the admissibility of such writings as evidence. The originals or examined copies were admissible, as is the case wherever the original is of a public nature. They are within the reach of either party in a cause; either for inspection or for copies, when a copy is wanted to be used as evidence. We need not enumerate the classes of such writings, or the particular kinds of them which from analogy have been adjudicated to be such, as both may be found in any of the elementary treatises upon evidence. There is authority for so classing these appraisements. It has been decided, that a copy of an official document, containing an account of the cargo of a ship, made in pursuance of an act of parliament by an officer of the customs and lodged there as an official document, should be admitted as proof that the property mentioned in it was put on board a vessel. So, also,

the copy of an official document containing the names, capacities, and descriptions of passengers on board of a vessel, made
*259] in pursuance of an act of parliament, has been received as *proof of such persons being on board. *Richardson* v. *Mellish*, 1 Ry. & M., 68; 2 Bing., 229.

In this instance, the counsel for the United States offered the originals of the appraisements, at the same time introducing the persons by whom they were made, as witnesses to authenticate them. They were not offered as conclusive of the cost or value of the goods, or as conclusive that an attempt had been made to enter them with an intent to evade or defraud the revenue. They might, with other evidence, conduce to establish those facts, and there is no doubt they were in part used for such a purpose in this case. But the primary object was to show from them, with other testimony, that there was probable cause for the seizure, that a course had been taken by the collector which the law permitted, and that everything had been done to give to the claimant the opportunity of establishing the fairness of his suspected entry. What we have said of the character of the appraisements is equally applicable to the objection to the admissibility of the affidavits of Ross and Lewis, by whom the goods were appraised upon the appeal. There is no force, then, in the objection, that the appraisements were not made in the presence of the jury. We have thus disposed of the first five exceptions to the admissibility of the evidence, for we do not understand that any objection was made to Stewart and Huntingdon as witnesses to prove, from their knowledge of the value of goods, what was the value of the goods in question, but that they were objected to, as it is expressed in the exception, because the appraisements made by them were not made in the presence of the jury. As experienced judges of goods and of their value, they were certainly good witnesses to testify what in their belief was the value of the goods in the English market, at the date of the invoice upon which they were entered. The sixth, seventh, and eighth exceptions were objections to the admissibility as evidence of other invoices of other importations made by the claimant, to show fraud in this case. Such invoices for the same purpose were decided by the court in *Wood's case* (16 Pet., 359, 360) to be admissible. It is not necessary to repeat what was then said upon the subject. The ninth exception is an objection to the introduction of any evidence to show that the factors of the claimant had sold goods for him at more than one hundred and twenty per cent. above the invoice prices. We know that the prices of commodities fluctuate from many causes, and that enhanced

prices can of themselves be no proof of unfair dealing, or of an entry having been made at the custom-house upon an undervalued invoice. But if in a particular business testimony can be found to establish that an importer has received prices extravagantly above invoice prices, such as others engaged in the same trade, at the same time, declare could not have been made in the state of the market during the time, a strong presumption arises that unfair means have been used *to produce effects contrary to the usual results of contemporary trade. Such a fact may well, then, be considered as good evidence, when the issue in a case is fraud or no fraud in the importation of goods. [*260

The exceptions taken to the evidence having been disposed of, we proceed to examine such as were taken to the charge of the court. The first, that the court had undertaken to determine from the evidence that there was probable cause for the seizure, without submitting it to the jury, was abandoned in the argument. This court had ruled in *Taylor* v. *The United States*, 3 How., 211, that the judge, and not the jury, was to determine whether there was probable cause, so as to throw on the claimant the *onus probandi* to establish the fairness of the importation.

The second exception is an objection to so much of the charge of the court as instructed the jury, that, under the present information, they were not restricted in their condemnation to such goods as they should find had been undervalued, but that they might find either the whole package or the invoice forfeited, though it contained other goods correctly valued, if they were of the opinion that such package or invoice had been made up with intent to defraud the revenue of the United States.

The information contained four counts. The first, upon the sixty-sixth section of the act of 1799, to which the exception does not apply. The second and third counts were framed upon the fourth section of the act of 1830, ch. 147; and the fourth upon the fourteenth section of the act of 1832, ch. 227. The objection is not meant to deny the liability of the goods to forfeiture in a case made out under either of those acts, from any conflict between them, or from either being a repeal of the other in any particular, so as to exempt the goods from condemnation. But the exception is confined to the insufficiency of the averments in the second, third and fourth counts to enforce a forfeiture. The language of the counsel in argument was, that the second, third, and fourth counts of the information are defective on account of the uncertainty and generality of the averments in each and every of them, and

that the judgment ought therefore to be reversed. The uncertainty complained of is, that there is not in either of the three counts an averment of the special circumstances of the examination of the goods and detection of the fraud, under the authority of the collector. In support of the objection, the counsel relied chiefly upon this court having said in Wood's case, that such an averment was necessary to enforce a forfeiture under the fourth or fourteenth sections of the acts of 1830 and 1832. Pressed as it was with other arguments in support of the position, the preparation of this opinion has been delayed, with the view of giving to the objection the most deliberate examination. Having made it, by a close scrutiny of all the acts of Congress which have been passed to prevent frauds upon the revenue; by a comparison of what has been the practice in our own courts, *upon informations of a like character under those acts, and of what have been, both in England and in our own country, declared to be essential allegations in informations for offences against the revenue arising from foreign trade, we have concluded that the language in Wood's case is stronger than it should have been. It was used argumentatively to show that the sixty-sixth section of the act of 1799 had not been repealed by the fourth and fourteenth sections of the acts of 1830 and 1832; and it was assumed in the argument, that certain allegations were proper in a count under the last two sections, which were not necessary and would not be suitable in a count under the sixty-sixth section. In that section, goods not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties, are subject to forfeiture. They are so, whether the undervaluation shall be discovered after they have been entered and passed from the custom-house, or whether there has or has not been an examination of them. But then, under that section, only such of the goods not invoiced according to actual cost, without any reference to the contents of the package in which they may be, or to the entire invoice of which they may form a part, are subject to forfeiture. It is neither necessary nor proper, then, as was said in Wood's case, in a count under that section, to allege the circumstances which led to the detection of the fraud. But it is said that previous examination and a consequent appraisement must be made under the fourth section of the act of 1830, and under the fourteenth section of the act of 1832, in the manner directed in the former; and therefore it is necessary, in a count under either of them, to aver that both were done. That, however, is only one of the ways which the collector may pursue, under existing laws, for the purpose of

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securing the payment of lawful duties, by detecting intended frauds upon the revenue. The object of an examination by packages, under the fourth section of the act of 1830, is for the purpose of ascertaining whether or not either of the causes mentioned in it exist to make it the duty of the collector to have all the goods in the same entry inspected and appraised, but he is not confined to one package out of every invoice, or to one out of every twenty packages of each invoice. He may examine a "greater number" of packages should he deem it necessary, extending the examination to every package in the invoice. If, before that course has been taken, the collector suspects the entry to be fraudulent as a whole, or any package of it to be falsely charged, he can, without any designation of particular packages, have all the goods inspected and appraised. Or, in making an appraisement under the seventh and eighth sections of the act of 1832, ch. 227, he may direct it to be done with reference to the detection of an apprehended fraud of any kind whatever, as well as to those particulars mentioned in the fourth and fourteenth sections of the acts of 1830 and 1832, which, when discovered and proved to the *satis- [*262 faction of the jury, attaches a forfeiture either to a package of an entry, or to the entire invoice. The fourth and fourteenth sections direct the collector how he is to act in one way to detect frauds upon the revenue. But one mode of prevention, without restrictive terms, limiting an examination and appraisement of goods to that mode, does not imply that other lawful means shall not be used to produce the same result. If the frauds, for which the fourth and fourteenth sections declare there shall be a forfeiture, shall be discovered, in any way of making an appraisement differing from the manner of examining goods under the fourth section of the act of 1830, no one can be found to say that the forfeiture would not attach, without any reference to the means by which the fraud was discovered. It follows, then, that the mode of making an examination is not confined to that mentioned in the fourth section of the act of 1830, and that the averment of it is not essential in a count under either of the sections of the law upon which the present information was framed. Without such an averment, a count under the fourth section of the act of 1830, and fourteenth section of the act of 1832, stating time and place, and such circumstances or particulars of those sections that a correction or acquittal might be given in evidence to prevent another information for the same offence, would be sufficient to prevent the judgment from being arrested upon a motion for that purpose. We think there was no error in the court having instructed the jury, that, under the

information in this case, they were not restricted in the condemnation of the goods to any entered goods which they found undervalued, but that they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

The judgment in the court below is affirmed.

MICHAEL MUSSON AND GEORGE O. HALL, SURVIVING PARTNERS OF WILLIAM NOLL, PLAINTIFFS, *v.* WILLIAM A. LAKE.

By the law merchant, when a demand of payment is made upon the drawee of a foreign bill of exchange, the bill itself must be exhibited.[1]

Neither the statutes of Louisiana, nor the decisions of the courts of that state, have changed the law in this respect.

The statutes and decisions examined.

If, therefore, the notarial protest does not set forth the fact that the bill was presented to the drawee, it cannot be read in evidence to the jury.

Even if the laws of Louisiana, where the drawee resided, had made this change in the law merchant, it would not affect the contract in the present case, which is a suit against an indorser residing in Mississippi, where the contract between him and all subsequent indorsees was made, and where the law merchant has not been changed.[2]

*263] This case came up, on a certificate of division in opinion, from *the Circuit Court of the United States for the Southern District of Mississippi.

The question which was certified to this court will be found at the conclusion of the following statement.

Lake was sued as endorser of the following bill of exchange:—

VICKSBURG, 17*th December*, 1836.

Exchange for $6,133\frac{00}{000}$.

Twelve months after first day of February, 1837, of this

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[1] A bill payable at a particular place must be presented there. *Picquet* v. *Curtis*, 1 Sumn., 478; *Hildeburn* v. *Turner*, 5 How., 69; *Seneca Co. Bank* v. *Neass*, 5 Den. (N. Y.), 329; *Rowe* v. *Young*, 2 Brod. & B., 165. And see *Cox* v. *National Bank*, 10 Otto, 704. And a presentment there on the day the bill falls due is sufficient, though there be no one there to answer the demand. *Bank of Washington* v. *Triplett*, 1 Pet., 25; *Wiseman* v. *Chiappella*, 23 How., 368. Presentation for payment at the place of the date of the bill is sufficient, where no place of payment is stated or agreed upon. *Wittkowski* v. *Smith*, 84 N. C., 671; s. c., 37 Am. Rep., 632.

[2] The notary is protected if the protest be made in conformity with the practice and law of the place where the bill is payable. *Wiseman* v. *Chiappella*, 23 How., 368.

first of exchange (second of the same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of STEELE, JENKINS & CO.

To KIRKMAN, ROSSER & CO., *New Orleans.*

Indorsed: R. H. & J. H. CRUMP.
W. A. LAKE.

Kirkman, Rosser & Co., New Orleans, 3d February, 1838,—protested for non-payment. A. MAZUREAU, *Not. Pub.*

It being admitted, that Vicksburg, where said bill bore date, was in the State of Mississippi, and New Orleans in the State of Louisiana, the plaintiffs then offered to read in evidence to the jury, the protest of said bill of exchange; which protest, thus offered to be read, is in the words and figures following, to wit:—

UNITED STATES OF AMERICA, *State of Louisiana:*—

By this public instrument, protest, be it known, that on this third day of February, in the year one thousand eight hundred and thirty-eight, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Adolphe Mazureau, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, demanded payment of said draft, at the counting-house of the acceptors thereof, and was answered by Mr. Kirkman that the same could not be paid.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment of the said draft.

Thus done and protested, in the presence of John Cragg and Henry Frain, witnesses.

In testimony whereof, I grant these presents under my sig-
[L. S.] nature, and the impress of my seal of office, at the city of New Orleans, on the day and year first herein written. A. MAZUREAU, *Notary Public.*

*The copy of the said bill of exchange, referred to in [*264
said protest, on the reverse side thereof written, is in the words and figures following, to wit:—

VICKSBURG, 17*th December*, 1836.

Exchange for $6, 133$\frac{00}{000}$.

Twelve months after the first day of February, 1837, of this first of exchange (second of same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of STEELE, JENKINS & CO.

TO KIRKMAN, ROSSER & CO., *New Orleans.*

Indorsed: R. H. & J. H. CRUMP.
W. A. LAKE.

WM. NOLL & CO., in liquidation.

But the defendant objected to said protest, and the copy of the bill on the reverse side thereof written being read in evidence to the jury, on the ground that it was not stated in said protest that the notary presented said bill of exchange to the acceptors, or either of them, or had it in his possession when he demanded payment of the same.

And that for this alleged defect, which it was insisted could not be supplied by other proof, the said protest was invalid and void upon its face, and could not be received as evidence of a legal presentment of the bill for payment, or of the dishonor of the bill. And, thereupon, on the question whether the said protest could be read to the jury, as evidence of a legal presentment of the bill for payment, or of the dishonor of said bill, the judges were opposed in opinion. Which is ordered to be certified to the Supreme Court of the United States for their decision.

J. MCKINLEY. [L. S.]
J. GHOLSON. [L. S.]

The cause was argued by *Mr. Barton*, for the plaintiffs, and *Mr. Mason* (Attorney-General), for the defendant.

Mr. Barton, for plaintiffs.

On the trial of this cause, and after the original bill of exchange, upon which the suit was brought, had been read to the jury, the plaintiff offered in evidence the protest thereof, and the following is a copy of the material parts thereof, to wit:—

*265] *"UNITED STATES OF AMERICA, *State of Louisiana*:—

"By this public instrument of protest, be it known, that on this 3d day of February, 1838, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Adolphe

Mazureau, a notary public in and for the city of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, demanded payment of said draft at the counting-house of the acceptors thereof, and was answered by Mr. Kirkman (one of the firm), that the same could not be paid."

The counsel of the parties to this suit do not differ at all as to the duty of a notary, when making a personal demand of the payment of negotiable paper prior to the protest thereof. We concur in opinion, that he must have the note or bill with him, and should present it for payment, &c.; and the only difference which arises is, as to the species of evidence which is indispensable to prove the fact of presentment. Must the term itself be used in the protest, and will no form of words therein supply its place? This is the position assumed for the defendant; and, this being controverted, the issue is made which is now to be disposed of.

A number of authorities have been cited by the learned counsel for the defendant, which, though certainly applicable to the duties to be performed by a notary *ante* protest, are believed not to decide the question raised here; nor, if they did, can it be conceded that they would be conclusive, upon a matter specially pertaining to Louisiana's jurisprudence.

The stress of the argument in the learned counsel's brief is, that in all cases the fact of presentment must appear, *in verbo*, upon the face of the protest; and this is assuredly not so. For example: if a note or bill should be payable at a particular place, and the notary takes it thither at maturity, and there should be no one there to whom to present it, or of whom to demand payment, the law dispenses the party with making either, and the notary, of course, from certifying either, for *nullus cogitur ad vana*. So in the case of a lost note; a valid protest could be made thereof without its production, if an adequate indemnity was tendered to protect the party from all future liability, or to reimburse him for any payments he should be constrained to make. In these and analogous cases, it could hardly be insisted, either that the law required the notary to certify to a presentment which was never made, and the failure whereof the law excuses; or that the protest would be invalid without it. One of the most important of the cases cited adversely is a strong authority to establish this. It is the case of *Freeman et al.* v. *Boynton*, 7 *Mass.*, 483. The court there, after affirming the necessity of having the note or bill present when the demand is made, says:—

"This rule may admit of exceptions,—as where the security may be lost; in which case a tender of sufficient indemnity would *make the demand valid, without pro- [*266

ducing the security. And where, from the usual course of business, of which the parties are conversant, the security may be lodged in some bank, whose officers shall demand payment, and give notice to the endorser, according to the custom of such banks,—the security not being presented at the time of the demand, but the parties being presumed to know where it may be found." Here, again, presentments are dispensed with, in cases where protests are authorized; and surely these protests must dispense with averments which would not be true.

The forms of protest vary in different countries. They vary in different states. They vary in the same state. They must necessarily adapt themselves to the true circumstances attendant upon the dishonor of bills and notes.

The acts of public officers are favored to the extent that they are presumed to know their duty, and to do their duty, unless the contrary appears. A notary has no right "to demand payment," in the absence of the security which attests the party's liability, or without its presentment; and of course he is presumed to know that he cannot do it. Where, then, notaries "demand payment," they have a right to the presumption that the demand followed the presentation. A contrary doctrine casts the presumption against the officer, and arraigns him, by implication, for a breach of duty; and that, too, in the absence of an interest or a motive. Hence, therefore, a "demand of payment," in the absence of other words, far from implying an actual presentment, would imply that there was none. It is believed that no principle, nor usage, nor even precedent, gives the sanction of its authority to accusatory implications like these.

If the protest had averred, that "payment was duly demanded," surely that would have implied that the demand was made upon presentment; and if so, is it to be implied that the demand alleged in this protest was otherwise than duly made? If a protest states the substance of what is required to be done, it is all that is needed. No form of words is sacramental; protests have been holden good, though they stated that the demand was made "at the maturity" of the bill or note; or "at the time they were due," in lieu of the usual mode of stating the precise day, month, and year when the demand was made. So, notaries must make their demand within certain hours of the days when the bills or notes mature. Demands made in unseasonable hours would be of no avail. Nevertheless, protests but rarely enter into such details, but the thing itself—the presentation—is as much required to be made within the prescribed hours, as it is

required to be made at all. Why, then, is more specialty of statement needed about the exact performance of one duty than the other? Why, if the demand of payment implies that it was made in due time, may it not imply that it was made after due presentation?

*But the protest *ad hoc* was made in Louisiana. If good there, it must be good elsewhere. Commercial usages, however ancient, however prevelant, and however reasonable, cannot confront her statutes and annul them, nor reverse her courts' judgments which settle their meaning. Most disastrous would be the results were it otherwise; for notarial offices in the large cities have their printed forms of protests, which they use in all cases in like conjunctures, and which have been in use for years, and are in daily use; and in heavy business offices (like that of Mazureau's), there are sometimes from twenty to a hundred protests made in a single day, in behalf of the banks; and hence there are vast and incalculable interests dependent upon the validity of these protests, and it would be an intolerable grievance to dealers in commercial paper, if, while these protests bound indorsers in Louisiana, they released them elsewhere. [*267

A rapid synopsis of the statutes and decisions of the Supreme Court of Louisiana will settle the law of protests specially applicable to the case at bar.

The act of the Louisiana General Assembly, of March 13th, 1827, section 1, provides:—"That all notaries, or persons acting as such, are authorized in their protests of bills of exchange, promissory notes, or orders for the payment of money, to make mention" (not of the presentment, but) "of the demand made upon the drawer, acceptor, or person, on whom such order or bill of exchange is drawn or given; and of the manner and circumstances" (not of such presentment, but) "of such demand; and whenever they shall have so done, a certified copy of such protest, &c., shall be evidence of all the matters therein stated."

In the case of the *Louisiana Ins. Co* v. *Shaumburg*, 2 Mart. (La.), N. S., 511, it was decided that a notary's certificate of demand of payment and protest may be contradicted by other evidence. If it might, evidence might be marshalled to rebut that contradiction, and even supply by parol, omissions excepted to; and if this were so, the objection to the protest at bar should not have been to its admissibility, but to its effect, &c. And this would accord with the decision of *Allain* v. *Whittaker et al.*, 5 Mart. (La.), N. S. 513, which declares that "the uniform practice in this State has been to receive

the protests of notaries as evidence of the demand on the maker of a note or acceptor of a bill of exchange."

In the case of *Gale* v. *Kemper's Heirs*, 10 La., 208, the court says,—"The note was made payable at the office of discount and deposit of the Bank of the United States, in the city of New Orleans, and the protest states, that" (not the presentation, &c., but) "the demand was made there of the proper officer. When a note is payable at a particular place, a personal demand on the drawer or maker cannot be made, and is not always required. It suffices to have been made of any person there."

*268] *In the case of *Thatcher* v. *Goff*, 13 La., 363, the court gave a striking instance of its liberality of interpretation when construing the language of protests. It decided that, where certain notes, payable at the Branch of the United States Bank at Natchez, are protested by a notary residing in Natchez, who states in his protest that he demanded payment at the United States Bank, it will be considered as meaning the Branch at Natchez, and not the principal Bank of Philadelphia; thus supplying, by intendment, the important words, "Bank at Natchez," which the notary had omitted in his protest.

The learned counsel has cited the case of *Warren* v. *Briscoe*, 12 La., 472; but it it is believed to be clearly distinguishable from the case at bar. There the note was "payable at the Planter's Bank of Mississippi at Natchez," and the protest stated that "he went to the Planter's Bank, Natchez, and was informed by the teller, there were no funds in the bank for the payment of said note; wherefore he protested," &c. Not only is no presentment stated, but there are no words from which it is to be implied, for no demand is stated to have been made; and though it be inferable that there was some note of the party which the bank had no funds to take up, yet *non constat* that it was the note in question, unless the same had been exhibited to the teller. But this case was fully reviewed in the next case to be cited, which it is respectfully suggested is decisive of the validity of the protest in question.

The case referred to is that of *Nott's Executor* v. *Beard*, 16 La., 308. The protest passed upon was from the identical notarial office which made the one in the case at bar. It is couched in the like language, thus:—"I demanded payment of said draft at the counting-house of the acceptors thereof, and was answered by Mr. Burnett, one of said firm, that the same could not be paid." It is to every extent the very case at bar; it decides emphatically, that, under the laws of Louisiana, the word *presentment* is unnecessary in notarial

protests; that the word *demand* implies the presentment, and is all-sufficient.

Mr. Mason (Attorney-General), for the defendant.

This is an action brought by the plaintiffs against the defendant, as endorser of a foreign bill of exchange. The question raised in the Circuit Court, and upon which the judges divided in opinion, was whether the protest offered in evidence showed upon its face that a presentment to the drawees of the bill, and a demand of payment, had been made. The protest does not state that the bill was presented to the drawees and payment demanded, but simply that the notary demanded payment of the bill, without alleging that he presented it, or that he had it with him and exhibited it at the time he made the demand. We maintain that, by the settled principles of the commercial law, the protest of a foreign bill must *show, that at the time the notary [*269 demanded payment he had the bill with him, ready to deliver in case it should be paid; this is generally done by stating that he presented or exhibited the bill. It does not necessarily follow, from a mere statement that he demanded payment of the bill, that he had the bill with him, and presented it or exhibited it to the drawees or acceptor, because he could demand payment of the bill without actually having it with him. To present a bill for payment is to exhibit or show the bill itself to the drawer or acceptor; to demand payment of a bill is to request its payment; and this request may be made whether the bill be present or not. A presentment *ex vi termini* imports that the bill itself was shown to the acceptor. A mere demand of payment does not necessarily import that the bill was shown and exhibited to the acceptor at the time the demand was made.

It is essential, to constitute a legal demand of payment of a bill or note, that it should be presented to the acceptor at the time the demand is made, or, in other words, that the person who makes the demand should have the bill with him. In *Hansard* v. *Robinson*, 7 Barn. & C., 90, 14 Eng. Com. L., 20, the Court of the King's Bench decided that the holder of a bill of exchange cannot insist on payment without producing and offering to deliver up the bill. The same principle is asserted in *Freeman* v. *Boynton*, 7 Mass., 483, and other authorities. *Vide* Chitty on Bills, edit. of 1836, 385, *et seq.*; 12 La. 473.

The contract of an indorser is conditional; he promises that the bill shall be paid if it is duly presented for payment, or if not paid upon presentment, and notice of its nonpayment be

given to him, that he will pay it. These constitute conditions precedent to a right of recovery against him. Chitty on Bills, edit. of 1836, 385. And being conditions precedent, the proof must be clear and explicit to charge him. 20 Johns. (N. Y.), 381. In the last case, the Supreme Court of New York say: —"The question is not what inference the jury might draw from the evidence, but what testimony does the law require in such case. We have seen that this is a condition precedent, and strict proof is required. The law has allowed the indorser this protection; nothing short of clear proof of notice shall subject him to liability. The reason and justice of requiring clear proof against a surety will not be doubted. It is imposing no hardship on the party," &c. In that case, the proof was, that notice was left at the office of the defendant, or at the post-office. In the one case the notice would have been sufficient, in the other it would not; and as the proof did not affirmatively and clearly show that it was left at the office of the defendant, it was held insufficient. So here, if the bill was present, and shown to the acceptor when the demand was made, it was sufficient to charge the indorser; if it were not present, *270] and ready to be delivered up when payment of it was demanded, it was not sufficient; *and as the evidence (that is, the protest) does not show it was presented or exhibited when the demand was made, it necessarily follows that the proof was insufficient to charge the indorser; because, as before shown, the statement in the protest, that he demanded payment of the bill, does not of itself import *ex vi termini* that he had the bill with him when such demand was made. The refusal to pay in this case, when payment was demanded, may have been predicated upon the fact, that the notary did not have the bill. Every fact stated by the notary in this protest may be true, and yet no dishonor of the bill have occurred on which to charge the indorser. The protest must show every act to have been done that is necessary to charge the indorser, and can leave nothing to inference or intendment. If every fact stated in this protest might be true, and the bill itself never have been exhibited or shown for payment, the proof is insufficient.

In suits against indorsers of foreign bills of exchange, the only legal evidence to prove the presentment of the bill and demand of payment is the protest. In regard to the drawer, if he had no funds in the hands of the drawee no protest is necessary, and an explicit promise to pay by an indorser may waive the necessity of a protest; but without such express waiver, a protest is the only evidence of presentment and demand known to the law. "Whenever," says the law (Chit.

Bills, edit. of 1836, 489 *et seq.*), "notice of non-payment of a foreign bill is necessary, a protest must also be made, which, though on first view it might be considered mere matter of form, is, by the custom of merchants, indispensably necessary, and cannot be supplied by witnesses or the oath of the party, or in any other way; and it is said is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer recognized in all parts of Europe, that a due presentment and dishonor has taken place, and all countries give credence to his certificate of the facts stated." To the same point are the following cases:—10 Mass., 1; 12 Pick. (Mass.), 484; 4 Har. & J. (Md.), 54, 61; 4 Wash. C. C. 468.

To make the protest evidence of presentment and dishonor, it must then show on its face the solemn declaration of the notary, that a due presentment of the bill and its dishonor has taken place, and to constitute such due presentment and dishonor, it has been shown that a presentation or exhibition of the bill itself to the acceptor, and a demand of payment, is necessary. And to establish a legal presentment, the bill must accompany the demand. The evidence must affirmatively show that fact, and as the protest in case of a foreign bill is the only evidence admissible to prove it, it must show that the bill accompanied the demand, by stating that it was presented, &c., or other equivalent words. This is expressly stated by Mr. Chitty (Chit. Bills, edit. of 1836, 492.) [*271 He *says,—"When the drawee, &c., refuses to pay the bill, the holder should cause it to be protested. For this purpose, he should carry the bill to a notary, who is to present it again to the drawee and demand payment," &c. If the drawee again refuse to pay, the notary is thereupon to make a minute, &c. The next step is to draw up the protest, which is a formal declaration, on production of the bill itself, &c., "that it has been presented for payment and payment refused," &c.

In countries governed by the commercial law, the form of the protest shows that the bill itself must be stated to have been presented in the protest, as well as the demand of payment. The form runs thus: —"On this day, the 1st, &c., at the request of A. B., bearer of the original bill of exchange, whereof a true copy is on the other side written, I, B. C., notary, &c., did exhibit the said bill," &c., &c. The demand of payment and refusal is then stated, *vide* form. Chitty on Bills, edit. of 1836, 496, 497.

If it be necessary to exhibit the bill at the time payment of it is demanded, it would seem necessary to prove it; and if it

be necessary to prove it, the protest, which is the instrument of proof, must not only show a demand of payment, but a presentation of the bill itself at the time the demand was made. And in conformity with these principles, the Supreme Court of Louisiana held, in the case of *Warren* v. *Briscoe*, 12 La., 472, the protest must show that the bill itself was presented, &c.

This case, it is true, has in effect been overruled by the case of *Nott's Executor* v. *Beard*, 16 La., 308, although the court endeavored to reconcile the two cases. The last case, it is submitted, is irreconcilable with the principle and the adjudicated cases hereinbefore cited. It substitutes inference or presumption for fact, and decides the point mainly on the ground that the notary is a public officer, and must be presumed to have done his duty. It introduces a new rule, unknown to the commercial law, and substitutes inference of a fact, the existence of which the law required should be shown by express proof; and, moreover, it assumes to raise the presumption from the statement of a fact (to wit, demand), which by no means necessarily imports that the bill was presented when such demand was made. The case is, as we will endeavor to show, inconsistent not only with the previous case in the same court in 12 La., but with principle.

The court (p. 312) admit the law to be, that the person making the demand must have the bill with him; but, say they, "It does not follow as a consequence, because both words are not used in the protest, that he had not the bill with him." By "both words," we understand the court to mean the words "presentment," and "demand," as used in the previous part of the sentence, in which they say,—"The person *272] making the 'presentment' or 'demand' must have the bill with him." With all due *deference to the opinion of that court, for whom we entertain the highest respect, the question was not whether it followed as a consequence, because both words were not used, that the notary had not the bill with him, but whether it followed as a consequence, from the statement of the one used, to wit, "demand," that he had the bill with him. The law required the plaintiff to prove that he presented the bill and demanded its payment, which was refused. It does not follow, that, because he demanded payment of a bill, therefore he had the bill itself with him and presented it. He may have had it when he demanded payment, or he may have demanded payment of the bill without having it. It is probable he had it, but the law will not permit the liability of an indorser to be established by the substitution of probability for proof. The state-

ment, therefore, that he demanded payment of it, is not proof that he presented or exhibited it. If it be essential that the bill should be presented or shown, and payment thereof demanded, it follows that both the presentment of the bill for payment and the demand of payment should be stated. Chitty (page 492) says the notary should present it and demand payment, and if payment is refused he should protest it, which is a formal declaration that he presented it, &c. From this, it appears the protest must state the presentment, that is, the exhibition of the bill to the acceptor, and the demand of payment.

Aware of the difficulty of sustaining their opinion, if the same rule of evidence applied to the statements of the notary that would apply to the same statements on oath by a private individual, they say he is a public officer, and it is not to be presumed that he would do so useless an act as to go to the house of the acceptor and demand payment if he had not the bill with him, and that the law will presume the notary had done his duty. The principle, that the law presumes public officers to do their duty, it is respectfully submitted, was misapplied by the court. It is true, in a proceeding against an officer for dereliction of duty, the presumption is that he has done his duty, and the contrary must be proved, though it involve a negative. But if this principle applies to a collateral proceeding like this, it proves too much, and the long train of recorded decisions, requiring a protest to be produced on the trial, will at once be struck from the commercial code. If the law presumes he will do his duty, why require the protest to be produced,—proof that the bill was left with him to protest would be sufficient, because, as it was his duty to protest it, it will be presumed he did so. So, when it is made his duty to give notice when he protests a bill, as is the case in some of the states, no notice need ever be proved; all that is necessary, upon the principle assumed by the court, is in such case to prove the protest, and then, as it was the notary's duty to give the notice, it will be presumed he gave it. Nay, if it is proved that the bill was put in his hands *to protest, it will be presumed he did his duty, and therefore it will be presumed he did protest it. But the question might be here asked, What is the duty of a notary when a foreign bill is placed in his hands for protest? It is not merely to present and demand payment, but to set forth these facts in his protest. If he omits to do so, the protest on its face shows he has not done his duty, and of course the presumption falls to the ground. The principle might be carried out to cure any defective statement as to the time notices were given; if [*273

omitted to be stated when notice was given, as the notary's duty was to give notice, at furthest, the day after the protest, it could be presumed he did so, although his protest does not show the time when he gave the notice.

The court endeavor to distinguish the case from the one in 12 La., 472. They say, in the last named case, the notary certified that he went to the Planters' Bank, and was informed by the teller there were no funds in the bank to pay the note, &c. He does not say, says the court, that "he presented the note or made a demand of payment." What was the use to do so, if their opinion in 16 La. is correct? According to that opinion, as he was presumed to do his duty, and as it was his duty to present the note and demand payment, this would be presumed; nay, as they say in that case, that it is not to be presumed the notary would do so useless an act as to go to the house of the acceptor without the bill; so, in this case, they might with equal justice have said it would not be presumed he would go to the bank to demand payment, and yet make no demand when he got there. Why was it not presumed he did his duty in that case, as well as in the last? Simply because in that case the court decided, very correctly, that the facts which constitute a legal presentment, &c., must appear on the face of the protest, and cannot be presumed.

Upon the whole, it is believed, both on principle and author ity, that the case in 16 La. cannot be sustained, and that the protest in this case is not legal evidence of presentment, to charge the defendant.

Mr. Justice McKINLEY delivered the opinion of the court.

The plaintiffs brought an action of assumpsit, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said state, by Steele, Jenkins & Co., for $6,133, payable twelve months after the first day of February, 1837, to R. H. & J. H. Crump; and addressed to Kirkman, Rosser & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the *274] reading of which the defendant objected; because it did not appear in the *protest, that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed

in opinion. Which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling. Story Bills, § 325. Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. Chit. Bills, 7th London ed., 246, 247; Story Bills, 360; 5 Taunt., 30; 12 Wend. (N. Y.), 439; 2 Doug., 515; *Warrington* v. *Furbor*, 8 East, 245; *Esdaile* v. *Sowerby*, 11 East, 117; 14 Id., 500.

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill, upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story Bills, § 361; *Hansard* v. *Robinson*, 7 Barn. & C., 90.

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on bills of exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for non-payment." Story on Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment *of it for payment or acceptance. Story on Bills, § 360. But the law [*275

makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte*; and the evidence contained in the protest is credited in all foreign courts. Chit. Bills, 215; *Rogers* v. *Stephens*, 2 T. R. 713; *Brough* v. *Parkings*, 2 Ld. Raym., 993; *Orr* v. *Maginnis*, 7 East, 359; *Chesmer* v. *Noyes*, 4 Campb., 129. The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists, that the statute of Louisiana, and the interpretation given to it by the Supreme Court of that State in the case of *Nott's Executor* v. *Beard*, 16 La., 308, have so changed the law merchant, as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific if in the protest it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for, or demand of, payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chit. Bills, and Bayl. Bills, and the annotators on them. And as further proof and illustration, and to show that *demand of* payment should be preferred to *presentment for* payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word *demand* is used in it, and that the word *presentment* is not; and they refer to the statute, also, to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged

against it, this presumption of law would cover all *such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord Tenterden, C. J., said on this subject, in delivering the judgment of the Court of King's Bench, in the case of *Hansard* v. *Robinson*, before referred to. He said,—"The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher, and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show, that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been, to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in

these words:—"That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, *277] or person on whom such *order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the legislature, that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legisla-

ture. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The *manner of the demand* must, therefore, mean the presentment of the bill for either acceptance or payment; and *the circumstances of the demand*, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear that bills payable at sight, and after sight, are within the *meaning of the statute; [*278 because it provides for a demand of payment of the acceptor of a bill. Now how can there be an acceptor of a bill, without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows, that without the word presentment and the word demand also, the plain meaning of the statute could not be carried into effect. A bill, payable at a fixed period after its date, need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity; but a bill payable at sight, or after sight, can never become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted, that, by fair and necessary construction, the word presentment is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this court; and that question is, Whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay

the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter state. Story Bills, § 366; 4 Pet., 123; 2 Kent Com., 459; 13 Mass., 4; 12 Wend. (N.Y), 439; Story Bills, § 76; 4 Johns. (N.Y.), 119; 12 Id., 142; 5 East, 124; 3 Mass., 81; 3 Cow. (N.Y.), 154; 1 Id., 107; 5 Cranch, 298.

*279] *Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi the custom of merchants has been adopted as part of the common law; and by that law and their statute law, this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

Mr. Justice McLEAN. I think the protest was evidence. The notary made demand of payment, at the maturity of the bill, and we know that he had possession of the bill, from the fact of the protest being made on the same day. Now as the notary could not make a legal demand in the absence of the bill, the fair, if not the necessary, inference is, that he had possession of the bill when he demanded payment.

Mr. Justice WOODBURY. I regret being compelled to dissent from a portion of the opinion of the majority of the court which has just been pronounced. This I should be content to do without explanation, if the grounds for it did not appear to be misunderstood. I do not question that a note should be present usually when payment is demanded (*Freeman* v. *Boynton*, 7 Mass., 483; 17 Id., 449; 3 Metc. (Mass.), 495); and that a written protest is the proper evidence to show a presentment or demand in the case of a foreign bill of exchange (8 Wheat., 333; *Burke* v. *McKay*, 2 How., 71). But, in my view, a protest like this was competent evidence to be submitted to the jury, in order that they might infer from it that the note was presented when the demand was

made. That was the point presented by the division of opinion between the judges in the court below. One held it was competent evidence from which to make such an inference, and the other, it was not, and we are merely to decide which was right.

The question of due presentment and demand is a mixed one of law and fact, and not one of mere law, unless all the facts are first conceded or agreed (*United States* v. *J. Barker*, 1 Paine, R., 156). This is in analogy to the rule about notice (1 Pet., 583). In all cases where it is possible for the jury on any reasonable hypothesis to infer a proper presentment from the protest offered, it is safer that the writing should not be withdrawn from them, but go in, and the court instruct the jury on the whole evidence what the law was on such facts as they might be satisfied of. Chancellor Kent (3 Com., 107) thinks it very difficult, in these mixed questions of law and fact about commercial paper, to do *justice by any other course. In this case the jury might or might not be satisfied of the fact of the bill being present when the demand was made. But why not let them pass on that fact? It is manifest that no evil or danger would result from leaving the matter to them, under due instructions from the court, provided there be no legal obstacle to such a course. [*280

Is there, then, any such obstacle?

It is conceded, on both sides, that the protest is competent evidence, and contains enough from which the jury could infer a demand of payment. That is the most material part of the notary's duty. It is not only so described in some elementary treatises, but the duty of having the note present, or of calling with it at the hours of business alone, are not described separately; but are involved or implied in the general duty of making a demand. Thus Dane, in his Abridgment, *Bills of Exchange* (art. 11, § 1), says,—"In making a protest, three things are to be done,—the noting, demanding, and drawing up the protest." "The material part is the making of the demand." So the word *demand* is at times urged as synonymous with the word *presentment* by Bailey. 16 La., 311.

But the protest in this case states not only a demand, but that payment of the bill was refused, and that he had it in possession, so as to make a copy "of the original draft" on the back of the protest, or, to use his own words, "whereof a true copy is on the reverse hereof written," and also "demanded payment of said draft," and was answered, "that the same could not be paid."

Under these expressions, it could hardly be deemed unfair,

or any stretch of probability, to infer that the bill was present at the demand, and the more especially as the notary knew it was his duty to have it present, and does not state that any objection was made, or refusal to pay, on account of its absence, as he should have stated, if such was the truth. My views do not differ from those of a majority of this court concerning the importance of having the principles as to commercial law, and especially commercial instruments, uniform, and as little fluctuating as possible; and hence as to them I would make no innovation here. But our difference is rather on a question of evidence. Thus, had the testimony offered been submitted to the jury, and they had inferred from it a due presentment of the note, it would not change any commercial principle as to the necessity of presentment, but merely establish the fact of presentment here on evidence deemed by the jury to render that fact probable. And if juries should be disposed to find such a fact on slight testimony, it would do no injury to commercial paper or commercial principles, or substantial justice between parties, but merely indicates an increased liberality as to forms, where substance has been regarded; that is, where the vital point in the transaction is beyond controversy, namely, that payment has clearly
*281] *been demanded and not made. Such a course would accord, also, in spirit, with what was laid down by this court in 1 Peters, 583, that rules as to commercial paper ought to be formed and construed so as to be reasonable and founded in general convenience and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description.

There is nothing in the nature of protests and presentments which on principle requires any increased strictness in the proof of them, but, on the contrary, much to justify every reasonable presumption in their favor. Any holder would be anxious to get his money at once of the drawee, and not neglect to have the note with him so as to give it up on payment and prevent delay. So would he wish to be paid and excused entirely from making protest, rather than resort to that and notice, and suffer the delay of recovering it of a drawer or indorser.

Both of these considerations strengthen the inference that he and his agent would present the note, or have it with them, when demanding payment, and render it reasonable, after slight proof of presentment, to leave it to the opposite party to rebut that inference, so natural, by stronger proof that the note was not present, if the facts would warrant such proof.

Another consideration against requiring great or greater

rigidity in the evidence of a presentment and form of protest is the fact, that a protest is of less materiality than notice.

As an illustration that the notice is deemed more material than the protest, "omitting to allege in the declaration a protest of a bill is only form, not to be taken advantage of on a general demurrer." 1 Dane Abr., Bills of Exchange, ch. 20, art. 11, § 9; Lill. Ent., 55; 3 Johns. (N. Y.), 202; *Salomons* v. *Stavely*, Doug., 684, in note to *Rushton* v. *Aspinall*.

But, omitting to state a demand or notice is bad after verdict. Doug., 684.

Dane, in his Abridgment (vol. 1, p. 395, ch. 20, art. 10, § 1), says,—"Notice is very material. Protests are mere matter of form." Yet notice may be very loose, and it answers in all cases, if it disclose merely the fact of demand, and a reliance on the person notified for payment. *Shed* v. *Brett*, 1 Pick. (Mass.), 401; *Miller* v. *Bank of United States*, 11 Wheat., 431; *Gilbert* v. *Dennis*, 3 Metc. (Mass.), 495; 2 Johns. (N. Y.) Ch., 337; 12 Mass., 6; 4 Wash. C. C., 464.

"The notice, however, should inform the party to whom it is addressed, either in express terms or by necessary implication, or at all events, by *reasonable intendment*, what the bill or note is, that it has become due, that it has been duly presented to the drawer or maker, and that payment has been refused." Chit. Bills (9th Lond. & 10th Amer. edit.), 469.

But it has again and again been held, that the notice need not *state a presentment in express terms, and [*282 that it will be implied from stating a demand and non-payment, and a looking to the indorser. 9 Pet., 33; 3 Kent Com., 108; 10 Mass., 1; 4 Mason, 336; 1 Johns. (N. Y.), Cas., 107. So, "Your note has been returned dishonored," is enough from which to intend all. See various other illustrations, 6 Ad. & E., 499; 5 Dowl., 771; 2 Chit., 364; 2 Mees. & W., 109.

It may be a letter,—merely to that effect,—and need not be a *copy of the protest*. 1 Chit. (2d Eng. & 1st Amer. edit.), 363, 364, 498, 499; 3 Campb., 334; 2 Stark. Ev., 232; *Goodwin* v. *Harley*, 4 Ad. & E., 520, 870; 4 Eq., 48. See 8 Mass., 386. And it has been adjudged, that the notice need not state, in express terms, that the note was present, or if present was exhibited, if it only contained matter from which, by *reasonable intendment*, this can be inferred. Chit. Bills (last edit.), 469; 2 Pet., 254; 9 Pet., 33.

It not being necessary, then, to inform the indorser of the presentment of the note itself, in so many words, there seems to be no use in having the fact stated at length in the protest, if enough appear to render the fact probable.

It would be difficult to find a reason, in the absence of posi-

tive law, why the form of the protest should not be dealt by as liberally as that of notice; and if, like the other, it disclose a demand, allow the jury to infer from that, as in the case of notice, that the note was present. Indeed, a protest is not required to be in writing at all except in case of foreign bills, drawn on persons abroad. 1 Chit. Bills, 643; *Rogers* v. *Stevens*, 2 T. R., 713; 2 Stark. Ev., 232; 6 Wheat., 572; 8 Id., 333; 3 Wend. (N. Y.), 173; 2 Pet., 179; 1 Cranch, 205. And then it doubtless originated in a rule merely allowing it to be done to save the expense and trouble of bringing a witness from abroad to prove the fact, rather than making it imperative.

Instead of a written protest being better evidence than a witness of the presentment and demand in case of inland bills or promissory notes, or even foreign bills drawn on persons here, it is inferior evidence to witnesses for proving presentment and demand, and is usually inadmissible, except by special statutes. 1 Chit. Bills, 405; 3 Pick. (Mass.), 415; 6 Wheat., 572; 5 Johns. (N. Y.), 375; 4 Wash. C. C., 148; 4 Campb., 129; 2 How., 71; 8 Wheat., 146.

Some seem to suppose that there is danger in allowing an informal written protest to go to the jury as evidence to be weighed in proving that the note was present. But there can be no more in that than in allowing an informal notice to go to the jury. The jury must be satisfied, in both cases, and should so be instructed, that all has been done which the law
*283] in both requires. If there be any defence in either case, that all proper has not been done, it can *probably be shown by counter evidence in one as well as the other. Why should it not be? and why is not that an ample security against being improperly charged? For the protest is not a written contract between the parties, or a sealed instrument not open to be contradicted by parol evidence. But it is a mere certificate of a notary, a subordinate officer, admitted for convenience as *primâ facie* evidence of certain facts, and allowed to that extent in order to save the expense of witnesses and delays, but ought to be always open to be impaired or disproved by the other party in interest, who has never been heard before him, and of course cannot reasonably be concluded forever by his acts. The notary is not required to swear to them, when they are admissible as evidence, as he would be to a deposition, because of his official obligations and standing. But the character and construction that properly belong to his certificate as evidence seem to be like those of a deposition; and if it states, in so many words, that the note was presented, or states what justifies such an inference,

there appears to be no good reason why the contrary may not be proved, if such was the fact, and the indorser be thus protected against statements or inferences not well founded. And the absurdity of the contrary course is still more apparent as to protests, when one made by any respectable merchant, and attested by two witnesses, in the absence of a notary, has the same validity as his. Chit. Bills, 303; Story Bills, § 276.

In *Nicholls* v. *Webb*, 8 Wheat., 336, counter testimony was held to be admissible against the minutes of a notary offered to prove demand and notice.

So is it admissible, that the notary mistook the place, and did not demand the bill at the place of business for the drawee. *Insurance Company* v. *Shamburgh*, 2 Mart. (La.), N. S., 513.

In *Vandewall* v. *Tyrrell*, Moo. & M., 87, counter evidence was offered, and avoided the protest, because the clerk of the notary, and not the notary himself, as stated in the protest, made the demand. See Chit. Bills, 495, *note*.

This point thus being established on both principle and precedent, all the danger or difficulty as to the merits of the case, by admitting a protest like this, is obviated. But it is further urged against it, that presentment is averred in the declaration, and therefore must be proved. This we admit. Chit. Bills, 643–647. And so is notice averred in the declaration and notice of a presentment, and so that must be proved. 1 Chit., 633; Doug., 654, 680. All we urge here is to let them be proved by similar general statements, from which the similar inferences may be drawn in one case as the other, that the note was present at the time of the demand, unless the contrary is shown, as it may be, if true.

Again, it is said that the forms of protest generally state, that the bill was present or exhibited. This is true. [*284
1 Chit., *395, 396 (1st Amer. edit.); Story Bills of Exch., § 276, note.

But we are aware of no case deciding that this fact must be stated, in so many words, in the protest itself, though we admit that the jury must be satisfied that the fact existed. Minutes in the book of a messenger deceased have been held to be proof to be submitted to a jury as evidence of due demand and notice. *Welsh* v. *Barrett*, 15 Mass., 380. Yet there does not appear to have been a presentment stated, *eo nomine*, or that there was any but inferential evidence that he had the note with him. See, also, *North Bank* v. *Abbott*, 13 Pick. (Mass.), 469. And it is not a little remarkable, that the only statute in England (9 and 10 Will. 3) which pre-

scribes the form of a protest, and which is in relation to inland bills of five pounds and upwards, in order to recover damages and interest, the form does not state in so many words that the bill was present or was exhibited, but merely "at the usual place of abode of the said A. have *demanded* payment of the bill," &c. Chit. Bills, 465 (9th ed.). In such cases, precisely that, and that alone, must be done which is contended for here, namely, leave it to the jury to infer the presence of the bill from its payment being *demanded*, and any other facts stated, unless the contrary is shown. Look at another analogy. It is necessary that the exhibit of the note and the demand be made in the legal hours of business. Chit. Bills, 349, 354; *Ruben* v. *Bennet*, 2 Taunt., 388; 2 Campb., 537; *Parker* v. *Gordon*, 7 East, 385; 1 Mau. & Sel., 20. But, as in respect to the presence of the note, no case holds that this must appear by so many words in the protest. And it is not stated, in the common forms, that the demand was made in the usual hours of business. 1 Chit. Bills, 396. On the contrary, the jury are allowed or instructed that they may infer, from the statement of the demand and non-payment, that they were made within the proper hours. And if it was not, the other party would doubtless be allowed to disprove it by counter evidence.

How can such a case, then, be distinguished in principle from this?—except that there is much less in the usual form of protest from which to infer that the bill was presented in legal hours, than there is in this protest from which to infer that the bill was present when the demand was made. I am the more inclined, also, to the opinion, that this protest is competent evidence, because, under a special law in Louisiana, passed March 13th, 1827, such protests have been adjudged sufficient. Their law uses the word "demand" when describing what the protest shall contain, and such a protest is there allowed to go to the jury as evidence from which to infer that the note was present. *Nott's Executor* v. *Beard*, 16 La., 308.

The bill now in dispute was on its face payable in Louisi-
*285] ana; and hence the principles of commercial law require that the protest *be made at the time and in the manner prescribed by that state. Story Bills of Exch., § 176; 1 Chit. Bills, 193, 506; Story's Conflict of Laws, § 360.

But whether the statute of Louisiana prescribing what protest shall be sufficient ought to be considered as affecting anything beyond the evidence of protest in its own courts, is not very clear on principle. (See cases, Story Bills, § 172).

Hence, in forming an opinion, I have placed it mainly on general considerations, though in the construction of a Louisi-

ana statute, which clearly affected the contract, and not the evidence; and where the judgment of its court clearly rested on the statute alone, about which some doubt exists, it ought unquestionably to control us in respect to contracts made or to be fulfilled there, even if a departure from the general principles of commercial law. I wish, also, to avert some serious consequences that I apprehend may result from the decision of the majority of the court in several of the states of the Union.

Bills of exchange drawn in one state on persons in another must be considered, under the previous decisions of this court, as foreign bills. *Townsley* v. *Sumrall*, 2 Pet., 179, 586, 688; *Lonsdale* v. *Brown*, 4 Wash. C. C., 87, 153; 1 Hill (N. Y.), 44; 12 Pick. (Mass.), 283; 15 Wend. (N. Y.), 527; 5 Johns. (N. Y.), 375; *Dickens* v. *Beal*, 10 Pet., 579. Demand of payment, then, cannot be proved in suits upon them out of the state where presented, unless by a written protest, according to the cases before cited.

Whenever the protest, then, in such case, does not state in detail a presentment or presence of the bill, though stating a demand, refusal, and no objection, the protest must, as in this decision, be ruled out as incompetent evidence; and the same decision virtually implies, that no other evidence except the written protest is admissible to show that fact, or indeed any fact which may be omitted by accident or otherwise in the written protest, and that no inference can be admitted to be drawn from the protest as to presentment, when only a demand, refusal, and no objection are stated, as here. These consequences, with others before named, I would avoid, by making the protest competent evidence, and when it showed a demand, refusal, and no objection explicitly, as here, would leave it to the jury, from that and the other circumstances, to say whether they were or were not satisfied that the note was present.

In this way it is easy to reconcile full action of the jury on the facts with that of the court on the law, and this, too, without any innovation or change in the rule as to commercial paper, or any violation of adjudged cases, but rather in conformity to them and to several strong analogies.

This court have in other cases gone still farther, and held it proper even to expand or enlarge the rules of evidence in certain exigencies. In *Nicholls* v. *Webb*, 8 Wheat., 332, the principle laid *down by Lord Ellenborough, in [*286
Pritt v. *Fairclough*, 3 Campb., 305, as to the rules of evidence, was adopted, namely, "That they must expand according to the exigencies of society." And in the *Bank of Columbia* v.

Lawrence, 1 Pet., 583, speaking of a rule as to diligence, Thompson, J., says,—"For the sake of general convenience it has been found necessary to enlarge this rule."

But all I ask here is to go as far as the existing rules of evidence seem to justify, and let reasonable inferences and presumptions be made by the jury from all that is stated in the protest, and thus decide whether the note was not probably present when the demand was made.

THE UNITED STATES, APPELLANT, *v.* JOHN C. MCLEMORE.

Although a Circuit Court, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made, yet it cannot entertain a bill, on the equity side, praying that the United States may be perpetually enjoined from proceeding upon such judgment.[1]

Nor can a decree or judgment be entered against the government for costs.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Middle Tennessee, sitting as a court of equity.

It is unnecessary to recite all the circumstances which led to the filing of the bill in equity, as it was dismissed for the want of jurisdiction in the Circuit Court. The facts in the case are summarily stated in the opinion of the court. It is proper, however, to exhibit the account to which the opinion of Mr. Justice Wayne refers:—

THE UNITED STATES OF AMERICA *v.* SEARCY'S EX'RS AND SECURITIES.

Robert Searcy, late District Paymaster, in account with the United States.

Dr.

To amount of judgment, 21st June, 1827, . .	$17,028 41
" interest till 20th Sept., 1843, 16 years, 3 months, 29 days, . .	16,597 80
	$33,626 21

[1] FOLLOWED. *Hill* v. *United States*, 9 How., 389. CITED. *Reeside* v. *Walker*, 11 How., 290; *United States* v. *Eckford*, 6 Wall., 488; *United States* v. *Lee*, 16 Otto, 207, 227; *The Elmira*, 16 Fed. Rep., 135; *Gorsuch* v. *Thomas*, 57 Md., 339. See *Bush* v. *United States*, 13 Fed. Rep., 627, 628; S. C., 8 Sawyer, 325, 326.

[2] S. P. *United States* v. *Barker*, 2 Wheat., 395; *The Antelope*, 12 Id., 546; *United States* v. *Hooe*, 3 Cranch, 73; *United States* v. *Boyd*, 5 How., 29. But that costs may be offset against the claim of the government, see *United States* v *Ringgold*, 8 Pet., 150.

		Amount brought forward,		33,626 21
		Cr.		
1828, May 3,	By payment to Tho. H. Fletcher,		$1,283 62	
"	" interest till 20th Sept., 1843, 15 years, 4 months, 17 days,		1,184 00	
" July 8,	" payment to Tho. H. Fletcher,		519 25	
"	" interest till 20th Sept., 1843, 15 years, 2 months, 12 days,		473 33	
" July 18,	" payment to Tho. H. Fletcher,		1,940 68	
"	" interest till 20th Sept., 1843, 15 years, 2 months, 2 days,		1,766 05	
" July 24,	" payment made to Tho. H. Fletcher,		498 33	
"	" interest till 20th Sept., 1843, 15 years, 1 month, 26 days,		455 34	
" Oct. 28,	" payment made to Tho. H. Fletcher,		960 00	
"	" interest till 20th Sept., 1843, 14 years, 10 months, 22 days		857 92	
" Nov. 10,	" payment made to Tho. H. Fletcher,		715 19	
"	" interest till 20th Sept., 1843, 14 years, 10 months, 10 days,		637 54	
1829, Jan. 15	" payment made to Tho. H. Fletcher,		304 60	
"	" interest till 20th Sept., 1843, 14 years, 8 months, 5 days,		267 77	
" Jan. 24,	" payment made to Tho. H. Fletcher,		498 34	
"	" interest till 20th Sept., 1843, 14 years, 7 months, 26 days,		437 91	
" Jan. 26,	" payment made to Tho. H. Fletcher,		286 67	
"	" interest till 20th Sept., 1843, 14 years, 7 months, 24 days,		251 39	
" April 6,	" payment made to Tho. H. Fletcher,		1,273 76	
"	" interest till 20th Sept., 1843, 14 years, 6 months, 14 days,		1,110 48	
" June 12,	" payment made to Jas. Collinsworth,		1,163 50	
"	" interest till 20th Sept., 1843, 14 years, 3 months, 8 days,		995 92	
" June 24,	" payment made to Jas. Collinsworth,		1,027 75	
"	" interest till 20th Sept., 1843, 14 years, 2 months, 26 days,		877 40	
" Oct. 22,	" payment made to Jas. Collinsworth,		1,920 00	
"	" interest till 20th Sept., 1843, 13 years, 10 months, 28 days,		1,602 56	
1831, Oct. 28,	" payment made to Jas. Collinsworth,		200 00	
"	" interest till 20th Sept., 1843, 11 years, 10 months, 22 days,		142 73	
1832, Jan. 1,	" payment made to Jas. Collinsworth,		500 00	
"	" interest till 20th Sept., 1843, 11 years, 8 months, 20 days,		351 67	
" Sept. 3,	" payment made to Jas. Collinsworth,		1,639 49	
"	" interest till 20th Sept., 1843, 11 years, and 17 days,		1,166 27	
1833, Jan. 1,	" payment made to Jas. Collinsworth,		2,104 60	
"	" interest till 20th Sept., 1843, 10 years, 8 months, 20 days,		1,351 00	
1834, Jan. 1,	" payment made to Collinsworth,		1,279 80	
"	" interest till 20th Sept., 1843, 9 years, 8 months, 20 days,		756 08	
1833, Jan. 1,	" payment made to Collinsworth,		861 00	
"	" interest till 20th Sept., 1843, 10 years, 8 months, 20 days,		553 91	
	Amounts carried forward,		$ 34,245 85	33,626 21

The United States *v.* McLemore.

		Amounts brought forward,	$ 34,245 85	33,626 21	
1839, Jan., 1,	"	payment made to J. P. Grundy,	422 00		
	"	interest till 20th Sept., 1843, 4 years, 8 months, 20 days, . .	119 58		
1831, Aug 10,	"	payment made to Collinsworth, .	425 00		
	"	interest till 20th Sept., 1843, 12 years, 1 month, 10 days . . .	308 84		
				$ 35,521 27	
		Amount overpaid, . .		$ 1,895 06	

The case was argued by *Mr. Mason* (Attorney-General), for the appellant, and by *Mr. Brinley* and *Mr. Eaton* for the defendant.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States, for the district of Middle Tennessee.

*288] *The bill was filed by McLemore and Cantwell, surviving executor of Robert Searcy, deceased, and surviving executor of George M. Deoderick, deceased, representing that a judgment was obtained by the United States against the executors of Searcy, for the sum of seventeen thousand and twenty-eight dollars and forty-one cents. That various payments had been made on the judgment until the whole or nearly the whole had been paid. That the last execution on the judgment was issued the 10th of January, 1842, for a balance claimed on the judgment of two thousand eight hundred thirty-two dollars and thirty-seven cents. And they state that their payments were made to different persons named, who succeeded each other in the office of District Attorney of the United States for Middle Tennessee; and that by the absence and death of a part of them it is difficult to show the sums paid. That the money was principally collected by the district attorneys on notes handed them for collection, the proceeds of which, when received, were to be applied to the discharge of the judgment. That this arrangement was sanctioned by the treasury department. And the prayer of the bill is, that the judgment may be enjoined, &c.

The District Attorney of the United States answered the bill, and the matter of payments was referred to a master, who reported a balance against the United States, after paying the judgment. On this report, the district judge holding the Circuit Court decreed a perpetual injunction; and that the United States should pay the costs.

There was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its

own consent, given by law. Nor can a decree or judgment be entered against the government for costs.

The Circuit Court, as a court of law, may direct credits to be given on the judgment, and having a right to order satisfaction to be entered on the judgment, consequently may examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made.

This bill is dismissed.

Mr. Justice WAYNE concurred in the decision of the case, but said it appeared in the record that a different mode of computing interest had been pursued from that which had been settled by this court. In *Livingston* v. *Story*, 13 Pet., 371, the court said —"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." Nor is it to be considered, by any thing which the court has done upon the motion, that any sanction is given to any other mode of computing interest. [*289

ZELLER'S LESSEE *v.* JACOB K. ECKERT AND OTHERS.

Under a will which devised land to the son of the testator, and provided that the widow should continue in possession and occupation of the premises until the son arrived at the age of fifteen years, she was entitled to their possession and enjoyment until the time when the child would have reached the age of fifteen if he had lived, although he died before that time.

Her possession, therefore, was not adverse to the heirs of the child, during that period.

Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself brought home to the other party, will satisfy the law.[1]

The burden of proof is on the holder to establish such a change in the character of the possession.

[1] DISTINGUISHED. *Vetterlein* v. *Barnes*, 6 Fed. Rep., 703; *Sherman* v. *Kane*, 86 N. Y. 67, 69; s. c., 46 Superior (N. Y.), 318. FOLLOWED. *Boggess* v. *Meredith*, 16 W. Va., 24. CITED. *Culver* v. *Rhodes*, 87 N. Y. 354.

The statute does not begin to run until the possession becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owners.[2]

In this case there was evidence enough given upon this point to authorize the court below to submit the question of adverse possession to the jury, and advise them that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.

The whole charge of the judge to the jury is incorporated into this record. This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial, and to the ruling of the law by the judge, and to the admission or rejection of evidence. And only so much of the evidence as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves to encumber and confuse the record, and to perplex and embarrass both court and counsel.[3]

The earlier forms under the statute giving the bill of exceptions are models which it would be wise to consult and adhere to.

THIS was a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to bring up for review certain instructions to the jury in an action of ejectment brought by the plaintiff in error against the defendants in error, and in which the latter obtained the verdict.

Frederick White was the owner of the premises in question, being part of a small tract of land situate in the county of Lancaster, Pennsylvania, of which he died seized in March, 1798, leaving a last will and testament by which he devised the said land in fee to Frederick White, Jr., his only child,
*290] who was then about four years of age. He also provided in the will that his widow should continue *in possession and occupation of the premises till the son arrived at the age of fifteen.

The widow married again in about nine months after the decease of her husband, Frederick White, to one George Eckert. One of the defendants, Jacob K. Eckert, is a son of that marriage, who was born in 1799. The other defendants claim under him.

Frederick White, Jr., the son, died in 1800, then about six years of age, leaving his mother and Jacob K. Eckert, the half-brother, surviving.

The mother resided upon the farm about one year, and then left the possession; but her husband had the charge of it, occupying and improving the land, leasing the same and re-

[2] CITED. *Taylor* v. *Benham*, 5 How., 276.

[3] FOLLOWED. *Phillips* v. *Preston*, 5 How., 289; *Johnston* v. *Jones*, 1 Black, 220. CITED. *United States* v. *Morgan*, 11 How., 158; *Arthurs* v. *Hart*, 17 Id., 14; *York, &c. R. R. Co.* v. *Myers*, 18 Id., 252.

ceiving the rents and profits, till their son became of age, when he went into the possession and management, and he and those claiming under him have been in the possession and occupation of the same down to the present time. The farm has always been occupied, improved, and claimed as belonging to the half-brother, first by Eckert, the father, during his minority, and afterwards by the son (Jacob K.) himself, and those under him. Large and valuable improvements have been made while it was thus occupied.

Frederick White, the testator, was a native of Germany, and emigrated to this country as early as 1755, and soon after settled in Lancaster county, and purchased the premises in question, where he resided till his death, in 1798, being then about eighty years of age.

The lessors of the plaintiff claim to be the descendants of a half-sister, whom he left in Germany, and to be the heirs at law of Frederick White, Jr., the deceased son. Evidence was given on the trial tending to establish the heirship derivable from this source, and which constitutes their title to the premises.

It further appeared, that as early as 1806 a family of the name of Bonert, another branch of the descendants of the half-sister, instituted action of ejectment against George Eckert, the father of the defendant, in the Common Pleas of Lancaster county, to recover the premises, as the heirs of the deceased son, Frederick White, Jr. This litigation appears to have been continued till 1810, when the controversy was referred to arbitrators, and an award made against the plaintiffs.

Another suit in ejectment was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by the same plaintiff, which ended in a compromise between the parties, in 1818, by whom it was agreed that the property should be appraised, the plaintiffs to have one third, and Jacob K. Eckert, the half-brother, the remaining two thirds; and that they should cast lots in order to determine which of the parties should have the land, and pay the valuation according to their proportion. The land was appraised at the sum of $24,000; the plaintiffs got the *right to make their [*291
election, and they chose the land, by which they became obligated to pay to Eckert the sum of $16,000, in one year from the time the election was made. They failed to make the payment in pursuance of the agreement, and in 1823 a judgment was recovered against them for the amount, and interest, and all their right and title to the property was sold

on execution, under the judgment, to Jacob K. Eckert, the half-brother.

It further appeared, that the lessors of the plaintiff in the present suit, called the Shultzheiss branch of the descendants of the half-sister, also brought suits against George Eckert, executor of the estate of Frederick White, the testator, to recover their share of the personal property, in the Common Pleas of Lancaster county, which in 1810 was referred to arbitrators, and an award made against them.

The latter were the only suits instituted by this branch of the heirs till the present suit was instituted to recover the real estate, which was commenced in April, 1834, and of course has been pending for nearly twelve years.

When the testimony closed, the counsel for the plaintiff prayed the court to instruct the jury, that, inasmuch as the widow of Frederick White was directed by his will to keep possession of the land until the son to whom it was devised should arrive at the age of fifteen, the possession by her and her husband was to be considered in the character of trustees of the estate for his benefit; and after his death, for the benefit of those who might be entitled to the inheritance as heirs at law; and that the possession, therefore, was not adverse to the plaintiff's title; that the trust having once attached, the possession of Eckert and wife could not become adverse to the title of the *cestuis que trust.*

Which instruction the court refused, and charged the jury as follows:—

"That, however true it might be, in point of fact, that the widow and her husband did enter upon and continue the possession of the land as trustees for young White, or his heirs, up to any stated period, the legal consequences asserted by the plaintiff's counsel would not result. A trustee of any description may disavow and disclaim his trust, though it is in the utmost bad faith, or in violation of his express agreement, from which time his possession of lands, money, or chattels, held under an original trust, becomes adverse, so as to bar an action of account after six years, or an ejectment in twenty-one years after notice of the disavowal, disclaimer, and adverse possession is given to the person entitled to the benefit of the execution of the trust." "That notice of the disclaimer puts the true owner under the same obligation to reclaim the possession within the fixed period, as if no trust had ever existed; and it matters not whether the trust began by
*292] the voluntary act of the trustee, or the law made him a trustee against his *will, as the result of his situation or conduct." And further, "That taking all the testimony in

the cause in connection, the court thought the jury would be justified in finding that the possession of the defendants, from the death of young White, was adverse to the right and title of the plaintiff, and that George Eckert held it for his son; and that, should this be their opinion, the statute of limitations began to run against the right in 1809, and had its full effect in 1830, by a continued adverse possession of twenty-one years."

The court also instructed the jury that they were authorized, from the fact of the lessors of the plaintiff having made a claim to the estate of Frederick White, Sen., as early as 1806, and afterwards abandoning it till 1834, together with the other facts and circumstances in the case, to presume a grant to Jacob K. Eckert from the heirs.

To all which instructions the counsel for the plaintiff excepted, and a verdict was rendered for the defendants.

The cause was argued by *Mr. Charles J. Ingersoll*, for the plaintiff in error, and *Mr. Scott*, for defendants.

Mr. Ingersoll, for the plaintiff in error, said that the opinion of the Circuit Court was, that the plaintiff was barred by limitation. But the widow was directed by the will to hold the property for the child, and both she and her husband were trustees for the child and his heirs. The trust once existed,—that is certain. But the court say that a trustee may disavow his trust, and establish his own right, "though it is in the utmost bad faith, or in violation of his express agreement." It is very true that a trustee may disavow his trust, and give notice that he means to hold the property in his own right; and in such case the other party is required to take care of himself. But the law will not sanction bad faith. In the charge of the court, it is said, also, that the effect of the record and writings introduced in evidence was for the court to decide; but the question was a mixed one of law and fact. 7 Wheat., 535; 5 Pet., 438, 440, 491, 493; 11 Id., 51; 6 Id., 743; 3 Id., 48; 4 Id., 500; 10 Id., 221, 226.

These cases do not sustain the doctrine stated by the Circuit Court, namely, that "a trustee of any description may disavow and disclaim his trust, though it is in the utmost bad faith, or in violation of his express agreement; from which time his possession of lands, money, or chattels, held under an original trust, becomes adverse, so as to bar an action of account after six years, or an ejectment in twenty-one, after notice of the disavowal, disclaimer, and adverse possession is

given to the person entitled to the benefit of the execution of the trust."

The case in 2 Sch. & L., 628, 636, is stronger, it must be admitted, in favor of the doctrine, but the case in 14 Serg. & R. (Pa.), 570, does not bear out the Circuit Court. See 1 Binn. (Pa.), 575, and also 14 Serg. & R. (Pa.), 333.

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The Pennsylvania cases all look to the fairness of the transaction, but here the court say that it was natural for the party holding to believe that the property belonged to him, and that these German heirs must have known that the trustee was claiming it in his own right.

Mr. Scott, for defendants.

There is no bill of exceptions in the record. It ought to be signed and sealed, and this court cannot notice an exception which does not come up in that way. 3 Pet., 418; 4 Id., 104; 3 Wheat., 651.

The charge of the judge below has been misunderstood. He inculcates no immoral principles. It was necessary for the jury to find the intention of the party, for it is one of the elements of adverse possession. If it is natural for a father to consider himself as holding property for his son, then this natural feeling is one of the evidences of intention, and it was not wrong in the judge to indicate to the jury all the sources from which they would be enabled to find the intention.

The intention is important. 5 Pet., 438, 440, 500.

The judge in his charge refers to the escheat laws of Pennsylvania, by which the estate would have gone to the half-brother for the want of other heirs of young White, with the unsettled state of the laws of descent for more than thirty years afterwards, and says, it "is a powerful consideration in our minds to denote a contrary intention." See Purd. Dig., 384, or 2 Dall., 552, or 2 Smith, 425; 3 Yates (Pa.), 400.

So the law stood until overruled by 7 Serg. & R., (Pa.), 397, in 1831. Was it a fault or crime in a father to hold for his son, under this state of the law, or in a judge to say so?

Statutes of limitations are to be enforced by courts, and disabilities, in order to exonerate a party from their operation, are not to be heaped one upon another. 7 Serg. & R. (Pa.), 209; 1 Watts (Pa.), 341.

It has been said, that the judge argued the case too much. But this court has nothing to do with the comments of the court below upon evidence; its only province is to correct mistakes in law. 4 Pet., 1; 3 How., 205.

The charge expressly says, that the jury are to decide, without being bound by the opinion of the court.

It is also said, that the claim, having been made within eighteen years, will prevent the statute from running. The statute of Pennsylvania requires the suit to be brought within twenty-one years, and a suit upon some collateral matter is not sufficient. If there is no such exception in the statute, the court can make none. *The very fact of litigation shows the possession to have been adverse. 3 How., 674. [*294

The statute of limitations is found in 2 Dall., 281, or 2 Smith, 299.

There are no exceptions on the record of this case, and no instructions asked. White died in 1798, and directed his widow to keep possession, but not for his son, as is said by the other side. The will is not in the record, and is only found in the charge of the judge. But it is stated in 1 Binn. (Pa.), 576. The widow's fifteen years were out in 1809. She married again in 1798, and the defendants sold and leased the property. In 1809, some claimants appeared and brought suits, which were compromised. The language of the judge which is complained of contains the doctrine of this court. 7 Wheat., 535, 519; 3 Pet., 48, 52; 4 Id., 500; 5 Id., 438, 440, 491–493; 10 Id., 221, 226.

See also Preston on Abstracts, 376; 1 Watts (Pa.), 275; 7 Johns. (N. Y.), Ch., 100; 3 How., 411; 1 Id., 189.

Mr. Ingersoll, in reply.

The agreement of counsel which is found in the record removes all difficulty which might arise from there being no bill of exceptions signed and sealed. The reason why such an agreement was made is, that there were two ejectments pending, in one of which there was a long trial, and the court gave the charge which is in the record. In the second case it was thought unnecessary to have another charge, and we agreed to bring the case up, adopting the charge in the first case. The case comes up somewhat irregularly, but Judge Sergeant has said that short pleadings are sanctioned by the bill of rights.

There is only one main point in the case, which is, whether or not there was an implied trust in the property. How far trusts are within the statutes of limitation, see 2 Prest. Abstr., 375; 7 Johns. (N. Y.), Ch., 90.

We do not deny that a trustee can repudiate the title of his *cestui que* use, but we say that such repudiation must be distinct and explicit. And as the widow was directed, by her first husband's will, to hold the premises for the first son till

fifteen years of age, she and her second husband, Eckert, held as trustees, and no adverse possession took place. During the first six years, as long as the first son lived, it clearly was a trust, and this trust was never disowned. The charge of the court below included the discussion of this fact of adverse possession, and thus excluded the jury from the consideration of what belonged to them alone. We say, therefore, that there was error.

Mr. Justice NELSON delivered the opinion of the court.

*295] According to the true construction of the will of Frederick *White, we are inclined to think that the widow was entitled to the possession and enjoyment of the premises in question down to the year 1809, when the son would have arrived at the age of fifteen had he survived, notwithstanding his death in 1800, some nine years short of that time, as the testator probably intended the rents and profits during this period as a part of her provision in the settlement of his estate. The right of entry, therefore, did not accrue to the lessors of the plaintiff till that time. Then the widow and her husband were bound to surrender the possession to the son had he lived, and of consequence to his heirs at law in the event of his death.

The statute of limitations attached and began to run from this period, provided the evidence is sufficient to raise an adverse possession on the part of the defendants, in hostility to the title of the heirs.

This suit was commenced in April, 1834, some twenty-five years from the time the right of entry accrued. The statute of limitations in the State of Pennsylvania is twenty-one years.

The original possession of Eckert, the husband of the widow, being confessedly in subordination to the title of the younger White during his lifetime, and after his decease to the title of the heirs at law, down to 1809, when the right to occupy under the will ceased, the burden lay upon him to establish a change in the character of the possession after this period; and being thus in privity with the title of the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, or in his son, the half-brother, brought home to the lessors of the plaintiff, will satisfy the law. Short of this, he will still be regarded as holding in subserviency to the rightful title. There are authorities maintaining the doctrine, that a party standing in the relation of Eckert to the title in question is incapable in law of imparting, by any act of his

own, an adverse character to his possession; and that, in order to deny or dispute the title, he must first surrender the possession, and place the owner in the condition he stood before the possession was taken under him. This doctrine was supposed to govern the rights of trustee and *cestui que trust*, landlord and tenant, vendor and vendee, tenants in common, &c., and that no lapse of time would lay a foundation for a statute bar to the right of entry by reason of an adverse possession between parties standing in this relation, or any others in like privity.

The law, however, has been settled otherwise. The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after the expiration of his lease; the vendee, the title of his vendor after breach of the contract; and the tenant in common, the title of his co-tenant; and drive the respective owners and claimants to their action within the period of the statute of limitations. *2 Bos. & P., [*296 542; 5 Barn. & Ald., 232; Cowp., 217; 2 Stark. Ev., 887; 7 Johns. (N. Y.), Ch., 90; 20 Johns. (N. Y.), 565; 4 Serg. & R. (Pa.), 310; 7 Wheat., 548; 3 Pet., 52, C. & H.'s note, pt. 1, notes, 307, 311, and cases; 2 Sch. & L., 633; 2 Jac. & W.,1, 191.

The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession. As that was originally taken and held in subserviency to the title of the real owner, a clear, positive, and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practised; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations.[1]

The statute, therefore, does not begin to operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner. If he then neglects to enforce his rights by action within the period fixed by

[1] Cited. *Creekmur* v. *Creekmur*, 75 Va., 436; *Stonestreet* v. *Doyle*, Id., 379.

the statute, the loss, as in every other case of the kind, is attributable to his own laches, and not to the law.

The main question, therefore, here is, as to the sufficiency of the proof. It appears, that as early as 1809 the heirs claiming here instituted actions against Eckert, as executor of Frederick White, the testator, to recover their share of the personal estate, as next of kin to the younger White, which were resisted, on the ground the whole estate belonged to the half-brother, and the claim defeated. Another branch of the same family, at an earlier date (1806), instituted actions of ejectment to recover their share of the real estate, which were resisted upon like ground, and like result. Both branches of the litigation were brought to a close in 1810. The latter branch (not the parties here) again renewed the litigation to recover the realty in 1816, which terminated in 1818 by compromise, with a view to put an end to the controversy, but which fell through by reason of the failure of the plaintiffs to fulfil the conditions of the settlement.

The present is the first suit brought by this branch of the heirs to recover the real estate, and which was commenced after the lapse of twenty-five years from the time their right of entry accrued, and after the lapse of the same period, also, from the termination of a litigation on behalf of themselves and their co-heirs *to recover the estate, real and personal, in which the present defendant succeeded. During all this time their title has been disavowed and resisted, and the right and title of the half-brother of the younger White asserted and maintained; and the property occupied, cultivated, and improved under this claim of title and ownership; and portions of it are now in possession of *bonâ fide* purchasers, upon which large and valuable erections and improvements have been made.

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We are satisfied, therefore, that the court below were right in submitting the question of adverse possession to the jury; as there was evidence enough, even within the strictest rules of law on this subject, arising out of the fiduciary relation in which the defendant originally stood to the title, to make this the duty of the court. And, further, looking at all the facts and circumstances disclosed at the trial, and characterizing the possession, occupation, and improvement of the property, we cannot say that any error was committed in also advising the jury that a foundation was laid upon which they might presume a grant for the purpose of quieting the title.

Twenty years' possession by one of two tenants in common, accompanied with an exclusive appropriation of the rents and profits, acquiesced in by the co-tenant, has been held to afford

the presumption of a conveyance from the party out of the possession (Cowp., 217), and the same length of time, coupled with other circumstances, a conveyance or release of an equity of redemption to the mortgagee in possession (9 Wheat., 490, 497, 498).

The facts and circumstances in this case, in connection with the length of the possession and occupation, are much stronger in favor of allowing the presumption, than existed in several cases where the doctrine has been applied.

The charge of the court below is a most elaborate one, discussing at large both the law and the facts upon general principles and upon authorities, as well as in reference to the particular questions involved, and the whole incorporated into the record. Some of the comments, both upon the law and the facts, are justly liable to the criticisms made by the learned counsel on the argument. But, looking at the whole case, and the main grounds upon which it was placed before the jury, we cannot say that the appellate court should interfere, or that the parts obnoxious to the criticisms afford ground of review and reversal on a writ of error.

This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of evidence. (1 Bac. Abr., 779; Bull. N. P., 316). Beyond this *we have no power to look [*298 into the bill, on a writ of error, as it is the creature of statute, and restricted to the points stated. 13 Edw. 1, c. 31. And only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel.

We have no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial, on a case made. More attention to the practice in drawing up the bill of exceptions, and to method and order in making up the error books, would greatly relieve the court, and enable counsel to bring out more readily and distinctly for consideration the legal questions involved. The earlier forms under the statute giving the bill of exceptions are models which it would be wise to consult and adhere to.

We think the judgment in the Circuit Court should be affirmed.

JOHN KNOX, JAMES BOGGS, AND JAMES A. KNOX, TRADING UNDER THE FIRM OF KNOX, BOGGS & CO., APPELLANTS, *v.* PEYTON SMITH AND OTHERS, DEFENDANTS.

A bill in chancery which recites, that the complainants had recovered a judgment at law in a court of the United States, upon which an execution had issued and been levied upon certain property by the marshal; that another person, claiming to hold the property levied upon by virtue of some fraudulent deed of trust, had obtained a process from a state court, by which the sheriff had taken the property out of the hands of the marshal; and praying that the property might be sold, cannot be sustained.

If the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill.

There exists a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the court of the United States for an attachment.[1]

No relief can be given by a court of equity, unless the complainant, by his allegations and proof, has shown that he is entitled to relief.

THIS was an appeal from the Circuit Court of the United States for the District of West Tennessee, sitting as a court of equity. The appellants had filed a bill against the defendants, which bill was dismissed by the Circuit Court.

The facts of the case were these:

On the 23d of March, 1839, Probert P. Collier, of the county of Tipton and state of Tennessee, executed to Peyton Smith, of the same state, a deed of trust, reciting the indebtedness of Collier to sundry persons, and proceeding as follows:—

*299] *"Now, the above-named creditors, to wit, Robert B. Clarkson, Jordan Brown, Isaac Killough, Stephen Smith, James D. Holmes, Samuel A. Holmes, Joseph T. Collier, and Forsythe, Goodwin & Co., merchants of New Orleans, being willing to wait and give the further indulgence of eighteen months longer from the date of this indenture with the said Probert P. Collier, upon having their debts and the interest accruing thereon; and the said Probert P. Collier being willing to give them a certain assurance that their money shall be paid at the expiration of eighteen months from this date; and the said Probert P. Collier being extremely desirous to save harmless and secure from all liabilities his indorsers as above

[1] APPLIED. *Lewis* v. *Cocks*, 23 Wall., 470. See note to *Brown* v. *Clarke*, *ante* *4.

described on the several notes already specified in this indenture as such indorsers.

"Now, therefore, this indenture witnesseth, that the said Probert P. Collier, as well in consideration of securing the said Robert B. Clarkson, Jordan Brown, Isaac Killough, Stephen Smith, James D. Holmes, Samuel A. Holmes, Joseph T. Collier, and Forsythe, Goodwin & Co., merchants of New Orleans, in the faithful payment of their debts and interest as aforesaid, and securing and saving harmless his indorsers as aforesaid, as also the sum of one dollar to him the said Probert P. Collier in hand paid by the said Peyton Smith, the receipt whereof is hereby acknowledged, hath this day granted, bargained, sold, transferred, assigned, and set over, and by these presents doth grant, bargain, sell, transfer, assign, and set over unto the said Peyton Smith the following real estate and personal property, to wit, as hereafter described, to wit:"

(The deed then enumerated several tracts of land, some slaves, horses, mules, and furniture, and proceeded as follows):

"And each and every of them to the said Peyton Smith, his heirs and assigns, to the proper use and behoof of the said Peyton Smith, his heirs and assigns, for ever.

"In trust, however, and to the intent and purpose, that if the said three notes, payable to the said Robert B. Clarkson, for six hundred and twenty-five dollars each, dates as above described; also the note, payable to Jordan Brown, for one hundred and eighty-two dollars, on which said note there has a judgment been obtained before Robert J. Mitchell, justice for said county; also the note, payable at the Memphis Bank, indorsed by Joseph T. Collier, James D. Holmes, and Samuel A. Holmes, for five hundred and forty-four dollars, now in judgment in the Tipton Circuit Court; the one payable to Forsythe, Goodwin & Co., commission merchants of New Orleans, for five hundred and sixty-one dollars, now in a judgment as above described; also the note, payable to Isaac Killough, for four hundred and twenty-one dollars, now in a judgment as before described; the one payable to Randolph Merchants' Association, for two hundred dollars, indorsed by Gabriel Smither, James D. Holmes, *and [*300
Samuel Glass, dates as above described; the one payable to Stephen Smith, for nine hundred dollars, dates not recollected; the one payable to the Branch Bank of the state of Tennessee, at Sommerville, for five hundred and eighty-one dollars, dates not recollected, indorsed by Joseph T. Collier and James Hudley; the one, payable to James D. Holmes, and Samuel A. Holmes, merchants, for three hundred and fifty dollars, due and payable 1st of January, 1839; the note payable to Joseph

T. Collier, for the sum of four hundred dollars, dates not recollected. All of the above notes not well and truly paid, with all lawful interest accruing thereon; and if each of his indorsers, as appear on the several notes described in this indenture, are not entirely secure from each and all of their liabilities by him, the said Probert P. Collier, or some other person for him, before the expiration of eighteen months from this date; then and in that case the said Peyton Smith, in executing this trust, hereby taken upon himself, advertise the said real and personal property for the space of twenty days, in a paper printed at Randolph, Tennessee, and by written advertisements, at four of the most public places in the county, one of which shall be at the court house door of the county aforesaid, that he will expose to the highest bidder the said land and negroes, horses, mules, household furniture, and kitchen furniture, spinning machine and loom, the barouche and harness, wagon and gear, and blacksmith's tools; one of the said lots in the town of Covington, the one on which the said Probert P. Collier resides, on a particular day, for ready money; and if the money be not still paid on that day, designated as aforesaid, then the said Peyton Smith shall proceed to sell the above described real and personal property for ready money to the highest bidder, and after such sale, to make good and sufficient deeds and bills of sale in fee for said property, conveying all the right and title the said Probert P. Collier or his heirs may have in and to the same.

"And this indenture further witnesseth, that the said Probert P. Collier is to still keep and retain the said land and personal property as above described in his own possession, subject for all losses which the said property may sustain, until the expiration of eighteen months from this date; and provided, nevertheless, that if the said money and interest should be paid before the day of sale herein mentioned, and his indorsers secure from liabilities as aforesaid, then this indenture to be wholly void and of no effect, either in law or equity.

"In witness whereof, the said Probert P. Collier hereunto sets his hand and seal, this the 23d of March, 1839.

PROBERT P. COLLIER. [SEAL.]
PEYTON SMITH. [SEAL.]

Witnessed by
J. P. FARRINGTON,
F. M. GREEN."

*301] *On the 4th of December, 1839, Knox, Boggs & Co., citizens of Pennsylvania, brought a suit in the District

Court of the United States, possessing Circuit Court jurisdiction, and sitting for the District of West Tennessee, against Thomas Eckford and Probert P. Collier, as indorsers of sundry promissory notes held by Knox, Boggs & Co.

On the 8th of April, 1840, a judgment was rendered against these defendants in the above court, for the sum of $3,562.20.

On the 24th of April, 1840, a writ of *fieri facias*, founded on the foregoing judgment, was issued, and the execution levied on seventeen negroes and four mules, as the property of P. P. Collier, being a part of the property included within the deed to Peyton Smith.

A forthcoming bond was taken, with the following conditions:—

"Now, if the said P. P. Collier shall deliver the property at Covington, on the 21st day of September, 1840, then and there to be sold to satisfy said judgment and cost, then this obligation to be void; else, to remain in full force.

(Signed,) P. P. COLLIER. [SEAL.]
M. BRYAN. [SEAL.]
HY. FEEZER. [SEAL.]
FRED. R. SMITH. [SEAL.]"

About this time, although the record does not say precisely when, Smith, the trustee, applied to the judge of the District Court for an injunction to restrain the sale, upon the ground that the property belonged to him and not to Collier, but the judge declined to grant it. He then applied to the Chancery Court at Brownsville (a State Court of Tennessee), and, upon filing his bill for relief, obtained an injunction.

On the 21st of September, 1840, when the property was to be delivered under the forthcoming bond, the marshal made the following return:

"Bond forfeited, and sale of the negroes and mules levied on enjoined by order of the Chancery Court at Brownsville, 21st Sept., 1840.

ROB'T J. CHESTER, *Mar. West Tenn.*"

On the 27th of October, 1840, an *alias fieri facias* was issued upon the judgment in the District Court, and placed in the hands of the marshal, who levied it, on the 6th of November, upon the same negroes and mules which were the subjects of the former execution. Another forthcoming bond was given for the delivery of the property on the 5th of December, 1840.

On the 20th of November, 1840, the Chancery Court at Brownsville issued the following order:

"STATE OF TENNESSEE:

To the Sheriff of Tipton County, greeting:

*302] *"Whereas, it hath been represented unto the chancellor, in our Chancery Court at Brownsville, in the western division of the State of Tennessee aforesaid, on the part of Peyton Smith, trustee, &c., complainant, that he has lately exhibited his amended bill of complaint in our said Chancery Court, against Knox, Boggs & Co., P. P. Collier, and Robert J. Chester, defendants, to be relieved touching the matters therein complained of; in which said bill it is, among other matters, set forth, that the said defendants are combining and confederating to injure the complainant touching the matters set forth in said bill, and that their actings and doings in that behalf are contrary to equity and good conscience.

"We, therefore, in consideration of the premises, do strictly command you, the said sheriff of Tipton county, Tennessee, that you do absolutely seize and take into your possession, immediately and forthwith, at all hazards, the following negro slaves, to wit: Jack, Jim, Jane, Marcella, Zilpha, Washington, Margaret, Doll, Bryant, Toney, Catharine, Cully, Cynthia, Sam, John, Clara, and Lucinda, heretofore levied on by the marshal of West Tennessee, as the property of said Collier, to satisfy a judgment in favor of said Knox, Boggs & Co.; and do you safely and securely keep said slaves, so that you have them forthcoming to abide the further order of our said Chancery Court; and this you shall in no wise omit, under the penalty prescribed by law.

"Witness, Sheppard M. Ashe, clerk and master of our said court, at office, in Brownsville, this second Monday in November, 1840, and in the 65th year of American independence.

SHEPPARD M. ASHE, *Clerk and Master.*"

On the 5th of December, 1840, when the second forthcoming bond was due, the sheriff, acting under the order of the Chancery Court of the state, and the marshal, acting under the execution issued by the District Court of the United States, both made returns.

The sheriff's return was as follows:—

"Levied this attachment on all the within-named negroes, except *Jim*, who was not found, nor was he levied on by the marshal of Tennessee.

J. HORNE, *Sheriff Tipton county.*"

"*Dec. 5th*, 1840."

The marshal's return was as follows:—

"The property executed, delivered according to bond; and

then arrested from me by the sheriff of Tipton, under an order of the Chancery Court at Brownsville; bill filed; see inclosed.

ROB. J. CHESTER, *Mar.*"

"*5th Dec.*, 1840."

*On the 8th of April, 1841, Knox, Boggs & Co. filed a bill in the District Court of the United States (the same court in which they had obtained their judgment), reciting all the circumstances of the case, stating that Smith claimed under a fraudulent deed of trust, and alleging that a state court had no right, power, or jurisdiction to enjoin the process issued from the District Court; that Collier and the securities upon the delivery bond combined and confederated with Peyton Smith to prevent the sale of the property levied upon, and so defeat the execution of the complainants, who had now no adequate and complete remedy at law. The bill prayed that Collier and Smith and all the securities might be made defendants to answer, and that the property might be sold to pay the judgment obtained by the complainants. [*303

Some of the defendants demurred to the bill, but the demurrers were overruled, and they were ordered to answer.

On the 10th of November, 1841, the Chancery Court at Brownsville passed the following decree in the case of the bill which had been filed by Peyton Smith, and in which he had obtained an injunction, as before stated.

"Be it remembered, that this cause came on to be heard on this, the tenth day of November, eighteen hundred and forty-one, before the Hon. A. McCampbell, chancellor, upon the orders *pro confesso* against said defendants. And it appearing to the satisfaction of the court, that in March, eighteen hundred and thirty-nine, defendant Collier made a deed conveying to complainant, amongst other things, the following negro slaves, to wit: Jack, Jim, Washington, Margaret, Doll, Marcella, Zilpha, Bryan, Toney, Catharine, Cully, Chloe, Phillis, Sam, John, Lucinda, and Cynthia; which said deed was executed by said Collier to complainant in trust to secure the payment of certain debts in the same specified; and by the terms of said deed said Collier was to remain in possession of the property conveyed in the same for the space of eighteen months from and after the execution of said deed; and in the event that the debts specified in said deed were not paid on or before the expiration of the eighteen months from the time of the execution of said deed, the property specified in the same was to be sold by complainant, and the proceeds arising from said sale to be applied by him to the liquidation and settlement of the debts set forth in said deed.

"And it further appearing, that said deed was duly proven and registered, and that the debts specified in said deed are *bonâ fide*, and due and owing, with the exception of about five hundred dollars, which has been paid by said Collier since the execution of said deed; and that said deed was executed in good faith, and there is no fraud in the same.

*304] *And it further appearing to the satisfaction of the court, that after the execution, probate, and registration of said deed, defendants Knox, Boggs & Co. recovered a judgment in the District Court of the United States, in the eighth circuit, for the State of Tennessee, at Jackson, for about the sum of three thousand four hundred and sixty-two dollars and twenty cents; upon which said judgment a writ of *fieri facias* issued to defendant Chester; who, by virtue of said writ of *fieri facias*, seized and took into his possession said negro slaves, Jack, Jim, Washington, Doll, Marcella, Zilpha, Bryant, Toney, Catharine, Cully, Chloe, Phillis, Cynthia, Sam, John, and Lucinda, and that defendant Chester was about to sell and dispose of said negroes slaves.

"And it further appearing to the satisfaction of the court, that defendants acquired no lien on any of said several negroes slaves by virtue of their said judgment and execution; and that said slaves ought not to be appropriated in satisfaction of the same.

"It is therefore ordered, adjudged, and decreed by the court, that the injunction heretofore awarded in this cause be made perpetual; and that said defendants Knox, Boggs & Co., and said Robert J. Chester, be, and are hereby, restrained perpetually from selling or otherwise controlling either of said slaves under and by virtue of said judgment and execution.

"It is further ordered, that the sheriff of Tipton county deliver said negroes over to complainant; that complainant pay all costs herein expended, for which execution may issue. And that complainant recover of defendants Knox, Boggs & Co., and Robert J. Chester, the costs of suit herein expended; and that defendant Collier recover of complainant the cost by him about this suit expended; for which executions may issue."

In April, 1842, the respondents answered the bill filed by Knox, Boggs & Co. in the District Court. It will only be necessary to refer to the answers of Smith and Collier. Smith denied that the deed of trust made to him was fraudulent as against creditors, but averred that the same was made in good faith; that he was governed by no other feeling or desire than a wish to discharge his duty as trustee; that the *cestui que*

trust looked to him to protect the property; denied all combination and confederation with any person, &c., &c. Collier admitted the truth of the facts as they are set forth in the preceding part of this statement, denied that the deed to Smith was fraudulent, but averred that it was made in good faith, &c., &c.

In May, 1842, a general replication was filed by the complainants.

On the 5th of August, 1842, interrogatories were filed on the part of the complainants, and the depositions of four persons taken. Chester, the marshal, was asked to state the value of the property conveyed by the deed of trust, to which he answered as follows:

Answer. "I believe, from the ages, &c., of the negroes mentioned *in the deed of trust, and what I saw of [*305 them when delivered to me, that they were worth, at the date of conveyance, seven to eight thousand dollars; I do not know what the mules and horses are worth, nor am I acquainted with the value of the land or the town lots."

Harris and Smith answered as follows:

Answer, "I, J. W. Harris, have examined the deed referred to in said interrogatory, and suppose the negroes, judging from their age and size, as stated in said deed of trust, to have been worth, at the date of said deed, seven thousand six hundred and fifty dollars; not being personally acquainted with but few of them, can only state their value from what appears to be their ages in the deed. Horses and mules supposed to be worth four hundred dollars; household and kitchen furniture supposed to be worth four hundred and eleven dollars, including spinning-machine, barouche, blacksmith's tools, and loom. As to the land, I have no idea what it was worth, never having been upon it that I know of, and not being acquainted with the value of land."

"I, A. W. Smith, answer and say, that I am acquainted with the property conveyed in the deed mentioned in the above interrogatory, and believe it to have been worth, at the date of the said deed, ten thousand three hundred and sixty-six dollars."

Clarkson was interrogated as to the amount which Collier owed to him, to which he responded, that it was a balance of eleven or twelve hundred dollars.

On the 16th of October, 1843, the cause came on to be heard on bill, answers, replication, and proof, when the bill was dismissed, with costs. From which decree an appeal brought the case up to this court.

The case was argued by *Mr. Brinley*, for the appellants, and *Mr. Milton Brown*, for the appellees.

Mr. Brinley, for the appellants.

It may be proper to make two statements, preliminary to arguing the points which are most material. The one is, that the original action was instituted in the District Court of the United States for West Tennessee. That was a correct proceeding, because that court had Circuit Court jurisdiction imposed upon it by the act of January 18th, 1839. 5 Lit. & Brown's ed., 313.

The other remark is, that the delivery bonds adverted to were taken in conformity to the laws of Tennessee. They provide, that when any execution may be levied on real or personal property, if the debtor shall give sufficient security to the officer to have the goods and chattels forthcoming at the day and place of sale, it shall be the duty of the officer to *306] take a bond payable to the creditor for double the amount of execution, reciting the service of *the execution, and the amount of the money due thereon, conditioned for the true performance of the same. Laws of Tennessee, 1801, ch. 13 (Caruthers & Nicholson's Compilation, 129).

The act of Tennessee of 1831, ch. 25, provides, in the first section, that the securities in such a bond, if forfeited, shall not be responsible for more than the value of the property. The second section provides, that if an execution be levied upon personal property, and bond and security shall be given for the delivery of the property upon the day of sale, and the bond shall be forfeited, in whole or in part, then the officer shall proceed to levy upon so much of the defendant's property as may be found, as shall be sufficient to satisfy the execution; if he finds no property of the defendant, then he shall levy upon property of the security or securities in said forfeited delivery bond. Laws of Tennessee (Caruthers & Nicholson's Compilation), 129.

Let us now pass to the consideration of the points arising out of an examination of the deed of trust. It is dated March 14th, 1839; and by it Collier conveys to Smith six parcels of real estate, negroes, horses, mules, furniture, and other property, in trust, to pay certain notes with interest, provided they are not paid by said Collier, or some other person for him, before the expiration of eighteen months from the date of the deed; if not paid by that time, Smith is to sell the property at auction for ready money. By the deed, Collier is to keep and retain the land and personal property in his own possession until the expiration of said eighteen months.

The deed is made to secure the payment of twelve notes, amounting to a trifle over $6,000. The value of the property conveyed, according to the testimony of Smith, is $10,366. Such an amount of property conveyed to secure, not all, but a portion, of Collier's creditors, without any stipulation for a release, indicates fraud in regard to other creditors; more especially as there is no proof of the validity of the debts. By the laws of Tennessee, every gift, &c., made with the intent to delay or defraud creditors of their just and lawful actions, suits, debts, &c., are wholly and utterly void, except as against the person making the same. Act of 1801, ch. 25, § 2.

Again; the deed of trust had matured before the second levy of the plaintiff's execution, and the property remained in the hands of the debtor; that is, the trustee had not taken possession of it at the time limited for the payment of the money. There was no proof that the trust was *bonâ fide*. The legal presumption upon this state of facts is, that the trust is fraudulent and void as to creditors, and the *onus* lies on the trustees to prove the contrary, and to prove the validity of the debts.

Possession remaining with the vendor, after an absolute sale, or with the grantor or mortgagor in deeds of trust and mortgage, after *the time when the debt secured [*307 by the latter should be paid, is *prima facie* evidence of fraud; but the presumption of fraud may be repelled by proof of fairness in the transaction, and that the instruments were executed for an adequate consideration. *Maney* v. *Killough*, 7 Yerg. (Tenn.), 440.

The marshal, therefore, had a right to levy on the slaves as the property of the debtor. The property had been levied on by the marshal, on the first execution, and a bond taken before the trust matured, and the bond was forfeited. But that did not prevent the trustee from taking possession of the negroes after the bond was forfeited; because a forfeiture of the bond released the property from all lien or liability on account of the levy, and it again became a part of the debtor's general property, and might have been taken by the trustee, without legal hindrance, so far as the first levy was concerned.

Where an execution is levied, and bond taken for the delivery of the property on the day of sale, the lien of the execution continues until the bond is forfeited. It is then discharged, and the property is subject to the claims of other creditors. *Malone* v. *Abbott*, 3 Humph. (Tenn.), 532.

The levy of the marshal was therefore valid as against the trust, which, for want of proof to the contrary, was fraudulent. This levy vested the title in the marshal for the benefit of the

plaintiffs, to pay their debt by execution; it was a lien created by law, which could not be enforced at law, because the marshal was forcibly prevented by the interference of the State tribunals, called into existence by the defendants. Their only remedy was in equity to enforce their lien, to prevent multiplicity of suits, conflicts of jurisdiction, and to inquire into the fraudulent conveyance by the deed of trust.

A judgment creditor, having a lien on personal property, has a right to come into chancery to remove obstacles thrown in the way of the due execution of his process by a levy and seizure of the property by a junior judgment creditor. *Parrish* v. *Saunders et al.*, 3 Humph. (Tenn.), 431. This is an analogous case.

The courts of Tennessee have decided, that a suit in equity can be brought for slaves, from the peculiar nature of the property. *Loftin* v. *Espy*, 4 Yerg. (Tenn.), 84. *A fortiori*, to enforce a lien upon them.

Lastly; the State court had no authority to enjoin an execution issuing from a court of the United States. *McKim* v. *Voorhies*, 7 Cranch, 279; 3 Story Const., 625, §§ 1751, 1752; *United States* v. *Wilson*, 8 Wheat., 253; 1 Kent Com., 409. It is true that the national courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the State courts; or in any
*308] other manner to interfere with their jurisdiction or proceedings. *3 Story Const., 626, § 1753; *Diggs et al.* v. *Wolcott*, 4 Cranch, 179. But the federal court had complete jurisdiction in this case, by injunction, to prevent the sale of the property levied upon by execution from its court. *Parker* v. *The Judges of the Circuit Court of Maryland*, 12 Wheat., 561. And as the State and federal courts had concurrent jurisdiction (Act of September 24th, 1789, § 11; 1 Lit. & Brown's ed., 78) of the action brought at law, and the suit in equity which arose out of it, the federal court having first acquired jurisdiction, the same cannot afterwards be taken from it by the State courts. Under such circumstances, the aid of the United States court is not an irregular interference with the proceedings of the State tribunal.

If the state courts have jurisdiction to enjoin the marshal from selling specific property in possession of the defendant, they may enjoin for all his property, or for any number of adverse claimants; and thus, in effect, entirely defeat the plaintiff's execution. At the same time, an injurious conflict of jurisdiction would be produced, inconsistent with the harmony which ought to exist between the state and federal jurisdictions. "Where the jurisdiction of the federal courts has once

attached, no subsequent change in the relation or condition of the parties will oust the jurisdiction. The strongest considerations of utility and convenience require that, the jurisdiction being once vested, the action of the court shall not be limited, but that it should proceed to make a final disposition of the subject." *United States* v. *Myers et al.*, 2 Brock., 516.

Mr. Milton Brown, for the appellees.

The principal and leading question in this case arises on the demurrer to the bill; for if this be adjudged for the appellees, there is an end of the case.

The bill, if its allegations be true, states a case of clear and unembarrassed remedy at law. When analyzed, it amounts to this:—That complainants had recovered a judgment at law, on which execution issued, and had been levied by the marshal of West Tennessee, on seventeen negroes and four mules, the property of Collier, one of the debtors in the execution, for the forthcoming of which, on the day of sale, a delivery bond had been taken, with sureties. That one Peyton Smith had applied to the Circuit Court of the United States, from which the execution had issued, for an injunction to restrain the sale of said negroes; which application, however, was refused by the court. That, afterwards, the property not having been delivered on the day of sale, the bond was forfeited; and on this judgment of forfeiture another execution issued against the defendants in the original judgment, and also the sureties in the forfeited delivery bond; on which last execution another levy was made, and another delivery bond, with new surety, taken. *The bill then adds:— [*309
"Upon this last execution the marshal made the following return:"—"The property executed, delivered according to bond, and then arrested from me by the sheriff of Tipton, under order of the Chancery Court at Brownsville, 5th December, 1840."

The next two paragraphs then disclose the points on which the supposed equity of the bill is made to rest. They are as follows:

"And your orators further show, that the said Peyton Smith, although your honor refused to grant an injunction restraining the sale of said negroes levied upon, has, by some means or other, procured from the state courts of the state of Tennessee a process of injunction, or some other process, enjoining the sale of said negroes and property levied upon by virtue of the executions issuing from your honorable court, and has procured one Josiah Horne, the sheriff of Tipton county, a citizen of the state of Tennessee, to arrest and take

possession of said negroes from the custody of the marshal of this court; and the said Josiah Horne has still possession of said property so levied upon as aforesaid, and refuses to deliver the same to the marshal of the Western District, to be sold according to law.

"Your orators further show, that said negroes and mules were the property of said Probert P. Collier, and liable to be sold for the debt due to your orators, and that the state courts had no right, power, or jurisdiction to enjoin the process issued from this honorable court; and your orators believe, and so charge, that the said Collier and the securities upon said delivery bond combined and confederated with said Peyton Smith to prevent the sale of the property levied upon, and so defeat the execution of your orators; and your orators have now no adequate and complete remedy at law."

On these vague uncertainties and allegations, meaning nothing and amounting to nothing, the debtors in the original judgment, the sureties to both the delivery bonds, and Peyton Smith and the sheriff of Tipton, are all made defendants. And it is only remarkable, that in this wholesale business, the chancellor of West Tennessee was not included.

The prayer of the bill for specific relief is,—1. That the negroes "be sold to pay the judgment due to your orators." 2. "That said defendants be jointly and severally bound personally to pay said judgment and interest to your orators." And lastly,—"That said negroes be forthcoming, to abide the decree of this honorable court." An injunction was prayed for, but not granted.

To this bill the defendants severally demurred. The demurrers were overruled by the court below, and the defendants required to answer. And now comes up the question, whether there is sufficient equity in the bill, and stated with sufficient legal certainty, to authorize a decree to be made on it.

*310] *And first, as to the defendant Peyton Smith, against whom there is equity, if against any one. The point is, the improper suing out of process and arresting the property from the possession of the marshal.

If it be the design of the bill to invoke the chancery powers of the court, to control or decide any real or supposed conflict between the federal and state judiciaries, the exercise of such a power would be alike unwarranted and dangerous.

But this is probably not the object of the bill. It proceeds on the ground that the process was wholly and absolutely void. What the process was, whether an injunction or a final process of execution, either in law or chancery, is not stated

The vague and unmeaning allegation is, that it was "a process of injunction, or some other process."

Nor is it stated on what this very uncertain process was sued out, or on what it was founded; whether on a final decreee in chancery, on a final judgment at law, or on an application for an injunction, does not appear with any degree of legal certainty. The allegations are, that said Peyton Smith, "by some means or other," "procured from the state courts of the State of Tennessee a process of injunction, or some other process," by which the sale of the slaves by the marshal had been prevented; and that the state courts "had no right, power, or jurisdiction" to issue this process.

Now, if these allegations be true, the process, whatever it might be, was absolutely void, and all acting under it trespassers. The marshal should have paid no attention to it; and if the property was taken without his consent, an action of trespass or trover, in his name, by virtue of his levy, was the plain remedy. If the process in the hands of the marshal was, as is here alleged, wrongfully and unlawfully obstructed or interfered with, it certainly furnishes no ground on which to invoke the chancery powers of the court. The case would be much nearer the province of a grand jury than the conscience of a chancellor.

In this it is not designed to intimate, that, in point of fact, there was any unlawful or improper interference with the rights of the marshal or the complainants. Nor is it designed to intimate that there was any conflict of jurisdiction between the federal and state courts. It is believed there was no such interference, and no such conflict. But for the purposes of the argument on the demurrer, the facts are taken as stated in the bill.

The attempt in the appellant's brief to sustain the bill, on the ground of its being filed to set aside a fraudulent deed of trust, finds no support in the allegations or frame of the bill itself. The case made in the bill is the alleged improper issuance of the process from the state courts, and the seizure of the property. On what this process issued, as already clearly shown, is not stated. *There is nothing on the face of the bill to show, with sufficient legal certainty, that the existence of a deed of trust is the subject of complaint. [*311

"Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises." Story Eq. Pl. § 28. If fraud is charged, it must be distinctly and clearly set out. Story Eq. Pl. § 251.

The only reference in the bill to a deed of trust is a mere historical reference in the statement that Peyton Smith had

applied to the Circuit Court of the United States for an injunction, which was refused. It was not charged that any other or further use was ever made or intended to be made of it.

Before the issuance of the "process" from the State courts, of which complaint is made, there had, as appears on the face of the bill, been an entire change in the nature of the question. The delivery bond had been forfeited, a new statutory judgment had attached, a new execution had issued, embracing not merely the former defendants, but the sureties in the delivery bond also, a new levy under this execution had been made, &c., &c. This "process," therefore, which is spoken of in the bill in such remarkably indefinite terms, might have been founded on an intervening judgment or decree in chancery, taking priority of lien, as happened in the case of *Brown* v. *Clarke*, decided at the present term of this court. In that case it was decided that, on the forfeiture of a delivery bond, the first lien was extinguished and a new lien attached, and that intervening liens might take precedence. May this not have been the case in this very instance, so far as anything appears on the face of the bill? In fact, the language of the bill favors this conclusion. It says that, "by some means or other," process was sued out. Does this not leave it wholly uncertain whether this process was obtained by "means" of a deed of trust, or by that "other" means referred to? But again; the bill says there was sued out "a process of injunction, or some other process," thus leaving it entirely uncertain what that "other process" was. Might not that "other process" here referred to have been founded on an intervening judgment or decree, creating a prior lien, and entitled to prior satisfaction?

These considerations are deemed sufficient to show that the reference to the deed of trust in the bill is too indefinite and uncertain to require an answer, or form an issue, and can furnish no possible ground for equitable interference. A statement of facts, to form the basis of relief, must not be vague and uncertain. And if, as in this case, they are stated in the alternative, or are otherwise left doubtful, it is such uncertainty as will be bad on general demurrer. Story Eq. Pl. §§ 243–249 and 450.

Upon what ground the sureties in the delivery bonds have been made parties it is hard to perceive. Complainants *312] already had *judgments and executions against them on the forfeiture; what more did they want? There is nothing in the bill against them, except a general charge of combination and confederacy, which cannot be a sufficient

ground of jurisdiction; and, if charged, need not be answered. Story Eq. Pl. §§ 29 and 856.

If the demurrers are sustained by the court, there is, of course, an end of the case; should they be overruled, another question presents itself. Can the reference to a deed of trust, in the answer, put that in issue which was not substantially relied on in the bill? That it cannot is clear. Gresley Ev. 22; Story Eq. Pl. § 36, in note; *Boone* v. *Chiles*, 10 Pet., 209; *Harrison and others* v. *Nixon*, 9 Id., 503; *Jackson* v. *Ashton*, 11 Id., 249. In this last case the court say,—"It may be proper to observe, that no admissions in an answer can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill."

But there is another reason why the statement in the answers, in the present condition of the case, cannot be regarded. The real persons interested in the deed of trust are not made parties; and this may also be regarded as another proof that the bill is framed with a view to no such end. Peyton Smith is a mere trustee, without interest; his answer cannot prejudice the rights of the *cestuis que trust;* and, though a party of record, is a competent witness. Gresley Ev., 242, 258. The true rule seems to be, that the *cestuis que trust* should be made parties in all cases where the "existence or enjoyment of the property is affected by the prayer of the suit." Calv. Parties, 212. To make, therefore, the admissions or statements in the answers of those having no interest in the trust work an injury to those who hold the real interest, would be to violate not merely the established rules of pleading and evidence, but the most obvious rules of substantial justice.

While it is believed that this is the law of the case, and that no decree, on several grounds, can be made touching the rights of the *cestuis que trust*, it is, with equal confidence, belived that there is not the slightest ground to infer fraud in the execution of the trust. It was designed to give a preference to Collier's own creditors over debts for which he was a mere security. This he had a lawful right to do. The debts designed to be preferred amounted to over seven thousand dollars, besides interest. The highest estimate placed on all the property is $10,366. But this is palpably an over-estimate, as is proved by the fact that one witness says the seventeen negroes were worth $7,650; while another witness thinks they were worth seven or eight thousand dollars. And yet the face of the bill shows, that the same negroes were valued on each levy by the marshal when inserted in the delivery bonds; the first time *valued at $4,100, and [*313

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the last time at $4,250. This proves that the estimate attempted to be placed on the property, for the purposes of this cause, is entirely too high. It is believed that at no time would it have sold under the hammer for enough to meet the debts named in the deed of trust.

One other suggestion will close this brief. The question of the validity of this deed has been before the Chancery Court of the State, where the parties in interest have been properly represented, and the result has been a decision in favor of the rights of the *cestuis que trust;* and it is fair to suppose that the trust, under the direction of the court, has, before now, been wound up, and justice done.

Mr. Brinley in reply.

1. It is insisted by the counsel for the appellees, that there was a remedy at law; that if the property was taken from the marshal without his consent, he had a remedy by action of trespass or trover. This objection is anticipated and met in the opening argument for the appellants.

2. It is contended that there were too many persons made defendants by the bill. Who are they? Peyton Smith, the person claiming the property under an alleged fraudulent deed of trust; Collier, the assignor in said deed. The former should be included beyond a doubt; so, too, the latter. Where the assignment is not absolute and unconditional, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, there the assignor is not only a proper, but a necessary, party. Story Eq. Pl. § 153. Eckford, being one of the judgment debtors, was of course a party. Bryan, Feezer, and Smith were securities on the delivery bond given on the levy of the first execution; they, together with Boon, were securities on the delivery bond given on the levy of the second execution. They were all made parties to the bill, on the principle that those in interest must be brought into court. By the statutes of Tennessee, as sureties to a forfeited delivery bond, their property might be levied on, and they had a direct interest in the subject. Besides, they were distinctly charged in the bill as confederating with Collier and Smith to prevent the sale of the property levied on. Horne was the sheriff who arrested the property from the marshal, and he was therefore made a party. This "wholesale business" was but a compliance with the rules of equity applicable to the circumstances.

3. It is then contended that there are not parties enough; that the *cestuis que trust* are not included.

It may be true, as a general rule, that all persons interested in the subject of a suit should be made parties as plaintiffs or

defendants, in order that a complete decree may be made; but there are exceptions. Thus, residuary legatees are interested in the object *of a suit by a creditor against [*314 the executor, to establish his debt or claim against the estate; for the establishment of such debt or claim goes *pro tanto* in direct diminution of their interest in the residue. Yet they are never required to be parties. Calv. Parties, ch. 1, p. 5.

So trustees for the payment of debts and legacies may sustain a suit either as plaintiffs or defendants, touching the trust estate, without bringing the creditors or legatees before the court as parties. *Fenn* v. *Craig*, 3 Younge & C., 216.

In case of assignment for benefit of creditors, the assignees may file a bill relative to the trust estate, without making the creditors parties; for the assignees are the proper representatives of all of them. In a suit to set aside an assignment as fraudulent, it is sufficient to make the fraudulent assignors and assignees parties. *Wakeman* v. *Grover*, 4 Paige (N. Y.), 23.

In the present case, Smith, the trustee, must be considered as the representative of the interest of all parties. It was not necessary to make the *cestuisque trust* parties; the complainants knew not who they were. *Nemo tenetur divinare.*

4. The bill is said to be vague and unmeaning, because it states that "a process of injunction, or some other process," enjoining the sale, proceeded from the state court. The bill states, in the words of the return on the *fi. fa.*, that the property was arrested from the marshal "under order of the Chancery Court at Brownsville." It then states, in the next paragraph, in reference to this order and arrest, that it was by "an injunction or some other process." If the language of the return had been used in that paragraph, it would have been sufficiently certain; the alternative phrase employed is not less so.

The sections in Story Eq. Pl., referred to by the counsel for the appellees, are to the point, that when the allegations in a bill are extremely vague, loose, and uncertain, or where the title of a plaintiff is stated in the alternative, so that the respondent does not know what he is to answer, they are not sufficient.

A general charge or statement of the matters of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to a general charge. Story Eq. Pl., § 28.

Here the general charge is, that the sale on the execution was enjoined by process from the state court, and the property arrested from the marshal. That is minute enough, particu-

larly as the precise character and appellation of the process were known to Smith, who obtained it. Moreover, a charge in general terms, where it is the point on which the merits of the cause turn, and does not come in collaterally and incidentally, will warrant the production of evidence to particular facts. 2 Atk., 333, 337.

*315] A plaintiff is not bound to set forth all the minute facts which go *to constitute a charge; and where the title to relief will be precisely the same in each case, the plaintiff may aver facts of a different nature, which will equally support his application. Story Eq. Pl., §§ 252, 254.

The cases cited by the counsel for the appellees, from the reports of this court, are to the undisputed point, that a party is not allowed to state one case in a bill or answer, and make out a different one by proof. No such attempt is made in this case; the allegation in substance is, that an injunction, or a process of like nature issued; that is put in issue. The proof, as obtained from the admissions in the answers of Smith, Collier, Feezer, Bryan, Horne, and Boone, is within the allegation, that an injunction issued. In the case of *Jackson* v. *Ashton*, 11 Pet., 249, the court said,—"The answer of the defendant is broader than the allegations in the bill; and, although such parts of the answer as are not responsive to the bill are not evidence for the defendant, yet the counsel on both sides have considered the facts disclosed as belonging to the case; and if the facts in the answer, not responsive to the bill, are relied on by the complainants' counsel as admissions by the defendant, he is entitled, thus far, to their full benefit."

So here the counsel, throughout the progress of the cause, have considered the fact that an injunction issued as belonging to the case. It was disclosed (admit it for the argument) in the answer of Smith, though not substantially set forth in the bill; yet the complainants shall have the full benefit of the admission.

The words, "or other process," may be considered surplusage.

5. It is said there is nothing on the face of the bill to show that the deed of trust was the subject of complaint.

The bill expressly states, that Smith claimed the property under a fraudulent deed of trust, and that he pursued that claim by the intervention of the state court. An illegal proceeding, based on a fraudulent conveyance, is the charge. The reference to the deed of trust is said to be in the statement. There it ought to be; for the statement constitutes the real substance of a bill. Story Eq. Pl., § 27.

6. The "process" from the state court, it is argued, may

have been founded on an intervening judgment, creating a prior lien, &c. Such a supposition is wholly at war with the true state of the case, as disclosed by the allegations in the bill, and the admissions in the answers.

7. The counsel for the appellees states, that "the highest estimate placed on all the property is $10,366;" and therefore there is no reason for inferring fraud. Fraud may not be conclusively established from that circumstance only; but it is one of a number of circumstances which unitedly afford strong presumption of fraud in regard to creditors.

8. The closing remark of the counsel for the appellees, that *the validity of the deed of trust has been established by the court of chancery of the state, is, as it purports to be, a "suggestion," and which cannot affect the decision of this court. [*316

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for the District of West Tennessee.

In their bill the complainants state that they recovered a judgment in the Circuit Court against Thomas Eckford and Probert P. Collier, for the sum of three thousand four hundred and sixty-two dollars and twenty cents, &c.; and that execution was issued the 24th of April, 1840, which, about the 18th of July ensuing, was levied on seventeen negroes and four mules; and that the marshal took a delivery bond and security, under the statute of Tennessee.

That one Peyton Smith, a citizen of the State of Tennessee, pretending to claim said property levied upon by virtue of some fraudulent deed of trust executed by Probert P. Collier to him, filed a bill, which prayed for an injunction, in the Circuit Court, and which was refused. That the delivery bond being forfeited, an execution was issued on it, against the principals and sureties, which was levied upon the same negroes and mules; upon which execution the marshal returned that "the property levied on had been taken from him by the sheriff of Tipton county, under the order of the Chancery Court, at Brownsville, 5th December, 1840." The bill alleges that the negroes and mules belonged to Collier, and it prays that they may be sold in satisfaction of the judgment.

There is no allegation in this bill which authorizes a court of equity to take jurisdiction of the case. Fraud is not charged, nor is anything stated going to show that the remedy at law is not complete. It is stated that Peyton Smith, pretending to claim the property, after the first levy, by virtue of some fraudulent deed of trust executed to him by Collier,

applied to the Circuit Court, by bill, for an injunction, which was refused. The present bill was not filed by the complainants until after execution was issued on the delivery bond and levied, and the property was taken, as returned by the marshal, under state process.

Now, if the object had been to set aside the deed of trust, as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill. Or if the negroes and mules were about to be taken out of the state, and beyond the jurisdiction of the court, unless restrained by an injunction, such fact should have been stated. But the principal allegation in the bill is, that under the state authority the sheriff had no right to take the negroes, &c. If this be admitted, it does not follow that the remedy of the complainants is in a court of equity. On the contrary, from the showing in the *317] bill, there is a plain remedy at law. The marshal might *have brought trespass against the sheriff, or applied to the Circuit Court for an attachment.

Out of the answer which sets up the deed of trust, the complainants insist they are entitled to relief. Now no relief can be given by a court of equity, except a proper case be made in the bill. The inquiry is not only whether the defendant, from his own showing or by proof, has acted unjustly and inequitably, but also, whether the complainants, by their allegations and proof, have shown that they are entitled to relief.

The decree of the Circuit Court is affirmed, with costs.

THOMAS COOKENDORFER, PLAINTIFF IN ERROR, *v.* ANTHONY PRESTON, DEFENDANT IN ERROR.

In an action brought by the indorsee against the indorser of a promissory note, which had been deposited in a bank for collection, the notary public who made the protest is a competent witness, although he has given bond to the bank for the faithful performance of his duty.

He is also competent to testify as to his usual practice.

The cases reported in 9 Wheat., 582, 11 Id., 420, and 1 Pet., 25, reviewed.

At the time when these decisions were made, it was the usage in the city of Washington to allow four days of grace upon notes discounted by banks, and also upon notes merely deposited for collection.[1]

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[1] See *Adams* v. *Otterback*, 15 How., 545. S. P. *Hill* v. *Norvell*, 3 McLean, 583. The local usage of the place where a bill is drawn, or a promissory note made payable, as to the number of days of grace, is valid. *Renner* v. *Bank of Columbia*, 9 Wheat., 581; *Bank of Washington* v. *Triplett*, 1 Pet., 25; S. P. *Fowler* v. *Brantly*, 14 Id., 318; *Wiseman* v. *Chiappella*, 23 How., 368.

But since then the usage has been changed as to notes deposited for collection, and been made to conform to the general law merchant, which allows only three days of grace.[2]

Although evidence is not admissible to show that the usage was in fact different from that which it was established to be by judicial decisions, yet it may be shown that it was subsequently changed.

THIS case came up, by writ of error, from the Circuit Court of the United States for the District of Columbia, in and for the county of Washington.

The case was this:

On the 17th of May, 1839, E. T. Arguelles gave the following note:

$300. *Washington, May* 17, 1839.

On the first day of February next, I promise to pay to Thomas Cookendorfer, or order, three hundred dollars, for value received, negotiable and payable at the Bank at Washington.

(Signed,) E. T. ARGUELLES.

(Indorsed,) THOS. COOKENDORFER,
ANTHONY PRESTON.

This note was deposited in the Bank of Washington, for collection. Not being paid at maturity by the drawer, it was protested *under the circumstances and in the [*318 manner stated in the bill of exceptions.

In February, 1842, a suit was brought by Preston, the indorsee, against Cookendorfer, the indorser, which resulted in a verdict and judgment for the plaintiff.

The following bill of exceptions shows the points of law which were raised and ruled at the trial.

Memorandum. Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bill of exceptions, to wit:—

Defendant's Bill of Exceptions.

ANTHONY PRESTON *v.* THOMAS COOKENDORFER.

On the trial of this cause, the handwriting of the maker and indorser of the note in the declaration mentioned was admitted, and the plaintiff, to maintain the issue on his part joined, offered George Sweeny, who was admitted to be a notary public for the county of Washington, District of

[2] A local usage at variance with the general law merchant is not binding on parties who have entered into no contract with reference to it. *Sturgis* v. *Cary*, 2 Curt., 382; *Bank of Alexandria* v. *Deneale*, 2 Cranch C. C., 488.

Columbia, lawfully commissioned and sworn, and by him they offered to prove that he, as such notary, was required by the Bank of Washington (who then held the said note for collection) to demand payment of the note mentioned in the declaration, and the said note was delivered to him by the said bank; and he did thereupon, on the 4th day of February, 1840, present the said note at the said bank, and did demand payment thereof at the said bank, and he was answered by the proper officer of the bank, "that there were no funds there for it"; that he, the said notary, did, on the next day, to wit, the 5th day of February, 1840, deliver to the defendant a notice in writing, which notice being now produced to the witness by the defendant, is in the words and figures following:—

Notice of 5 *February*, 1840.

Washington, *February 5th*, 1840.

SIR:—A note drawn by E. T. Arguelles, dated the 17th May, 1839, for three hundred dollars, payable at 1–4 February, 1840, due, and by you indorsed, and for which you are accountable to the President and Directors of the Bank of Washington, has been this day protested for non-payment.

Your obedient servant,

GEORGE SWEENY, *Notary Public.*

THOS. COOKENDORFER, Esq.

And he did, also, on the said 5th day of February, 1840, extend and record in his notarial register the protest of the said note, which is in the words and figures following:—

*319] *Protest.

$300. WASHINGTON, *May* 17, 1839.

On the first day of February next, I promise to pay to Thomas Cookendorfer, or order, three hundred dollars, for value received, negotiable and payable at the Bank of Washington.

(Signed,) E. T. ARGUELLES.

(Indorsed,) THOS. COOKENDORFER,
ANTHONY PRESTON.

DISTRICT OF COLUMBIA, *Washington County*, *sct.*

Be it known, that on the 4th day of February, 1840, I, George Sweeny, notary public, by lawful authority duly commissioned and sworn, dwelling in the county and District aforesaid, at the request of the President and Directors of the Bank of Washington, presented at the said bank the original

note, whereof the above is a true copy, and demanded there payment of the sum of money in the said note specified, whereunto I was answered,—"There are no funds here for it."

Therefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the drawer and indorser of the said note, and all others whom it doth or may concern, for all costs, exchange, re-exchange, charges, damages, and interests suffered and to be suffered for want of payment thereof.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial, this 5th day of February, [SEAL.] 1840. GEORGE SWEENY, *Notary Public.*

Protesting, $1.75.

Recorded in protest-book G. S. No. 3, page .

And the said witness further testified, that he copied the form of the said notice from a form used by Michael Nourse, one of the oldest notaries in the city, and largely employed as notary, and that he made the demand and gave the notice in this case according to his usual practice, and that his said practice conformed, so far as he knows and believes, to the practice of the other notaries in the city of Washington.

And the plaintiff offered further evidence tending to prove the said practice of said notaries to be according to the statement made by Mr. Sweeny, and that the usual practice was, when a notice was to be sent abroad, to put it into the post-office, and date it on the third or last day of grace; but when the notices were to be delivered in the city of Washington, a latitude was allowed to the notary, either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery, and the usage is to extend the protest on the day on which the notice is given, as in this case, stating the demand [*320 *to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated.

And the said George Sweeny, on cross-examination, testified that he usually acted on behalf of the said Bank of Washington, at its request, as the notary in regard to notes and bills in said bank, and that he had given a bond, with security, to said bank, in the penal sum of $10,000, for the faithful performance of his duty as notary public in regard to said business, and that the note in controversy had been deposited by plaintiff in said bank for collection.

And the counsel for the defendant objected to the admissibility and competency of said George Sweeny as a witness,

and the court overruled the said objection, and permitted the said Sweeny to be sworn, and to testify as aforesaid to the jury, to which the defendant, by his counsel, excepted, and prayed the court to seal this bill of exceptions, which is done accordingly.

And the said counsel for the defendant further objected to the admissibility and competency of the said testimony upon the subject of the practice and usage spoken of by the witness, but the court overruled the objection, and suffered the said testimony to go to the jury; whereupon the said counsel excepted.

And the said counsel for the defendant thereupon moved the court to instruct the jury, that the said evidence was not sufficient, if believed to be true, to show that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant so as to bind him.

But the court refused to give such instruction.

To each of which rulings of the court, in permitting the evidence as aforesaid to go to the jury, in refusing the instruction as prayed, the defendant, by his counsel, excepts, and prays the court to seal this bill of exceptions, which is accordingly done, this 7th day of April, 1843.

W. CRANCH. [SEAL.]
JAMES S. MORSELL. [SEAL.]

The cause was argued by *Mr. Bledsoe* and *Mr. Coxe*, for the plaintiff in error, and *Mr. Bradley*, for the defendant in error.

Mr. Bledsoe, for plaintiff in error, made three points:—

1. That the court erred in admitting the testimony of the notary public.

2. That the court erred in refusing the instruction asked for by the defendant's counsel.

3. That the declaration is radically and essentially defective.

1. It may be said, that the objection to the evidence of the notary public goes to his credibility rather than to his competency. *But inasmuch as the bank would be absolved from responsibility if the notary committed an error, and all the liability to the party injured by the fault would devolve upon the notary, it clearly became his interest to exonerate himself from it by proving that he committed no fault. His interest was strong and direct. Bayl. Bills, 251; 20 Johns. (N. Y.), 372; same case, 3 Cow. (N. Y.), 562.

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If the plaintiff should fail in recovering from the indorser,

on account of the ignorance or neglect of the notary in making a sufficient protest, the latter would become personally liable. His interest is to protect himself by securing a recovery from the indorser.

2. Supposing the evidence to be admissible, it is not sufficient.

A note must be presented for payment on the day that it falls due. When is that? On the last day of grace. The time of grace formed a part of the contract by the indorser. 1 Pet., 31.

But in this case it was presented on the third day of grace. This would have been proper under the general law merchant, if that law prevailed in the District of Columbia. But it does not. It is controlled by a local usage, which is to allow four days of grace. 1 Pet., 34; 9 Wheat., 582.

Such an usage is part of the contract, whether the parties were acquainted with it or not. 11 Wheat., 430.

A presentment too soon is a nullity. Bayl. Bills, 236.

No proof was offered in this case of the four days usage, but as it had been once proved and established, we were not bound to prove it again. It then became a part of the law. 1 Pet. C. C., 230; 2 Stark. (7th Lond. ed.), 360.

In 1 Pet., 34, there was no proof of this usage, but the court relied upon its having been proved before. There was proof of another usage, but none of that now in question.

It is apprehended that the counsel on the other side mean to make a distinction between notes discounted by banks and those left for collection; and to contend that the usage of four days grace applies only to notes discounted by banks. But this distinction is not recognized in the case in 1 Pet., 33, 34.

The usage being once established and recognized by law, the court below erred in admitting evidence to contradict it. 9 Law Lib., 40; 2 Burr., 1216, 1220, 1222, 1224, 1228; 1 Call. (Va.), 159; 2 Stark., 360.

It is an usage in other places to allow four days grace, and this is recognized as valid in the books. Chit. Bills, 407, *n;* Bayl. Bills, 235, note, speaking of this one.

It is contrary to the policy of the law to leave these questions open for the jury. Chit. Bills, 402.

The law merchant is built upon usage taken in connection with the principles of justice, not being found in any statutes. Evidence to unsettle it ought not to be received. 1 Dall., 265; 3 Wash. *C. C., 149; 5 Binn. (Pa.), 207; 6 Id., 420, 450; 1 Hall (N. Y.), 619. [*322

3. The evidence does not support the declaration, which

says that the note was presented on the third day of grace. The notice does not state the day of presentation, saying only that it was protested on the 5th of February. The note was due either on the 4th or 5th. We say it was not due until the 5th. If so, it was premature to present it on the 4th, the day on which the counsel on the other side say it was due.

Mr. Bradley, for defendant in error.

As to the first point. A notary is not an officer of the law to demand payment of notes, but is merely an agent of the bank. It has been said, that the bank would not be responsible for an error of the notary, and the case in 3 Cowen cited to sustain it. But in that case the bank was held responsible.

The bank is the agent of the deposition, and the notary is the agent of the bank. In an action by the holder against the indorser, the competency of the notary cannot be affected. If the action were against the bank, the conclusion might be different. The competency of a notary as a witness is discussed in 2 Bail. (S. C.), 183.

An agent is generally a competent witness as to matters within his agency. 1 Bing., 368; 6 Lea (Tenn.), 29; 1 N. H., 192; 5 Mart. (La.), N. S., 310. See also 15 Wend. (N. Y.), 314.

2. The notary not only proved his own acts, but the general usage and custom of allowing different days of grace upon notes discounted by a bank and those merely deposited for collection. It is admitted, that if courts have, by their decisions, settled and established what the usage is, it becomes as binding as statute law. The general usage in the United States is to allow only three days of grace, and the special custom of this District is to allow four days only as to those notes discounted by a bank. 9 Wheat., 582, 583; Story Prom. N., 242, *n.*

In the case of *Bank of Washington* v. *Triplett and Neale*, 1 Pet., 33, 34, the report of the case does not show that any evidence was taken to establish usage, but the original record shows that it was so. (Here *Mr. Bradley* produced the original record.) Usage depends on the practice of banks. But this may have changed between 1824 and 1840, and if so, can we not show it? Is a usage, once recognized by a court as existing, to last forever without any change? If the people in the District should conform to the custom in other parts of the United States, shall we be precluded from showing it by evidence? It is said that the evidence given was not suffi-

cient. But the existence of usage is a fact of which the jury are to judge, and the court was right in leaving it to them.

3. The declaration says that demand was made on the third day *of grace. But the fact of notice on that day is immaterial; it always says on the day and year aforesaid. [*323

Mr. Coxe, for plaintiff in error, in reply.

As to the competency of the witness. The notary was a public officer, and the bank could not be held responsible for his mistakes. It is the duty of the bank to collect notes which are deposited for collection, and for this purpose it must employ competent agents. It is only responsible in case it employs incompetent ones. But where it uses due diligence according to the law of bailments, it is not liable for their errors. In the case in 20 Johnson, the bank was held responsible because it did not employ a public officer, but an agent of its own. In the present case, the bank would be blameless, but the notary is responsible to the holder of the note, if, from any negligence or ignorance on the part of the notary, the holder were to lose his remedy against the indorser. Besides, he has given a bond to the bank, in a penalty of $10,000, for the faithful performance of his duty. If a person, standing in such a situation, is ever admitted as a witness, it is only from necessity, and then he is only allowed to prove his own acts. But here he not only proves what he did, but goes on to testify as to the regularity and correctness of his actions, and that, too, by referring to other persons. For example, he says that he "copied from an old notary." The old notary himself could have proved this much better. The usage is to extend the protest on the last day of grace. The notice here says, "this day protested," &c., that is, on the 5th; but it does not say whether the demand was made on the 3d or 4th day.

Was any evidence admissible in this case to show usage? There have been three decisions of this court upon the subject. In the first, 9 Wheat., 582, the note happened to be discounted at bank. But can a contract be changed without the party's being aware of it, merely by the circumstance that the note has been subsequently discounted at bank?

In 11 Wheat., 431, stress was laid upon the note's being made for the purpose of being negotiated.

In *Bank of Washington* v. *Triplett and Neale*, 1 Pet., both the above cases came up again for reveiw, and the original record has been referred to by *Mr. Bradley*, to show that evidence was given upon the subject of usage. It was so. That evidence says, that it was the usage to demand payment of

notes which were deposited for collection on the day after the third day of grace.

(*Mr. Bradley* referred to the record, and said that the original practice was changed by the banks, and demand made on the third day.)

It is contended by the other side, that there is a difference between discounted notes and those deposited for collection. *324] But there is no *allusion to this in the testimony, and no such distinction made in any part of the record. The same usage appears to be applicable to all.

Mr. Justice McLEAN delivered the opinion of the court.

The questions in this case arise on the rulings of the court, to which, at the trial, exceptions were taken.

Preston, the defendant, as the indorsee of a promissory note, brought an action against the plaintiff in error, the indorser. The signatures of the maker and indorser were admitted. These grounds of error are assigned:—

1. That the court erred in admitting the testimony of the notary public.

2. In refusing the instructions asked by the defendant's counsel.

3. The declaration is defective.

George Sweeny, the notary who protested the note, testified that it was delivered to him by the Bank of Washington, who held it for collection, to demand payment, and that he did thereupon, the 4th of February, 1840, present the note to the bank, and demanded payment, but was informed by the proper officer that there were no funds to pay it, on which he protested the same for non-payment; and on the next day, the 5th of February, he delivered to Cookendorfer, the plaintiff in error, the following notice, in writing:—

"WASHINGTON, *February 5th*, 1840.

"SIR,—A note drawn by E. T. Arguelles, dated 17th May, 1839, for three hundred dollars, payable 1–4 February, 1840, due, and by you indorsed, and for which you are accountable to the president and directors of the Bank of Washington, has been this day protested for non-payment."

And the witness stated, "that he made the demand and gave the notice according to his usual practice," and "that said practice conformed, as far as he knows and believes, to the practice of the other notaries in the city of Washington."

And other evidence was given conducing to show that the usual practice in such cases was, "when a notice was to be

sent abroad, to put it into the post-office, and date it on the third or last day of grace; but when the notice was to be delivered in the city of Washington, a latitude was allowed to the notary either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery; and the usage is to extend the protest on the day on which the notice is given, as in this case, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated."

It is insisted that the notary, by reason of his interest in this suit, is an incompetent witness.

*In the case of *Smedes* v. *Utica Bank*, 20 Johns. (N.Y.), 372, it was held that a bank which receives a promissory note for collection, to charge the indorser, by a regular notice, is liable for neglect; but this is not the case where the bank delivers the note to a notary, who is a sworn public officer, and whose duty it is to make the demand and give the notice. The same doctrine is laid down in 3 Cow. (N.Y.), 662. From this it is argued that the notary is liable directly to the holder of the paper for neglect, as a public officer, and not to the bank, as its private agent. That in the latter case he would not be liable to the holder of the paper, but might be called on to indemnify the bank which had suffered on account of his laches. [*325

A notary is a competent witness on the same ground that other agents are admissible. They are always responsible to their principals for gross negligence, and yet, from the necessity of the case, they are competent witnesses to prove what they have done in the name of their principals.

It appears that the witness, who generally acted as notary for the Bank of Washington, had given a bond, with security in the sum of ten thousand dollars, for the faithful performance of his duty as notary public, in the business of the bank committed to him. But this, it would seem, does not render him incompetent. "The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note, or for money lent or overpaid, or obtained from the officer without the security which he should have received; and even though the officer has given bond to the bank for his official conduct." Greenl. Ev., 485; *The Franklin Bank* v. *Freeman*, 16 Pick. (Mass.), 535; *United States Bank* v. *Stearns*, 15 Wend. (N.Y.), 314.

It is further insisted, that if the notary was competent to state his own acts, he could not prove the usage under which he acted. He stated, that in making the protest and giving

notice he pursued "his usual practice," "and, so far as he knew, the practice of the other notaries in the city." Now it would be an exceedingly technical rule which would permit a notary to say what he had done in a particular case, but prohibit him from stating that he acted in such case according to his usual practice. And this was all the witness did say; for although he spoke of his belief as to the practice of other notaries in the city, he does not state that he had a knowledge of their practice.

The instruction prayed by the defendant's counsel, and the refusal of which is the second ground of error assigned, was, "that the said evidence was not sufficient, if believed to be true, to show that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant, so as to bind him.

*326] In the case of *Renner* v. *The Bank of Columbia*, 9 Wheat., *582, a suit was brought against the indorser of a note which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to be the usage of the bank, and this court held the demand was made at the proper time. In *Mills* v. *The Bank of the United States*, 11 Wheat., 430, this court held, that "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not."

In the *Bank of Washington* v. *Triplett and Neale*, 1 Pet., 25, this court sanction the usage to make the demand of payment of a note which was left in the bank for collection on the day after the last day of grace, placing such notes, in this respect, on the same footing as notes discounted by the bank. And that such was the usage in 1817, when payment on the note or bill in question was demanded, was proved in that case. But it was also proved, as appears from the record, that the usage was changed in 1818 by all the banks of Washington and Georgetown, "so as to conform to the general commercial usage of demanding payment on the last day of grace." This referred to notes or bills sent to the banks for collection, and of course embraces all notes not negotiated in bank.

Where a usage is sanctioned by judicial decisions, it becomes the law of the place, and no further proof is necessary to establish it; and it is said, that no evidence is admissible to controvert the fact, as laid down by the court. *Edie* v. *East India Co.*, 2 Burr., 1221.

Now if the usage, as sanctioned in the cases above cited, governs this case, it is clear that such diligence has not been used as to charge the indorser. For, under that usage, the demand should have been made on the day after the third day of grace, when it was in fact made on the third day of grace.

This objection is met by the defendant in error by the proof of the usage as stated; which he insists governs all notes not discounted by the banks of the District. The note in question was not discounted by the Bank of Washington, it being merely left there for collection. But it is insisted that this usage cannot be shown to overthrow that which has been sanctioned by judicial decisions. A local usage may be changed in the same mode by which it was established. But parol evidence is not admissible to show that the usage was different, at the time, from what the courts have solemnly adjudged it to be. The law merchant is founded upon custom, and every modification of it by local usage shows that, like other laws, it may be changed.

The usage proved in this case, except in *Bank of Washington* v. **Triplett and Neale*, and that is explained by [*327 the evidence cited, does not conflict with that decided by this court, if the latter be limited to notes discounted by the banks, and the former applies to all other notes payable in the District. In other words, that the law merchant should be modified by the usage only as to demand and notice on notes discounted by the banks. And it would seem, from the decisions above cited, the usage to demand payment the day after the third day of grace had its origin with the banks, and has not been extended, since 1818, to paper not discounted by them. On all other paper, a demand is made on the third day of grace, and the "usage is to extend the protest on the day on which the notice is given, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated." Now a demand and protest on the last day of grace, and a notice on the following day, come strictly within the law merchant. And this was the diligence used in the present case, except the formal date of the protest on the day of the notice. No confusion can, therefore, arise from this general commercial usage, as it conforms to the established law. No inconvenience has arisen, it is supposed, from the bank usage in the District, which has been so long and so firmly established.

No defects in the declaration are perceived, and none have been pointed out to us, which are not cured by the verdict.

Upon the whole, we affirm the judgment of the Circuit Court, with costs.

ALEXANDER RANKIN, CUNNINGHAM SMITH, GEORGE C. C. THURGER, AND JOHN MCCALL, PLAINTIFFS IN ERROR, *v.* JESSE HOYT.

Under the act of 1832, the collector had power to direct wool to be appraised, for the purpose of ascertaining whether or not it was entitled to be imported free from duty; the exemption depending upon its value not exceeding eight cents per pound at the place of exportation.

Although it was necessary for the collector to request the appraisers to act, and no such request appears in the record, yet the legal presumption is, that the collector and appraisers did their duty, he requesting their action and they complying.

And the collector's subsequent adoption of the proceedings of the appraisers is tantamount to having requested them.

It was the duty of the collector to be guided by such an appraisement, and a subsequent verdict of a jury, finding that the value of the wool was under eight cents per pound, cannot be considered as rendering his acts illegal.[1]

The importer had a right to appeal to another board of appraisers, differently constituted, and if he did not choose to resort to them, he cannot, with much grace, afterwards complain that an over-estimate existed.[2]

THIS case came up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

*328] It was an action brought by the plaintiffs in error, transacting *business as copartners, in the city of New York, under the name of Smith, Thurger & Co., for the return of duties which they alleged to have been illegally exacted, upon several importations of wool, by Hoyt, the collector of New York.

The acts of Congress which bear upon the case are the following:

By the act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports," by the first clause of the second section (4 Lit. & Brown's ed., 583), it is enacted,—"That wool unmanufactured, the value whereof, at the place of exportation, shall not exceed eight cents per pound, shall be imported free of duty: and if any wool so imported shall be fine wool, mixed with dirt or other material, and thus reduced in value to eight cents per pound or under, the appraisers shall appraise said wool at such price as in their opinion it would have cost had it not been so mixed, and a duty thereon shall be charged in conformity with such appraisal; on wool unmanufactured, the value whereof, at the place of exportation, shall exceed eight cents, shall be levied four cents per pound, and forty *per centum ad valorem*."

[1] APPLIED. *Bartlett* v. *Kane*, 16 How., 273. CITED. *Greely* v. *Thompson*, 10 How., 240. *Belcher* v. *Linn*, 24 Id., 522, 525.

[2] CITED. *Kimball* v. *The Collector*, 10 Wall., 453, 454.

By the seventh section of the same act, it is enacted,—"That in all cases where the duty which now is, or hereafter may be, imposed on any goods, wares, or merchandise imported into the United States shall, by law, be regulated by, or be directed to be estimated or levied upon, the value of the square yard, or of any other quantity or parcel thereof; and in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise imported into the United States, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual value thereof, at the time purchased, and place from which the same shall have been imported into the United States, to be appraised, estimated, and ascertained, and the number of such yards, parcels, or quantities, and such actual value of every of them as the case may require; and it shall, in every such case, be the duty of the appraisers of the United States, and every of them, and every other person who shall act as such appraiser, by all the reasonable ways or means in his or their power, *to ascertain, estimate, and appraise the true and actual value, any invoice or affidavit thereto to the contrary notwithstanding*, of the said goods, wares, or merchandise, at the time purchased, and place from whence the same shall have been imported into the United States, and the number of such yards, parcels, or quantities, and such actual value of them as the case may require; and all such goods, wares, and merchandise, being manufactures of wool, or whereof wool shall be a component part, which shall be imported into the United States in an unfinished condition, shall, in every such appraisal, be taken, deemed, and estimated by the said *appraisers, and every of them, [*329 and every person who shall act as such appraiser, to have been, at the time purchased, and place from whence the same were imported into the United States, as of great actual value as if the same had been entirely finished: Provided that, in all cases where any goods, wares, or merchandise subject to *ad valorem* duty, or whereon the duty is or shall be by law regulated by, or be directed to be estimated or levied upon, the value of the square yard, or any other quantity or parcel thereof, shall have been imported into the United States from a country other than that in which the same were manufactured or produced, the appraisers shall value the same at the current value thereof, at the time of purchase, before such last exportation to the United States, in the country where the same may have been originally manufactured or produced."

And by the eighth section it is further enacted,—"That it

shall be lawful for the appraisers to call before them, and examine upon oath, any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true value of any merchandise imported, and to require the production on oath to the collector, or to any permanent appraiser, of any letters, accounts, or invoices, in his possession, relating to the same; for which purpose they are hereby authorized to administer oaths; and if any person so called shall fail to attend, or shall decline to answer, or to produce such papers when so required, he shall forfeit and pay to the United States fifty dollars; and if such person be the owner, importer, or consignee, the appraisement which the said appraisers may make of the goods, wares, or merchandise shall be final and conclusive, any act of Congress to the contrary notwithstanding; and any person who shall swear falsely on such examination shall be deemed guilty of perjury, and if he be the owner, importer, or consignee, the merchandise shall be forfeited."

By the third section of the act of the 28th of May, 1830 (4 Lit. & Brown's ed., 409), entitled "An act for the more effectual collection of the impost duties," it is enacted,— "That if the owner, importer, or consignee, or agent for any goods appraised shall consider any appraisement made by the appraisers, or other persons designated, too high, he may apply to the collector, in writing, stating the reasons for his opinion, and having made oath that the said appraisement is higher than the actual cost and proper charges on which duty is to be charged, and also that he verily believes it is higher than the current value of the said goods, including said charges at the place of exportation, the collector shall designate one merchant skilled in the value of such goods, and the owner, importer, consignee, or agent may designate another, both of whom shall be citizens of the United States, who, if they cannot agree in an appraisement, may designate an umpire, who shall also be a citizen *of the United States, and when they, or a majority of them, shall have agreed, they shall report the result to the collector, and if their appraisements shall not agree with that of the United States' appraisers, the collector shall decide between them."

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This last enactment was not repealed by the act of 1832, and it was under this last act, as modified by the compromise act of 1833 (4 Lit. & Brown's ed., 629), that the cause came on to be tried at the November term, 1842.

The plaintiffs in error made three several importations of wool in the year 1838, viz.:—

April,	by the	Sarah Sheafe,	25 bales.
May,	" "	Josephine,	21 "
November,	" "	Renown,	19 "

The whole of the duties paid upon these several importations were claimed in this one action.

The jury found a special verdict of the following facts, viz.:—That the plaintiffs in error were copartners; that Hoyt was collector of the customs; that the three importations above mentioned were made and the original invoices produced; that in each invoice the value of the wool was stated to be seven and one half cents per pound; that the wool was all unmanufactured; and then proceeded as follows:

"And the jurors aforesaid, upon their oaths aforesaid, further find, that upon the importation of the said three several invoices of wool as aforesaid, and upon the several entries thereof, the said wool was examined and appraised by the appraisers of the United States for the collection district of New York, and that the said appraisers did, upon such examination, appraise the said wool, and each and every part and parcel thereof, as of the value, at the places of exportation thereof, of nine cents per pound; which appraisements were, by said appraisers, reported to the collector, and from which said appraisements, or either of them, no appeal was made by the said plaintiffs.

"And the jurors aforesaid, upon their oaths aforesaid, further say, that the said appraisers found the said several parcels of wool to be unmixed and of the same quality.

"And the jurors aforesaid, upon their oath aforesaid, further find, that the said collector claimed and insisted that the said wool was subject to the payment of duties to the United States according to the valuation of the appraisers, so reported to him, and refused to deliver the said wool to the plaintiffs except upon payment by them of the duties claimed by the defendant to be due thereon as aforesaid."

The special verdict then went on to find that the plaintiffs in error insisted that the wool was free from and not subject to the payment of any duties to the United States, and protested against *the right of Hoyt to require payment of any duties; that they paid, under this protest and a notice that they would bring an action to recover it back, the sum of $1,909.93, and that the interest thereon, from the time of payment until the 29th of November, 1842, amounted to $577.22, the aggregate of the principal and interest being $2,487.15; that the duties charged by Hoyt were calculated and charged upon the value of the wool, as appraised by the [*331

appraisers, and that the wool mentioned in the three several invoices, and each and every part and parcel thereof, at the place of exportation, was of the value of seven and one half cents per pound and no more.

Upon this special verdict, the court, on the 23d of December, 1843, ordered a judgment to be entered in favor of Hoyt, the defendant, and a writ of error brought the case up to this court.

The cause was argued by *Mr. Dudley Selden* for the plaintiffs in error, and *Mr. Mason* (Attorney-General), for the defendant in error.

Mr. Selden made the following points:

First. Under the facts found by the special verdict, the plaintiffs were entitled to judgment.

Second. The power vested in the officers of the revenue to appraise the value of goods subject to duty does not authorize them to decide whether goods are or are not subject to duty.

Third. If the act of July 14th, 1832, "to amend the several acts imposing duties on imports," has extended the power, under certain circumstances, in regard to the article of unmanufactured wool, the finding in this case shows that those circumstances did not exist, and therefore the appraisement is inoperative.

Fourth. The power given to the appraisers by section second of that act, in relation to unmanufactured wool invoiced at eight cents per pound or less, is confined to the inquiry whether the value thereof has been diminished by being mixed with other material. The seventh section of the act applies alone to goods subject to duty.

Fifth. If the appraisers acted without authority, an appeal from their decision was unnecessary.

Mr. Justice WOODBURY delivered the opinion of the court.

The right of the plaintiffs to recover in this case, and consequently to have a reversal of the judgment rendered in the Circuit Court, must depend on the legality of the course pursued by the defendant.

No question has been made by counsel, that an action in this particular form cannot be maintained against a collector of the customs, if the course pursued by him was illegal, or that the protest against paying the duties should have been in writing; points which have arisen in similar controversies, and led to special legislation *by Congress, but not being made here, it is not necessary now to consider them.

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See on them *Elliott* v. *Swartwout*, 10 Pet., 138, 158; *Bond* v. *Hoyt*, 13 Id., 267; *Carey* v. *Curtis*, 3 How., 236; *Swartwout* v. *Gihon*, 3 Id., 110; Act of February 26th, 1845.

The illegality imputed to the proceedings of the collector is supposed to have consisted in this: that he possessed no power, in cases of this kind, to call on the appraisers to estimate the value of the wool; and if he did possess it, that they do not appear to have acted here by his request. These objections, if well sustained, are material, because, by the appraisal, the true value of the wool was reported to be nine cents per pound, and then, by the act of July 14th, 1832, a duty on it was "levied of four cents per pound, and forty *per centum ad valorem*." (4 Lit. & Brown's ed., 583). Whereas if the appraisal was unauthorized, and the invoice should have been the only guide, the value of the wool was but seven and a half cents per pound, and by the same act it ought then to have been allowed to "be imported free."

The legal power of the collector to call on the appraisers to estimate the value of this wool rests on the construction which ought to be given to the second and seventh sections of the act aforesaid, both of which are extracted at length in the statement of this case. The plaintiffs contend, that the seventh section, authorizing an appraisal where the duty may be regulated by the value, or imposed at a rate *ad valorem*, is not applicable to any importations which, like these, if looking to the invoice alone, are not dutiable; and that the second section, regulating the appraisement of wool "mixed with dirt or other material," is the only one applicable to wool which, like this, was valued so low in the invoice as to be free; but did not in this case authorize the action of the appraisers in respect to these particular importations, as these, by the verdict of the jury, afterwards, were found not to have been so mixed.

In the first place, we so far coincide with the views of the plaintiffs, as to be satisfied that the second section does not justify the course pursued by the defendant in the present case. But we dissent from the argument, that it is the only section applicable to importations like these, and hold that the seventh section, though open to different constructions on this subject, is plainly susceptible of one which embraces it; and that the spirit of the section, as well as of the whole system of appraisement under the revenue laws, seems not only to justify, but require, the application of its provisions to importations like those now under consideration. It ought, then, to be so construed; since this court has recently decided, that acts imposing duties are not, as has often been done, to

be construed strictly against the government, like penal laws, but so as "most effectually to accomplish the intention of the legislature in passing them." *Taylor et al.* v. *United States*, 3 How., 210.

*333] *By the words of this last section, so far as material to the present inquiry, it is provided, that if the duty "imposed on any goods, wares, or merchandise" "shall by law be regulated by, or be directed to be estimated or levied upon, the value of the square yard, or of any other quantity or parcel thereof, and in all cases where there is or shall be imposed any *ad valorem* rate of duty," &c., "it shall be the duty of the collector" "to cause the actual value thereof, at the time purchased," &c., "to be appraised, estimated, and ascertained," &c., by appraisers.

Under the act of May 19th, 1828, a duty partly specific and partly *ad valorem* had been imposed on all wool imported from abroad. No doubt can exist, that the power to have appraised the value of any wool, imported under that act, had it remained unaltered in 1838, would have existed in the collector, because a duty in all cases was imposed and was in some degree *regulated by the value*, though it was not wholly *an ad valorem rate of duty*. But by the act of July 14th, 1832, an amendment was made in the rate on one description of wool, so as to admit it free, if its value did not exceed eight cents per pound, and the argument for the plaintiff is, that as such wool no longer paid an *ad valorem* duty, the collector would no longer call on the appraisers to estimate its value. It is to be noticed, however, that this exemption did not make wool, as an article, cease to be dutiable. Nor did it become, after this change, any less important, in *regulating* the duty which was proper to be imposed on any wool, to ascertain the true value of it in all cases, so as to levy thereon four cents per pound and forty per cent. *ad valorem*, if the value turn out to be above eight cents per pound; and nothing if at or below eight cents. (See the first section, 4 Lit. & Brown's ed., 583.)

This act may then be considered to authorize the use of appraisers not merely when an article imported pays an *ad valorem* rate of duty, but whenever the duty is *regulated by* the value; or in other words, as we construe the provision, whenever a duty may exist or cease according to the value, as well as whenever it may increase or diminish, according to it. The language of the seventh section is broad enough, under this view, to justify the course that was adopted by the collector in the present case. But, if we look to the spirit of that section, and of the whole act of which it forms a part, in

respect to the policy both of employing appraisers and discriminating in the duties imposed on wool, any remaining doubt as to the propriety of considering this case as coming within the seventh section must be removed. If the appraisers could not be called on to estimate the true value of the wool, when imported at low prices, but the value in the invoice was alone to guide, the revenue on all wool was manifestly liable to be lost, or the treasury greatly defrauded, by the article being put in the invoice at a price below the actual value, in order to introduce it free. Any *incidental [*334 protection, contemplated from the duty, to the growth of finer and more valuable wools in this country, would also be thus exposed to total defeat by the importation of this last kind at a valuation so low as to escape any duty whatever.

The utility of appraisers in such a case is even more apparent and important than in most others, because the value of wool is uncertain, fluctuating, and liable to be concealed by many ingenious devices,—lowering the prices in the invoice, and others putting different qualities of wool in the same bale, or bringing it in mixed with dirt and burrs. It is on this last account, and not, as argued for the plaintiffs, because it is the only case in which the appraisers were authorized to act in respect to wool, that the second section requires them, in estimating its value, if mixed, to appraise it as high as if not mixed. In like manner, the act of 1832, as well as 1828, requires wool imported on the skin to be taxed according to its "weight and *value*," as in other cases. And, instead of either of these provisions appearing to exclude the use of appraisers generally for ascertaining the true value of low-priced wool, they both seem to contemplate or imply their employment in such imports, knowing that the duty was to be affected or *regulated by* the value, and proceeding therefore merely to lay down specific rules for ascertaining it in cases where the wool is found to be mixed or on the skin.

It is not a little confirmatory of this view, that the act of August 30th, 1842, which imposes some duty on all kinds of wool, and thus confessedly authorizes an appraisement in every importation, repeats substantially the provisions in former acts for guiding the appraisers in estimating the value of mixed wool; thus showing with absolute certainty that such provisions do not in other acts exclude—or can probably in the present case be meant to exclude—the employment of appraisers in ascertaining the true value of wool, however low it is put in the invoice, and however unmixed it may be with other materials.

The only adjudged case which has been alluded to by the

plaintiffs as supporting their views is that of *Curtis* v. *Martin et al.*, 3 How., 106.

There the article in question, being gunny-bags, had not, at the time the duty was levied, been specified in the tariff laws, as subject to any duty whatever, in any form or value. The effort by the collector was to impose a duty on it under another name, such as cotton bagging. But in the present case, the article in dispute had been made by Congress dutiable in express terms, and no kinds of it were exempt unless of a particular value; and the object and the effect of the appraisement were not, as has been contended, to make the article of wool dutiable, when it was not before dutiable by *335] law, but to see whether a particular import of the article *was actually of so small value per pound as by law to be entitled to exemption from duty.

The other leading objection urged in this case is more easily disposed of. In saying that the appraisers had no right to act without the previous request of the collector, and that no such request appears in the evidence, nothing is stated beyond the truth. But, in the absence of testimony to the contrary, the legal presumption is, that the appraisers and collector both did their duty, he requesting their action, as by law he might, and they complying.

Besides this, it is conceded that he adopted their doings, and such a subsequent ratification of them is undoubtedly tantamount to having requested them. An incidental exception taken in the argument is, that as the jury have found the value in the invoice to be correct, the collector could not be justified in following the higher valuation of the appraisers. But an appraisal, made in a proper case, must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. *Tappan* v. *The United States*, 2 Mason, 404. The propriety of following it cannot in such case be impaired by the subsequent verdict of the jury differing from it in amount, as the verdict did not exist to guide the collector when the duty was levied, but the appraisal did, and must justify him, or not only the whole system of appraisement would become worthless, but a door be opened to a new and numerous class of actions against collectors, entirely destitute of equity. We say destitute of it, because, in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed, by the act of Congress of May 28th, 1830, before paying the duty, an appeal and further hearing before another tribunal, constituted in part by persons of his own selection. (See second section, 4 Lit. & Brown's ed., 409.)

These persons have been aptly denominated a species of "legislative referees" (2 Mason, 406); and if the importer does not choose to resort to them, he cannot with much grace complain afterwards that any over-estimate existed.

The judgment below is affirmed.

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*BENJAMIN D. HARRIS, PLAINTIFF IN ERROR, *v.* [*336
JAMES ROBINSON, DEFENDANT IN ERROR.

In the case of a protested note, it is not necessary for the holder himself to give notice to the indorser, but a notary or any other agent may do it.[1]

The object of the rule which requires the notice to come from the holder is to enable him, as the only proper party, either to fix or waive the liability of indorsers.

Where a note was handed to a notary for protest by a bank, and it did not appear whether the bank or the last indorser was the real holder of the note, and the notary made inquiries from the cashier and others not unlikely to know, respecting the residence of the prior indorsers, and then sent notices according to the information thus received, it was sufficient to bind such prior indorsers.[2]

If the last indorser was the holder, the cashier of the bank was his agent for collecting the note, and the evidence showed that in fact the last indorser knew nothing more than the cashier.

The cases on this subject examined.

The facts being found by a jury, the question, whether or not due diligence was used, is one of law for the court.[3]

If due diligence is used in sending the notice to the indorser, it is immaterial whether it is received or not.[4]

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Alabama.

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[1] S. P. *Watson* v. *Tarpley*, 18 How., 517. See note to *Burke* v. *McKay*, 2 How., 66.

[2] FOLLOWED. *Lambert* v. *Ghiselin*, 9 How., 558.

[3] S. P. *United States* v. *Barker*, 1 Paine, 156; *Watson* v. *Tarpley*, *supra*; *Bank of Columbia* v. *Lawrence*, 1 Pet., 578; *Bank of Alexandria* v. *Swann*, 9 Id., 33; *Rhett* v. *Poe*, 2 How., 457; *Orr* v. *Lacy*, 4 McLean, 243. Compare *Knickerbocker Ins. Co.* v. *Gould*, 80 Ill., 388; *Dolfinger* v. *Fishback*, 12 Bush (Ky.), 474.

Where evidence has been given as to notice, the court will leave the question to the jury, stating as matter of law, what is sufficient notice. *Orr* v. *Lacy*, 4 McLean, 243.

In South Carolina, the question of due diligence is held to be one of law for the decision of the court. *Diercks* v. *Roberts*, 13 So. Car., 338.

[4] S. P. *Gallagher* v. *Roberts*, 2 Wash. C. C., 191.

And this is so, even when the holder, after mailing the notice to a wrong address, discovers the true one, and sends no further notice. *Lambert* v. *Ghiselin*, 9 How., 552. But where notice is given in a manner other than that authorized by law, the evidence that he received the notice must be clear and direct. *Bank of United States* v. *Corcoran*, 2 Pet., 121; s. c., 3 Cranch C. C., 46.

It was an action brought by the indorsee (Robinson) against an indorser (Harris) of a promissory note.

Robinson, the plaintiff below, was a citizen of the State of Tennessee, and Harris a citizen of Alabama.

The note was as follows:

"$1,600 $\frac{0}{0}$. Eight months after date, we promise to pay Matth. Burks, or order, sixteen hundred dollars; payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville, for value received. Dated in Lincoln county, Tennessee, 20th November, 1837.

(Signed,) "John P. Burks & Co.

(Indorsed,) "Matth. Burks, Benj'n D. Harris, J. Robinson."

The note not being paid at maturity, Robinson, in September, 1839, brought his action against Harris, in the District Court of the United States for the Northern District of Alabama, which, after several interlocutory proceedings, came on for trial at May term, 1843.

The jury, under the instructions of the court, found a verdict for the plaintiff in the sum of two thousand and sixty-two dollars and sixty-six cents. It is impossible to give a clear idea of the instructions of the court without reciting all the circumstances of the case to which the instructions referred. They are all stated in the bill of exceptions, which is as follows:

The Bill of Exceptions.

In the District Court of the United States of America, for the Northern District of Alabama.

*337] In this case, the plaintiff brought his action against defendant *as indorser of a promissory note, and introduced the deposition of Alpha Kingsley, which is as follows:

"*Deposition of A. Kingsley.*

"The said Alpha Kingsley, being about the age of sixty years, and being by me first carefully examined, cautioned and sworn to testify the truth, the whole truth, and nothing else but the truth, makes oath, deposeth, and saith: that he resides in the city of Nashville, in the State of Tennessee, and more than one hundred miles from Huntsville, aforesaid, the place of trial of this cause; furthermore he saith, I am now a notary public of Davidson county, in the State of Tennessee, and was such on the 23d day of July, 1838, duly qualified according to the laws of said State; that on that day there came into my hands, as notary public, a promissory note, a true copy of which is herewith inclosed, marked A, and is

made a part of this my deposition; that at or about three o'clock of the said 23d day of July, 1838, I presented said promissory note at the counter of the Planter's Bank of Tennessee, at Nashville, where the same was payable, and demanded payment thereof, and was answered by the teller of said bank that it would not be paid; whereupon, as notary public aforesaid, I did protest said promissory note, as well the drawers as the indorsers thereof, and duly recorded the same in my notarial book, and on the evening of the said 23d day of July, 1838, I deposited in the post-office at Nashville, Tennessee, in time to go by the first mail leaving Nashville after said demand and protest, notices of said demand and protest, directed to John P. Burks & Co., Matth. Burks, and Benjamin D. Harris, Madison county, Alabama, to each separately; a copy of the notice so sent to Benjamin D. Harris is herewith *to be* inclosed, marked B, and is made a part of this my deposition. I was not, when these notices were forwarded, acquainted with the residence of any of the parties thus protested, or their nearest post-office; and I made inquiry of those I thought were [not] unlikely to know, where would be the proper place to which to direct notices to them; I applied, I recollect, to Nicholas Hobson, cashier of the Planters' Bank, who informed me they lived in Madison county, Alabama, but could not say where their nearest post-office was; I also applied to Joseph Estell, who had resided in Madison county, and also had a very general acquaintance there; he likewise informed me, that they all lived in Madison county, but did not know their nearest post-office. I knew of no other source from whence to derive information as to where to direct, and accordingly directed said notices 'Madison county, Alabama,' knowing that, from the general rules of the post-office department, they would be sent to Huntsville, the county seat.

(Signed,) ALPHA KINGSLEY.

* *Copy of Note.* [*338

(Copy of the note, referred to in Alpha Kingsley's deposition, as marked A.)

"$1,600 $\frac{0}{00}$. Eight months after date, we promise to pay Matth. Burks, or order, sixteen hundred dollars; payable and negotiable at the Planters' Bank of the state of Tennessee, at Nashville, for value received. Dated in Lincoln county, Tennessee, 20th November, 1837.

(Signed,) JOHN P. BURKS & Co."

(Indorsed,) "Matth. Burks, Benj'n D. Harris, J. Robinson."

(Copy of the notice, made part of Alpha Kingsley's deposition.—B.)

"NASHVILLE, 23*d July*, 1838.

"MR. BENJAMIN D. HARRIS:

"Please to take notice, that a note drawn by John P. Burks & Co., payable at the Planters' Bank of Tennessee, at Nashville, eight months after date, to the order of Matt. Burks, by him, you, and J. Robinson indorsed, for the sum of sixteen hundred dollars, dated the 20th day of November, 1837, was this day protested by me for non-payment, and the holder looks to you for payment as indorser thereof.

"Respectfully, your obedient servant,

"ALPHA KINGSLEY, *Notary Public.*"

And defendant introduced the deposition of N. Hobson, which is as follows:

Deposition of N. Hobson.

Interrogatories to Nicholas Hobson, on the part of the defendant.

"1. Were you acquainted with the defendant, Benjamin D. Harris, in the years 1837 and 1838?

"2. Do you know whether said Benjamin D. Harris resided in Tennessee or Alabama, in 1837 and 1838?

"3. Have you any recollection of ever telling Alpha Kingsley, notary public, that the said Benjamin D. Harris resided in Madison county, Alabama, in 1838?

"4. Were you acquainted with the plaintiff, James Robinson? if so, state where he resided in 1837 and 1838.

"First. I was not acquainted personally with Benjamin D. Harris in 1837 and 1838.

"Second. I do not know whether said Harris resided in Tennessee or Alabama in 1837 and 1838.

"Third. I have no recollection of A. Kingsley having
*339] applied to me in reference to this particular case; he often made application *to me in regard to the residence of persons living in Alabama; I know that there are a great many of the name of Harris residing in Madison county, Alabama; and from the fact of the drawers of the note living in Madison county, I may have told the notary public what my belief was as to the residence of Mr. Harris, but not from any personal knowledge I had of his residence.

"Fourth. I was acquainted with the plaintiff, James Robinson; he resided in Nashville in the years 1837 and 1838.

(Signed,) N. HOBSON."

Also, the deposition of Joseph Estell, which is as follows:

"*The Deposition of Joseph Estell.*

"*Question by defendant.* Were you acquainted with the defendant in the years 1837 and 1838?

"*Answer.* I was, and for some time before.

"*Question by same.* Do you know whether the defendant resided in Tennessee or Alabama in 1837 and 1838?

"*Ans.* I understood that he resided in Alabama in 1837 and 1838. I never saw him in Alabama, and how it was that I understood that he resided in Alabama in these years I cannot now recollect; but such was my belief of his place of residence.

"*By Same.* Have you any recollection of telling Alpha Kingsley, notary public, that the defendant resided in Madison county, Alabama, in 1838?

"*Ans.* I have no recollection that I ever told Alpha Kingsley that the defendant resided in Madison county, Alabama, in the year 1838; Mr. Kingsley has often inquired of us, that is, of my brother, while living, and myself, as to the residence of persons in Alabama, but my recollection does not serve me as to the name of any of those about whom he made inquiries.

"*By same.* Were you acquainted with James Robinson? if so, state where he resided in 1837, 1838.

"*Ans.* I was acquainted with James Robinson; he resided in Nashville, Tennessee, in the years 1837 and 1838.

(Signed,) JOSEPH ESTELL."

Defendant also introduced Joseph Bradley as a witness, who proved that, previous to the maturity of said note, plaintiff had directed to him at Huntsville, Madison county, Alabama, notices to all the parties to the note, requesting him to hand them to the defendant and the other parties, the notices being intended to remind them when the said note would fall due. Witness directed the notices to the post-offices of the parties respectively, and to defendant at his post-office at Cross Roads, Madison county, Alabama; but the notices of protest of said note were not sent to witness; witness acted as plaintiff's friend in the matter; there was no evidence *to show, that the notary knew who was the holder of the bill, or where he resided. [*340

The court instructed the jury, that if they believed that the notary made the inquiries stated in his deposition, and sent notice to defendant as therein stated, he being ignorant of his true residence, that the notice was sufficient to charge the defendant, and that, under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of

the note as to the residence of the indorser; to which instructions the defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly.

WM. CRAWFORD, [SEAL.]

The cause was argued by *Mr. Crittenden*, for the plaintiff in error, and *Mr. Brinley*, for the defendant in error.

Mr. Crittenden.

It is insisted, on the part of Harris, that the instruction given by the court is erroneous:—

1st. In making the sufficiency of the notice depend exclusively on the jury's belief of the circumstances stated in the deposition of Kingsley.

2d. In instructing the jury, "that, under the circumstances of the case, it was not necessary (for the notary) to make inquiry of the holder of the note as to the residence of the indorser."

Harris, on the contrary, insists that "the circumstances of the case" were these, namely, that Robinson was the holder of the note; that he was known as such to the notary; that he lived in Nashville at the time, and might have been easily and immediately found, and could, in all probability, have given the required information as to the residence of Harris, and the post-office nearest to him. It is insisted that all these circumstances are proved by or deducible from the evidence; and that it ought to have been left to the jury, with the instruction, that, if they believed all these circumstances to have existed, then that it was necessary for the notary to have made inquiry of the holder of the note as to the residence of the defendant, Harris; and that if, in consequence of his neglecting to make that inquiry, he misdirected the notice to Harris, then that such misdirected notice is not due notice, or such as entitled the said Robinson to recover in this action.

The general law is, that the holder must give notice. The notary is a mere agent of his. The inquiry as to Harris's residence ought to have been made from Robinson, who lived in Nashville. Story Bills, 334, § 309; Chit. Bills (8th edit.), ch. 10, pp. 515, 516, 524, 525; Bayl. Bills (5th edit.), ch. 7, § 2, pp. 280–283.

*341] If the holder does not know, he should inquire. Much more, *then, should the notary. A notice is more than a mere matter of form, for it might have enabled Harris to save the debt.

Mr. Brinley, for defendant in error, stated the case and then proceeded.

1st. A demand of payment of a note should be made on the last day of grace, and notice of the default of the maker be put into the post-office, if he live in another place, early enough to be sent by the mail of the succeeding day. *Lenox* v. *Roberts*, 2 Wheat., 363.

2d. If there be no post-office in the town where the indorser resides, the notice may be sent through the post-office to the post-office nearest to his residence. *Freeman* v. *Boynton*, 7 Mass., 483; *Ireland* v. *Kip*, 11 Johns. (N. Y.), 231.

3d. The putting of notice into the post-office is sufficient, without proof of its having been actually received. *Munn* v. *Baldwin*, 6 Mass., 316; *Miller* v. *Hackley*, 5 Johns. (N. Y.), 375; *Dickins* v. *Beal*, 10 Pet., 572; 1 Bell Com. (5th edit.), 418.

4th. If due diligence be used to give notice to the indorser, and he cannot be found, this is equivalent to due notice. *Stewart* v. *Eden*, 2 Cai. (N. Y.), 121; *Smyth* v. *Hawthorn*, 3 Rawle (Pa.), 355; 1 Bell Com. (5th edit.) 413.

5th. If the indorsee is ignorant of the indorser's place of abode, it is an excuse for not giving him notice; and then it becomes a question of fact, whether he used due diligence to discover it. *Bateman* v. *Joseph*, 12 East, 433.

6th. Whether due notice has been given, all the circumstances necessary for the giving of such notice being known, is a question of law; and the court will determine upon the facts. Where the facts are contested, the question of law becomes mixed with fact, and is for the decision of the jury, under instructions from the court upon the hypothetical state of facts claimed to be proved. *Eagle Bank* v. *Chapin*, 3 Pick. (Mass.), 180; *Bank of North America* v. *Pettit*, 4 Dall., 127; *Robertson et al.* v. *Vogle*, 1 Id., 252; *Hussey* v. *Freeman*, 10 Mass., 86; *Bryden* v. *Bryden*, 11 Johns (N. Y.), 187; *Davis* v. *Herrick*, 6 Ohio, 55; *Bank of Utica* v. *Bender*, 21 Wend, (N. Y.), 643; *Bank of Columbia* v. *Lawrence*, 1 Pet., 587; *Dickins* v. *Beal*, 10 Id., 572.

7th. The defendant excepted to that portion of the opinion of the court below which maintained, that it was not necessary to make inquiry of the holder of the note as to the residence of the indorser.

The inference is, that had such inquiry been made, the requisition of due diligence would be satisfied. The inference is sustained by the authorities. But there is no case which decides that such an inquiry of the holder is indispensable, they decide that such an inquiry is proof of due diligence, not that it is the only proof of such diligence; that it is sufficient, not that it is indispensable. For instance, inquiry of one of

*the parties to a bill as to the residence of the indorser is due diligence. *Beveridge* v. *Burgis*, 3 Campb., 262.

The holder of a bill, as indorsee, went to the house of his immediate indorser to inquire the residence of the first indorser, and it was held to be due diligence. *Bateman* v. *Joseph*, 2 Campb., 461.

Where the notary made inquiry of the second indorser as to the residence of the first indorser, who informed him that notice to an office in a post town, which, it seems, was three miles and a half from the first indorser, and where he did not receive his papers and letters, it was held to be due diligence. *Ransom* v. *Mack*, 2 Hill (N. Y.), 587.

Where the holder, before the note became due, applied to one of the parties to ascertain the residence of the indorser, and he declined giving him any information, the holder was not obliged, after the bill became due, to renew his inquiries of that party. *Firth* v. *Thrush*, 8 Barn. & C., 387.

8th. There is no evidence to show that the notary knew who was the holder of the note. He had a right to infer that it belonged to the Planters' Bank; he accordingly inquired of the cashier where the parties lived, that he might notify them, and duly mailed notices of protest to Madison county, Alabama, their supposed place of residence. This was sufficient.

Notice of non-payment to an indorser was left at his boarding-house, where he was reported to reside; but it seems, some weeks before the note fell due, he left Philadelphia for Europe, without the knowledge of the holder of the note. The notice was sufficient, as reasonable diligence had been used to ascertain the residence of the indorser. *M'Murtrie* v. *Jones*, 3 Wash. C. C., 20[illegible]

A bill was drawn and dated at New York, on persons residing in that city, who accepted it. The drawers resided in Petersburg, Virginia. The bill being protested for non-payment, two letters were put into the post-office, giving notice to the drawers, one directed to New York, and the other to Norfolk, Virginia, the supposed place of their residence. It was holden that this was sufficient notice, inasmuch as it did not appear that the holder knew where the drawers lived, and notice had been directed to their supposed place of residence. *Chipman* v. *Liscombe*, 1 Johns. (N. Y.), 294.

Besides, there was no evidence to show that the notary, in the case under consideration, knew who was the holder of the bill, or where he resided.

If, after reasonable diligence on the part of the holder, the residence of the indorser cannot be ascertained, an excuse is

furnished for a failure to give notice. The rule in such cases is, not that it is sufficient to send the notice to the last place of residence of the indorser, or to the place at which the bill or note bears date, but that it is sufficient to send it to the office believed to be the proper *one from information acquired, upon due diligence to ascertain it. *Hoopes & Bogart* v. *Newman, Executor*, 2 Sm. & M. (Miss.), 71; (January term, 1844), cites Chit. Bills, 486; *Nichol* v. *Bate*, 7 Yerg. (Tenn.), 305; *Chapman* v. *Lipscombe*, 1 Johns. (N. Y.), 294. [*343

9th. But suppose that the notary, knowing that Robinson was the holder of the note, had applied to him for information, what would have been his answer in regard to the residence of the parties? Undoubtedly it would have been, that to the best of his knowledge they resided at Huntsville, Madison county, Alabama.

The defendant introduced Joseph Bradley as a witness, who proved, that, previous to the maturity of the note, Robinson had directed to him, at Huntsville, notices to all the parties to the note, requesting him to hand them to Harris and the parties, to remind them when the note would fall due.

There is nothing to prove that Robinson was informed that they were delivered to any place other than Huntsville. Of course, had the notary known that Robinson was the holder, and consulted him as to the residence of the parties, he must have answered, that notices had better be sent to Huntsville. The notary did so direct, substantially; that is, he directed the notices, "Madison county, Alabama," knowing that, from the general rules of the post-office department, they would be sent to Huntsville, the county seat.

10th. There is no conflict between the testimony of the notary, and that of Messrs. Hobson and Estell; the former swears that he applied to them for information as to the residence of the parties; they could not recollect that he did in this case in particular, because he often inquired as to the residence of persons living in Alabama. His positive testimony, as to a fact which he was interested to ascertain, must be believed; it more than counterbalances their want of recollection, it being of no interest to them to remember.

Chitty, in his Treatise on Bills (8th Amer. edit.), 486, says, that "the holder of a bill of exchange is excused for not giving regular notice of its being dishonored to an indorser, of whose place of residence he is ignorant, if he uses reasonable diligence to discover where the indorser may be found;" in support of this undeniable position, he cites Pothier de Change, n. 144. The reasoning of Pothier and of Pardessus (Droit

Com., Tom. 2, art. 426), in the opinion of Judge Story (in his Commentaries on the Law of Bills of Exchange, 350, 351), covers the case stated by Chitty, though they both treat in those sections of the *force majeur* (*vis major*) as an excuse for a non-compliance by the holder with the requisites of law, and not upon the question of ignorance of residence. The continental and civil law, which is identical with the common law and common sense, do not require impossibilities. The law *344] does not presume that the holder of the paper is acquainted with the residence *of the indorsers; and if the notary or holder, after diligent inquiry as to the residence of the indorser, cannot ascertain it, or mistakes it, and gives the notice a wrong direction, the remedy against the indorser is not lost. 3 Kent Com., 107; *Barr* v. *Marsh*, 9 Yerg. (Tenn.), 253; Story Bills of Exch., 334–347, in notes. The rule of due diligence "must not be such as to clog commercial opperations." *Bank of Columbia* v. *Lawrence*, 1 Pet., 578.

Mr. Justice WOODBURY delivered the opinion of the majority of the court.

Under the bill of exceptions in this case, the proper practice in some important particulars respecting notices of non-payment of promissory notes and bills of exchange is involved. It appears that the defendant was indorser of such a note, and at the trial the court instructed the jury, that if they believed that the notary made the inquiries stated in his depositions, and sent notice to the defendant as therein stated, he being ignorant of his true residence, that the notice was sufficient to charge the defendant, and that, under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser; to which instructions the defendant excepts.

The substance of the inquiries which were made, as shown in the depositions, was, that the note, being "payable and negotiable at the Planters' Bank of the state of Tennessee, at Nashville," the notary, after presenting it and payment being refused, inquired of those "not unlikely" to know the residences or nearest post-offices of the indorsers, as they were not known to him. He recollects, as one of whom he inquired, the cashier of the bank, and was informed by him that Harris lived in Madison county, Alabama, but that he did not know his nearest post-office. The notary made similar inquiries of a Mr. Estell, who had resided in Madison county, but was found to be ignorant of the defendant's nearest post-office; and the notary adds, that, knowing "no other source from

whence to derive information as to where to direct" the notice, he "accordingly directed" this and others "to Madison county, Alabama, knowing that, from the general rules of the post-office department, they would be sent to Huntsville, the county seat."

The only "other circumstances of the case as proved," to which the judge probably refers, are, that the name of the present plaintiff appears on the back of the note as the last indorser; that he was then an inhabitant of Nashville; and that Joseph Bradley, a witness for the defendant, testified, that before the note reached maturity, he, then living at Huntsville, received notices from Robinson for Harris and the other indorsers, "requesting him to hand them to the defendant and the other parties," in order "to remind [*345 *them when said note would fall due," and that he directed the notice for Harris to his post-office at Cross Roads, in Madison county.

It is further stated, as a part of the case, "there was no evidence to show that the notary knew who was the holder of the bill, or where he resided."

These being the facts as proved concerning the inquiries and circumstances to which the judge refers, he properly considered it a question of law, whether, upon those facts, if believed by the jury, it was necessary to make inquiry of the holder himself as to the residence of the indorsers, and whether the notice as given was in all respects sufficient to charge the defendant. *Bank of Columbia* v. *Lawrence*, 1 Pet., 583; 10 Id., 581; *Bryden* v. *Bryden*, 11 Johns. (N. Y.), 187; *Hadduck* v. *Murray*, 1 N. H., 140.

It is to be regretted, that some other facts were not agreed or referred to the jury; such as the distance of the residence of the defendant, as well as of the Cross Roads post-office, from Huntsville; whether he was accustomed to receive letters at the former place; and who in truth was the holder of the note at the time it fell due. But the judge properly submitted to the jury whatever facts the parties chose to present; and it is usually the best course thus to submit complicated questions of law and fact, accompanying them, however, with due legal instructions as to the rules which ought to govern. 3 Kent Com., 107. Then the instructions can as easily be revised as if the case was withdrawn from the jury, and, what is very desirable, the rules as to commercial paper can be preserved as uniform over the commercial world, and the holders of it have, as they ought to have, a fixed standard, on a like state of facts, for protecting as well as knowing their rights. 11 Johns. (N. Y.), 187; 1 T. R., 168; 1 N. H., 140.

The first objection that has been raised under the instructions or ruling of the court is, that the notice does not appear to have been given by the holder of the note. There is no evidence here to indicate any person except Robinson or the bank as the holder at that time, and probably at the trial it was taken for granted to be one of them, without making any point concerning it to the court or jury. Whichever it was, there is no pretence but that the notary came into possession of the note from the agent of the holder lawfully, and with a view, as agent, to make the demand, and if not paid to give due notice. When notes are left at banks for collection, the notaries may often be ignorant of the names of the holders, as the notes are handed to them by the cashier. He would as properly do this business when employed by an agent of the holder, as by the holder himself; and having the note in either of these ways, he would be competent in law to deliver it up if paid, or, if not paid, to give notice of that fact to the indorsers. It has been adjudged, that any agent of the hold-
*346] ers may give notice. Chit. Bills, 527; *Bank of Utica* v. *Smith*, 18 *Johns. (N. Y), 239, in point; *Stewart* v. *Kennett*, 2 Campb., 177, by Lord Ellenborough, 178; 3 Kent Com., 108; *Stanton et al.* v. *Blossom et al.*, 14 Mass., 116; 7 Id., 486; 9 Id., 423.

The agent to collect the note may do it. *Mead* v. *Engs*, 5 Cow. (N. Y.), 303; 3 Bos. & P., 599; 2 Taunt., 38; 15 East, 291; 9 Id., 347; 1 Campb. 349; *Ogden et al.* v. *Dobbin et al.*, 2 Hall (N. Y.), 112.

And in 9 Yerg. (Tenn.), 255, it was decided that a notary public is a suitable agent for this purpose. It was done by a notary of the agent in 2 Hall (N. Y.), 112.

The meaning of the rule that the holder must give notice, is not that he may not do it by an agent, as any other commercial act, but that it shall not be given by some other party on the bill not standing in the relation in which the holder does, and who has no right to give it and try to make the indorser responsible when the holder may be willing to waive a resort to him. *Tindal* v. *Brown*, 1 T. R., 170; 7 Ves., 597; 1 Esp., 333. In this case the notice is express, that "the holder looks to you for payment as indorser" of the bill, and the notary had the note in his possession (11 East, 117; 2 Campb., 178) in order to make demand and give notice in behalf of the holder.

The only remaining questions which are material are, whether any farther inquiry, and especially of the holder of the note, ought to have been made by the notary, as to the residence of the indorsers, before despatching the notices, and

whether the notices sent were sufficient, considering the information he obtained, and his ignorance of the true residence of the indorsers. It was a part of the evidence, that the indorsers lived remote in another state, and that the notary was ignorant of the exact places of their abode.

Under such circumstances, he was undoubtedly bound to make inquiries of persons likely to be acquainted with their residences. This he did; and, among them, of the cashier of the bank, the person most likely to be acquainted with the place of abode of those making paper negotiable and payable at the bank, and of another person who had lived in the same county with the indorsers, and not getting entire certainty from either, he sent the notices, addressed as accurately as his information enabled him, to the county where they lived, and from the capital of which the notices would be likely to be forwarded to the indorsers.

This, in most cases, might be sufficient as to inquiry, and especially where nobody was known to reside near who was able and bound to give fuller and more accurate information on that subject. It would usually satisfy a jury that the due diligence had been exercised which, and which only, the law imposes. Chitt. Bills, 525 (8th Amer. ed.); 2 Campb., 461. But it is argued in this case, that the holder probably lived in Nashville, and could and ought to have been resorted to on this occasion for such information. *Chitt. Bills, [*347
525. This argument is not without force, and might be insuperable if the notary knew who the holder was, and did not obtain otherwise all the intelligence on this subject which the holder probably possessed. But the evidence not showing that he knew him, did he resort to the holder's agent, and obtain from him all the information on this point which the holder himself was likely to have possessed?

Supposing the bank to have been the holder, the cashier, its agent, was resorted to, and doubtless gave all the intelligence in possession of the bank on this subject.

But supposing Robinson to have been the holder, which is the only other probable presumption on the evidence, and which is contended for by the defendant, and then the cashier was doubtless his agent to collect the note, and received from Robinson all he knew as to the residences of the prior indorsers, and communicated it to the notary when applying to him on the subject. This is not only the general inference from what would be likely to take place on such occasions, but is strengthened in this case from the testimony of Bradley, on the part of the defendant, saying that Robinson, a short time prior, had sent notice to him at Huntsville for these parties,

stating when the note fell due, and that he requested him to hand them to these indorsers. From this it is obvious that Robinson supposed they resided in Huntsville, or he would have sent the notices to a different place; and he would not probably have desired a resident of Huntsville to *hand them* to the indorsers, unless he believed they lived in the same place.

There can be little doubt, on this evidence, that the real holder, whether the bank or Robinson, did give to the cashier all the information the holder possessed on this subject, and that the cashier communicated the same to the notary, and that the latter would have obtained no more had he known and resorted to the holder in person, and that the cashier, in conforming to this information, by addressing notices to Madison county, supposing that, by the rules of the post-office department, they would be sent to Huntsville, the county town, did all which duty required of him.

Besides the light flung on this subject, and favorable to this conclusion, by some of the general positions in the authorities cited at the bar, there are several precedents which bear more directly on a state of facts such as exists in this case, and which deserve special notice, as they fortify the correctness of the views we have presented.

In *Stewart* v. *Eden*, 2 Cai. (N.Y.), 121, the court ruled, that the holder was bound to inquire no further than a reasonable and prudent man should, and said, "We do not exact from him every possible exertion," or inquiry. Only "ordinary diligence" is required in inquiring. *Catskill Bank* v. *Stall*, 15 Wend. (N.Y.), 367. Only "reasonable diligence." *Fisher* v. *Evans*, 5 Binn. (Pa.), 543. So in **Chapman* v. *Lipscombe*, 1 Johns. (N.Y.), 294, where a bill was drawn and dated in New York city, on persons there, and accepted but protested afterwards for non-payment, and it did not appear that the holder knew where the drawers lived, but sent two notices to them, one addressed to New York and one to Norfolk, it was held that they were good, though the drawer in fact lived in Petersburg.

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In that case, inquiry was made at the banks and elsewhere, and notice was sent in conformity with the information received; but he did not inquire of the acceptors, who lived in New York, and could have told him correctly where the drawers lived.

In 3 Kent Com., 107, it is laid down, that notice need not always be sent to the post-office nearest to the indorser's residence. It suffices, if sent to the nearest which can be ascertained on due inquiry. And in 1 Pet., 578, and 2 Id., 551,

where a notice like this was addressed to the indorser, as belonging to the county in which he lived, the same rule is recognized. It is true, that there the party in fact resided near the county seat, or received some of his letters there, about which there is no particular proof here; but it is said to be proper to address a notice in that way, "if after due inquiry it is the only description within reach of the person sending the notice."

It is enough to send the notices to the place where the information received reasonably requires him to send them. 2 Car. & P., 300; 1 Barn. & C., 243; *Bank of Utica* v. *Davidson*, 5 Wend. (N.Y.), 587. If the place it reaches is the wrong one, he is then not in fault. 5 Yerg. (Tenn.), 67. All his duty in this case is to use "ordinary diligence" on the subject, and not to insure at all events that the notice actually reaches the indorser. 1 Pet., 582; 10 Id., 581.

In *Barr et al.* v. *Marsh*, 9 Yerg. (Tenn.), 255, it was held, that the holder was not bound or presumed to know where the indorser lived. But it was enough if the agent of the indorsee or holder made due inquiry, and directed the notices to the places indicated by the information, though wrong. It was the best that could be done under the circumstances. *Nichol* v. *Bate*, 7 Yerg. (Tenn.), 307; *Dunlap* v. *Thompson et al.*, 5 Id., 67. Where so many post-offices exist, the residences of parties change so often, and people live so remote from each other, as in this country, it would clog the circulation of negotiable paper if the holder or his agent was bound to know every alteration in the residence of indorsers. The inquiries were at the bank, and of other persons, in the case of *Barr* v. *Marsh*, much as in this instance.

In *Sturges et al.* v. *Derrick*, Wightwick Exch., 77, an inquiry was made of the son of an indorser as to his residence, and he did not know it, and the court held, that "sufficient diligence had been used." And in *Stuckert* v. *Anderson*, 3 Whart. (Pa.), 116, the case itself on examination shows that an inquiry of the officers *of the bank where the note [*349 was discounted is deemed sufficient, if there be no others near who are likely to know more as to the residence of the indorsers.

Some cases, it is true, have been more stringent, such as 13 Johns. (N.Y.), 434, and 3 Campb., 262; but they do not contradict our conclusions, as in the first one the notice was sent to a wrong place quite remote, and the inquiry is said to have been limited; while in the last, no inquiry was made except at the "*house*" where the bill was payable. Most of the cases referred to on this point, of due diligence in making inquiry,

are rather cases as to due diligence in respect to the time when the notices are sent.

Some of those, as bearing on this, allow a very liberal time to make inquiries where the residence is remote (2 Barn. & C., 246; 8 Id., 393; 2 Dowl. & Ry., 385; 2 Moo. & Ry., 359); and only require the notice to be sent as soon as information is obtained under proper exertion (1 Barn. & C., 245; Gow., 81; 2 Campb., 462). And some go so far as to excuse giving notice at all, if the place of residence at the time is unfixed (4 Campb., 285), or cannot be ascertained (10 Pet., 580, and 9 Wheat., 591, before quoted). In the case now under consideration, then, the conclusion seems well sustained, that reasonable inquiries were made as to the residences of the indorsers, and notices promptly dispatched, by a proper agent, in conformity with the information received. Whether the notices were actually received or not, and whether, if received, it was not as soon as if they had been directed to the Cross Roads post-office, does not appear, nor is it material, as the circumstances before mentioned show due diligence, and thus make out a sufficient case, whether the notices ever reached the indorsers or not. Let the judgment below be affirmed.

Mr. Justice McLEAN.

I dissent from the opinion of the court in this case with regret.

The Circuit Court instructed the jury, "that if they believed that the notary made the inquiries stated in his deposition, and sent notice to the defendant, as therein stated, he being ignorant of his place of residence, that the notice was sufficient to charge the defendant; and that under the circumstances of the case, as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser."

The note was given by John P. Burks & Co. to Matth. Burks, for sixteen hundred dollars, in eight months from its date, payable and negotiable at the Planters' Bank of the State of Tennessee, at Nashville. It was indorsed by Matth. Burks, Benjamin D. Harris, the defendant below, and also by J. Robinson, the plaintiff. The note does not appear to have
*350] been negotiated at the bank. A. Kingsley, the notary, made a demand of payment at the bank when *the note became due, but it does not appear who delivered it to him. Notices of non-payment were directed by the notary to Matth. Burks, and Benjamin D. Harris, the two first indorsers, to Madison county, Alabama.

He did not know where these indorsers resided, but Hob-

son, the cashier of the bank, to whom he applied for information as to their place of residence, informed him that they lived in the above county and state. Similar information was communicated to him by Joseph Estell, but neither of these individuals knew the post-offices nearest to the respective indorsers.

Bradley, a witness, stated that, previous to the maturity of the note, Robinson directed to him, at Huntsville, Madison county, Alabama, notices to all the parties to the note, requesting him to hand them to Harris and the other parties, stating the time when it would become due. And that witness directed the notices to the respective post-offices of the parties. To Harris, he directed the notice to the post-office at "Cross Roads," Madison county, Alabama.

On this state of facts, the court instructed the jury, "that the notary was not bound to inquire of the holder as to the residence of the indorsers."

The notary did not act for himself, but as agent of the holder; and it was proved that Robinson, who appears to have been the holder, resided in the same town with the notary, and knew the proper direction for the notices. Now the holder is bound to give the notice himself, or through his agent; and can he evade the law by employing an agent who is ignorant of the residence of the indorser, which is known to himself. He knows where the indorser resides; is he not then bound to direct the notice as the law requires? It is a new principle in the law of agency, that the knowledge of the principal shall not affect him, provided he can employ an agent who has no knowledge on the subject. The holder is bound to communicate to the notary all the knowledge he has, so that the notice may be properly directed. And if this be not done, and the notice is improperly directed, the holder loses his recourse against the indorser. This seems to me to be clear of all doubt.

In the case of *Preston* v. *Daysson et al.*, 7 La., 7, it was held, "that the holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the indorsers in giving them notice of protest; if he knows, he must disclose their residence, or it seems that his neglect will discharge the indorsers." And this is the case now before the court.

There was no proof that the notary knew where Robinson, the plaintiff below, resided; but it is proved that he lived in the same town, his name being on the note, and from the fact that the notary gave no notice to him, as indorser, it is clear that he knew he was *the holder. In *Hill* v. [*351

Varrell, 3 Greenl. (Me.), 233, it was held, "that where the residence of the drawer of a bill is unknown to the holder, he ought to inquire of the other parties to the bill if their residence is known to him." And in *Hartford Bank* v. *Stedman*, 3 Conn., 489, "where the holder, who was ignorant of the indorser's residence, sent the notice to A., who was acquainted with it, requesting him to add to the direction the indorsers' place of residence, it was held sufficient."

"If the holder of a bill uses reasonable diligence to discover the residence of an indorser, notice given as soon as this is discovered is sufficient." *Preston* v. *Daysson, et al.*, 7 La., 7. In *Beveridge* v. *Burgis*, 3 Campb., 262, Lord Ellenborough said,—"Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill," &c. In *Bateman* v. *Joseph*, 12 East, 433, "in an action by the indorsee against the payees and first indorser of a bill, it appeared the plaintiff received notice of its dishonor on the 30th of September, in time to give notice to the defendant on that day; he gave no notice, however, until the 4th of October; to excuse which, his clerk proved that the plaintiff did not know the defendant's residence until that day. Lord Ellenborough left it to the jury, whether the plaintiff had used due diligence to find the defendant's residence."

In Story Prom. Notes, 370, note 1, it is laid down,—"That merely inquiring at the house where a bill is payable is not due diligence for finding out an indorser. Inquiry should be made of some of the other parties to the bill or note, and of persons of the same name." And again, in page 368, note,—"To excuse the not giving regular notice of the dishonor of a bill to an indorser, it is not enough to show that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the bill was payable; he should have inquired of every other party to the bill."

There is no pretence that the bank was the holder of this bill. For the evidence showed that the notary did inquire of the cashier of the bank where the indorsers resided. But the court charged, that, under the circumstances, it was not necessary for the notary "to make inquiry of the holder of the note as to the residence of the indorser;" the court, therefore, referred to Robinson as the holder, and not to the bank. This charge is wholly inconsistent with the supposition that the

note was discounted by the bank, for then it would have been the holder, and the proper inquiry, as to the residence of the indorsers, was made of it. The note bears no marks of its having been discounted. That Robinson *was the [*352 holder appears from the notice he gave to the parties when the note would become due, from the fact that he was not notified as an indorser, and also that he commenced suit as the holder, after the dishonor of the note.

The turning point in the case is, whether the holder, in failing to give the proper direction to the notices by his agent, the notary, is not answerable for the knowledge he possessed of the residences of the indorsers, which he failed to communicate to the notary. I care not whether or not Robinson knew the post-offices of the indorsers. He had communicated with them through Bradley, the witness, and if the notices had been thus sent, the law required nothing more.

It will be observed, that the cases cited show the duty of the holder as to giving notice. And it is believed no case has been reported, except the one cited from Louisiana Reports, where it has been supposed that a principal having knowledge of the residence of the indorsers could excuse himself from giving notice to them by a want of such knowledge in his agent. That the notary knew Robinson was the holder is conclusively shown, as before remarked, by not treating him as an indorser. His name was upon the note as an indorser, and he must have understood the purpose for which the indorsement by him was made.

All the authorities say the holder is bound to use reasonable diligence to ascertain the residence of the indorser; and when he attains that knowledge, is he not governed by it? And if so, is he not equally bound to communicate it to his agent whom he may employ to give the notice? A denial of this principle will overthrow the doctrine of notice, as established for more than half a century.

I think the judgment should be reversed, and the cause remanded for a *venire de novo*, in the Circuit Court.

Mr. Justice McKINLEY dissented also.

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*JOSEPH E. FOXCROFT, PLAINTIFF IN ERROR *v.* DAVID MALLETT, DEFENDANT. [*353

Where a township of land was granted to a college upon condition (amongst others) that the grantees should give security that they would place a cer-

tain number of settlers on the land within a certain time, the duty of placing settlers remained as a permanent charge upon the land, unless counteracted by express agreements and special provisions between some of the subsequent grantees.

The second grantee, in his deed to a third grantee, for an undivided portion of the land, having "excepted and reserved certain lots," and conveyed the rest, "subject to the condition that the third grantee should perform his part of the settling duties in proportion," and also, "that from the portion conveyed a part should be taken, in the proportion which the part conveyed bore to the whole township," by this language limited the extent and nature of the grant.

When this third grantee mortgaged his interest, the portion of land destined for settlers did not pass by the mortgage; but when this portion was afterwards located according to law, a title accrued to the settler, paramount to a title held under a foreclosure of the mortgage.

Whether the clause in the original grant be construed as an exception or reservation, or as a condition, the result would be the same. The title to the settlers' lots did not vest in any of the persons through whom the grant passed, but remained as a charge upon the land, until the intentions of the legislature were carried out by an actual settlement.

By appropriating these lots to settlers, no part of the security provided by the mortgage is withdrawn, because the mortgage itself must have contemplated such an arrangement.

The mortgage being executed on the same day that the mortgagor received his title, and containing a reference to the deed to the mortgagor, both deeds may be considered parts of one transaction, and be construed together.[1]

A decision of a state court upon the construction of a deed, as to matters and language belonging to the common law and not to any local statute, although entitled to high respect, is not conclusive upon this court.[2]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maine.

It was a writ of right sued out by David Mallett, an inhabitant of New Hampshire, demanding two lots of land situated in Lee, in the county of Penobscot, and state of Maine, being lots numbered eleven in the fourth range, and eleven in the fifth range, containing two hundred acres, more or less, in said town of Lee.

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[1] CITED. *Hogg* v. *Emerson*, 6 How., 482; *Clark* v. *Manufacturers' Ins. Co.*, 8 Id., 246.

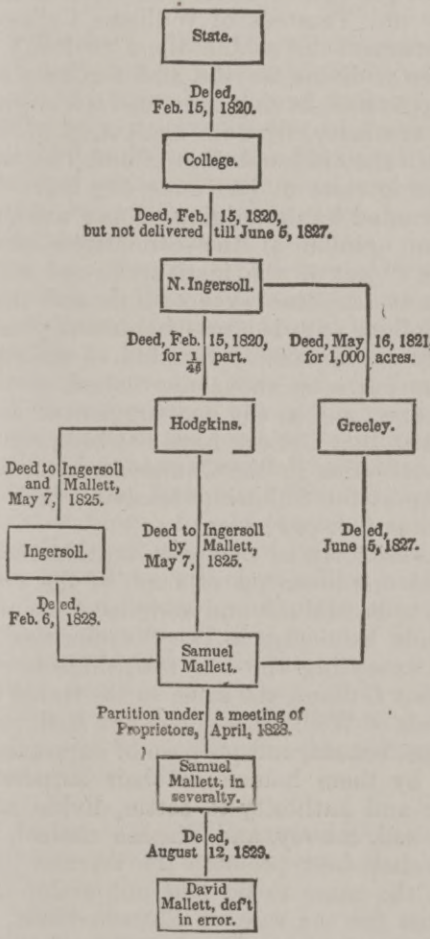
[2] CITED. *Russell* v. *Southard*, 12 How., 148; *Dred Scott* v. *Sandford*, 19 Id., 603; *Talcott* v. *Township of Pine Grove*, 1 Flipp., 124. And see *Jackson* v. *Chew*, 12 Wheat., 153; *Henderson* v. *Griffin*, 5 Pet., 151; *Lane* v. *Vick*, 3 How., 464, *n.*; *Martin* v. *Waddell*, 16 Pet., 367; *Thomas* v. *Hatch*, 3 Sumn., 170.

The federal courts have in many cases followed the decisions of the highest state courts, as the local law of real property, not only when expounding the statutes of the state, but also when grounded on the common law of the state. *St. John* v. *Chew*, 12 Wheat., 153; *Bell* v. *Morrison*, 1 Pet., 352; *Henderson* v. *Griffin*, 5 Id., 151; *Green* v. *Neal*, 6 Id., 291; *Brashear* v. *West*, 7 Id., 609; *Murray* v. *Gibson*, 15 How., 425; *Beauregard* v. *New Orleans*, 18 Id., 497; *Suydam* v. *Williamson*, 24 Id., 427; *Sumner* v. *Hicks*, 2 Black, 532.

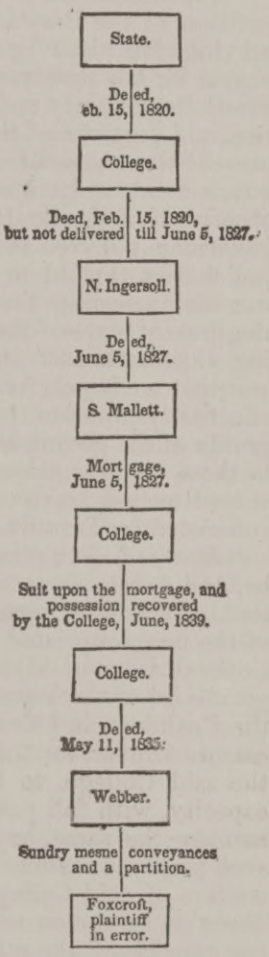
Where private rights are to be determined by the application of common law rules alone, the Supreme Court is not bound by the decisions of state tribunals. *Chicago City* v. *Robbins*, 2 Black, 418. So, where the construction of a state statute was unnecessary to the decision of the case decided by the state court, the Supreme Court will not follow such decision. *Carroll* v. *Carroll*, 16 How. 275.

*As an illustration of the chain of title, on the part of both plaintiff and defendant, the reporter has prepared the two following diagrams, showing the title as exhibited upon the trial by the plaintiff and defendant respectively.

MALLETT'S (PLAINTIFF BELOW AND DEFENDANT IN ERROR) TITLE.



FOXCROFT'S (PLAINTIFF IN ERROR) TITLE.



*On the 19th of February, 1805, the State of Massachusetts passed the following resolution: [*355

No. 1.

"*Resolve on the Petition of the President and Trustees of Williams College, granting them a Township of Land, with a Proviso. February* 19, 1805.

"The committee of both Houses, to whom was referred the petition of the President and Trustees of Williams College, praying the aid of government to enable them to build a chapel for the performance of divine service, and for keeping the College library and apparatus, having examined the origin, rise, and progress of that seminary, from its institution to the present time, together with the aid heretofore afforded by the government, and the existing state of its funds, beg leave to observe, that the funds granted by the original donor and the government have, in the opinion of the committee, been judiciously applied to the object of the institution, and with success exceeding the most sanguine expectations, and that the present state of the College affords a reasonable and pleasing expectation of its future extensive benefits to society, and that a chapel, for the purposes above mentioned, would effectually promote the same; and as the encouragement and grants of the government to that College have not been equal to those made to other seminaries in the Commonwealth, the committee ask leave to report the following resolve, which is submitted by Ezra Starkweather, per order:

"*Resolved*, For reasons set forth in the petition, that there be, and hereby is, granted one township of land, of the contents of six miles square, to be laid out and assigned from any of the unappropriated lands belonging to the Commonwealth in the district of Maine, excepting the ten townships lately purchased of the Penobscot Indians, the same to be vested in the President and Trustees of Williams College and their successors forever, for the use, benefit, and purpose of supporting the said College, to be by them holden in their corporate capacity, with full power and authority to settle, divide, and manage the same, or to sell, convey, and dispose thereof, in such way and manner as shall best promote the interest and welfare of said College; the same to be laid out under the direction of the committee for the sale of Eastern lands, at the expense of the said corporation, and a plan thereof to be lodged in the secretary's office.

"*Provided*, The trustees of said College, or their assigns, shall cause to be settled fifteen families in said township within twelve years from the passing of this resolve; and also,

that there be reserved in said township three lots, of three hundred and twenty acres each, for the following uses: namely, one lot for the first *settled minister; one lot [*356 for the use of the ministry; and one lot for the use of schools, in said township.

And on the 27th of January, 1820, the following:

No. 2.

"*Resolved*, That the commissioners of the land-office be, and they hereby are authorized and empowered to satisfy a grant of a township of land of the contents of six miles square, made by a resolve of the nineteenth of February, eighteen hundred and five, to the President and Trustees of Williams College, by locating the same, and conveying the said corporation township number three, in the second north of Bingham's Penobscot purchase, the same being numbered four, as surveyed by Alexander Greenwood. *Provided*, said grantees, or their assigns, shall first pay to said commissioners the expense of surveying and locating said township, and give security to the Commonwealth in a manner satisfactory to said commissioners, that they will, within one year from the passing of this resolve, cut out a road, two rods wide, from the termination of the road commonly called the St. John's Road (which has been opened, under the direction of said commissioners, from Penobscot River into township number two in the first range) to said township to be conveyed, and clear a travelled path therein of one rod in width; and that within two years they will clear a like road through said township, so to be conveyed, and make the necessary causeways and bridges thereon, all in a manner to be directed by said commissioners; and within three years will place on said township thirty families as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine; also reserving in said township the usual public lots."

On the 15th of February, 1820, the commissioners executed a deed to the College, in which they recite the preceding resolution and proceed thus:—

"Now, therefore, know ye, that we, the undersigned, whose seals are hereunto affixed, appointed commissioners for promoting the sale and settlement of the public lands in the District of Maine, conformable to an act passed the fifteenth day of February, eighteen hundred and sixteen, by virtue of powers vested in the undersigned, and pursuant to the resolve

of the twenty-seventh day of January, eighteen hundred and twenty, herein recited, do by these presents, in behalf of the Commonwealth aforesaid, assign, relinquish, and quitclaim to the President and Trustees of Williams' College, and their successors forever, one township of land, of the contents of six miles square, lying in the county of Penobscot, as the
*357] same was surveyed by Alexander Greenwood in the year of *our Lord one thousand eight hundred and eleven, bounded and described as follows: namely, southerly on township number three, in the first range; westerly on located land; northerly on unlocated land; and easterly on township numbered four, in the second range, containing twenty-three thousand and forty acres; conditioned, however, that the said grantees, their successors and assigns, shall lay out three lots of three hundred and twenty acres each, for public uses. One lot for the first settled minister, his heirs and assigns; one lot for the use of the ministry; and one lot for the use of schools, in said township.

"To have and to hold the aforegranted premises to the President and Trustees of Williams College, their successors and assigns, on the conditions aforesaid, for ever. In witness whereof, we have hereunto set our hands and affixed our seals, this fifteenth day of February, in the year of our Lord one thousand eight hundred and twenty.

EDWARD H. ROBBINS. [L. S.]
LATHROP LEWIS. [L. S.]
JOSEPH LEE. [L. S.]

"Signed, sealed, and delivered in presence of
SAM'L REDDINGTON.
GEORGE W. COFFIN."

On the same day, namely, the 15th of February, 1820, the treasurer of the College executed the following deed to Nathaniel Ingersoll.

"Know all men by these presents, that I, Daniel Noble, of Williamstown, in the county of Berkshire and Commonwealth of Massachusetts, esquire, treasurer of the corporation of Williams College, for and in consideration of the sum of four thousand six hundred dollars, secured to be paid to said corporation by Nathaniel Ingersoll, of the town of New Gloucester, in the county of Cumberland and Commonwealth aforesaid, have given, granted, sold, and conveyed, and by these presents, in behalf of said corporation, do give, grant, sell, and convey unto the said Nathaniel Ingersoll, a township of land lying in the county of Penobscot and Commonwealth afore-

said, and containing twenty-three thousand and forty acres, as the same was surveyed by Alexander Greenwood, in the year one thousand eight hundred and eleven, bounded and described as follows: namely, southerly on township number three in the first range; westerly by unlocated land; northerly by unlocated land; and easterly on township number four in the second range, the same being township number three in the second range of townships north of Bingham's Penobscot purchase, and numbered four by said Greenwood; conditioned, however, that the said Ingersoll, his heirs and assigns, shall lay out three lots of three hundred and twenty acres each, for public uses; one lot for *the first settled [*358 minister, his heirs and assigns; one lot for the use of the ministry; and one lot for the use of schools in said township. To have and to hold the aforegranted premises to the said Nathaniel Ingersoll, his heirs and assigns for ever, on the condition aforesaid; and the said Daniel Noble, treasurer of the corporation of Williams College, covenants with the said Nathaniel Ingersoll, that he has good right to sell and convey the premises aforesaid, and that said corporation shall warrant and defend the same, on the condition aforesaid, to the said Ingersoll, his heirs and assigns for ever, against the lawful claims and demands of all persons.

"In witness whereof I have hereunto set my hand and affixed the seal of the corporation of Williams College, this fifteenth day of February, in the year of our Lord one thousand eight hundred and twenty.

"DANIEL NOBLE. [L. S.]"

"Signed, sealed, and delivered in presence of us,—the word 'each' being first interlined in the twenty-sixth line of the first page.

LATHROP LEWIS.
GEORGE W. COFFIN."

"*Suffolk ss.* *Boston*, 16*th February*, 1820.

"Then personally appeared the honorable Daniel Noble, in his said capacity as treasurer of said corporation, and freely and voluntarily subscribed his name and affixed the seal of said corporation as the act and deed of said corporation, and delivered the same before me.

GEORGE W. COFFIN, *Justice of the Peace.*"

This last deed, although executed in 1820, was not delivered to Ingersoll until June 5th, 1827, being deposited in the meantime, with the agent of the College, as an escrow.

On the same day, namely, the 15th of February, 1820, Ingersoll conveyed to William Hodgkins, one undivided forty-sixth part of the township, saving and reserving out of said forty-sixth part, so called, one forty-sixth part of the lands reserved in the grant of said township to the President and Trustees of Williams College, for public uses.

On the 17th of March, 1820, Ingersoll, with eight other persons, executed to the treasurer of Massachusetts a bond, in the penalty of three thousand dollars, with the following condition, namely:—

"The condition of the above obligation is such, that whereas the above Nathaniel Ingersoll, and others above named, have become the assignees of a township of land, being numbered three, in the second range of townships north of Bingham's Penobscot purchase, the same being numbered four, as surveyed by Alexander Greenwood, and the same that was conveyed by the commissioners of the land-office, the fifteenth day of February last, to the President and Trustees of Williams College, conformable to a resolve, *passed the twenty-seventh day of January, eighteen hundred and twenty, and as such have paid the expense of surveying and locating said township. If, therefore, the said Nathaniel Ingersoll, Roger Merrill, Jonathan Page, Thomas Merriman, Thomas Skofield, Jacob Randall, Simeon Tryon, Jacob Davis, and Hugh Nevens shall, within one year from the passing of said resolve, cut out a road, two rods wide, from the termination of the road commonly called the St. John's Road (which has been opened, under the direction of said commissioners, from Penobscot River into township number two in the first range) to said township, and clear a travelled path therein of one rod in width; and that within two years they will clear a like road through said township, and make the necessary causeways and bridges thereon, all in a manner to be directed by said commissioners, and within three years will place on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine, then this obligation to be null and void, otherwise to remain in full force."

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On the 16th of May, 1821, Ingersoll conveyed to Eleazer Greeley one thousand acres of land, "in common and undivided, with the reservation of the public lands."

On the 7th of May, 1825, Hodgkins reconveyed the same land which Ingersoll had deeded to him to Ingersoll, and Samuel T. Mallett.

On the 5th of June, 1827, three several deeds were executed, and in order to enable himself to execute one of them, Inger-

soll received the deed which had so long been kept as an escrow by the College, namely, the deed of the fifteenth of February, 1820, by which the College conveyed the entire township to Ingersoll. Being now in possession of his deed,

1. Ingersoll conveyed to Samuel T. Mallett "six thousand acres of land, in common and undivided, in the township of land lying in the county of Penobscot, as the same township was surveyed by Alexander Greenwood, Esq., in the year 1811, the same being township numbered three in the second range of townships north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same conveyed to me by the President and Trustees of Williams College, as described in their deed, dated February 15th, 1820, and this day delivered to me, reference thereto being had; excepting and reserving the lots marked as settlers' lots on a plan of said town made by John Webber, and excepting also the lot on which I have improved, which are not to be subjected to a draft; subject, however, to the condition that the said Mallett shall perform his part of the settling duties in proportion to the land conveyed, and also that from said six thousand acres a part of the public lands reserved shall be taken in proportion as said six thousand acres bears to the whole township."

*2. Greeley conveyed to the same Samuel T. Mallett [*360
"all my right, title, and interest in and to one thousand acres of land, in No. 4, second range, north of Bingham's purchase, and east side of Penobscot River, in common and undivided, with the reservation of the public lands, being the same I purchased of Nathaniel Ingersoll, as per deed dated May 16th, 1821."

3. Mallett, being in possession of these two branches of the entire title, mortgaged one of them (namely, the one which he had just received from Ingersoll) to the College, to secure the payment of certain notes to the College. As the whole case turned upon the construction of this mortgage, and what passed under it, the whole paper is inserted.

"Know all men by these presents, that I, Samuel T. Mallett, of Litchfield, in the county of Lincoln, yeoman, in consideration of the sum of three thousand dollars paid by the President and Trustees of Williams College (the receipt whereof I do hereby acknowledge), do hereby give, grant, bargain, sell, and convey unto the said President and Trustees of Williams College, and their successors, for ever, six thousand acres of land, in common and undivided, in the township of land lying in the county of Penobscot, as the same township was sur-

veyed by Alexander Greenwood, in the year 1811, the same being township numbered three in the second range north of the Bingham Penobscot purchase, and numbered four by said Greenwood; being the same this day conveyed to me by Nathaniel Ingersoll, as by his deed, reference thereto being had.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said President and Trustees, their successors and assigns, to their use and behoof for ever. And I do covenant with the said President and Trustees, their successors and assigns, that I am lawfully seized in fee of the premises; that they are free of all encumbrances; that I have good right to sell and convey the same to the said President and Trustees, to hold as aforesaid; and that I will warrant and defend the same to the said President and Trustees, their successors and assigns, for ever, against the lawful claims and demands of all persons.

"Provided, nevertheless, that if the said Mallett, his heirs, executors, or administrators, pay to the said President and Trustees, their successors, heirs, executors, administrators, or assigns, the sum of three thousand dollars, in equal annual payments, in one, two, three, and four years, with interest, annually, on the whole, from the 1st day of January last past, as by notes dated May 28th, 1827; then this deed, as also four certain notes of the above date, given by the said Mallett and Jonathan Hodgman, to the said President and Trustees, to pay the sum and interest at the times aforesaid, shall both be void; otherwise, shall remain in full force.

*361] *"In witness whereof I, the said Mallet, have hereunto set my hand and seal, this 5th day of June, in the year of our Lord one thousand eight hundred and twenty-seven. SAMUEL T. MALLETT. [L. S.]

"Signed, sealed, and delivered in presence of
NATH'L INGERSOLL."

On the 6th of February, 1828, Ingersoll conveyed to Mallett a certain piece or parcel of land situated in No. 3, in the county of Penobscot, being one half of lot numbered eleven, in the fifth range, in common and undivided, being one of the settlers' lots, the half of said lot containing fifty acres; said land being north of Bingham's Penobscot purchase in the county of Penobscot.

On the 16th of April, 1828, a meeting of the proprietors was called, "To see what measures the said proprietors will adopt to divide and apportion said lands, and to act thereon as may be judged proper." After sundry proceedings and adjourn

ments, the meeting voted, on the 1st of July, "That the proprietors will proceed to divide and apportion the lands reserved to be set off as public lots," and a committee was appointed to perform this duty. The report of the committee was adopted by the meeting. After setting off nine hundred and sixty acres as "ministerial lands," and some other proceedings, it was voted, "To assign and set off twenty-seven lots as settlers' lots; namely, to Nathaniel Ingersoll, thirteen lots, which he has sold to settlers, and on which improvements have been made, as so much towards his share. Also, to Samuel T. Mallett, fourteen lots, being lots which he has sold to settlers, as so much towards his share in said lands."

Amongst the lots thus assigned to Mallett were lots No. 11 in range 4, and No. 11 in range 5, being the two lots in controversy in the present case. The meeting then proceeded to make division by lot of the lands not reserved for public lands; and not reserved to be holden as tenants in common among the several proprietors, according to their several rights in said township; and not assigned to Nathaniel Ingersoll and Samuel T. Mallett.

On the 12th of August, 1829, Samuel Mallett conveyed to David Mallett, the plaintiff below, the two lots in question.

On the 26th of July, 1832, the notes to the College not being paid by Samuel Mallett, the College brought an action called a "plea of land," in the nature of an ejectment, to recover sixty-eight lots of one hundred acres each, which had been drawn to the share of said Mallett as above set forth, the action being for "six thousand acres in common and undivided."

At June term, 1837, the case came on for trial, and was left to a jury, who found a verdict for the plaintiffs, and the judgment of the court was, "that the said President and Trustees of Williams College recover against the said Samuel T. Mallett their title and *possession of and in the [*362 demanded premises, and that a writ of possession issue accordingly, unless the defendant, his heirs, executors, administrators, and assigns [pay] the sum of five thousand three hundred and five dollars and seventy-five cents, and interest, within two months, together with costs of suit, taxed at ninety-five dollars and thirteen cents."

Upon this judgment a writ of *habere facias possessionem* was issued, on the 20th of June, 1839.

Under this recovery, Foxcroft, the plaintiff in error and defendant below, claimed. It is unnecessary to set out the

mesne conveyances and partition by which his title to the lots in question was established.

The suit brought by David Mallet in the Circuit Court was a writ of right, which came on for trial in October, 1843, when the jury found a verdict for the plaintiff. The following bill of exceptions to a ruling of the court was taken on the part of Foxcroft, the defendant.

"DAVID MALLETT *v.* JOSEPH E. FOXCROFT.

"Be it remembered, that the aforesaid Mallett having, on the twenty-ninth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, brought his writ of right, returnable to said Circuit Court, to be holden on the first day of October, then next, wherein the said David demands against the said Joseph two certain lots of land, with the appurtenances, situate in Lee, in said Maine District, being lots numbered eleven in the fourth range, and eleven in the fifth range, in said town of Lee; which two certain lots the said David claims to be the right and inheritance of him, the said David, and of which he alleges that he was seized in his demesne as of fee and right, within twenty years, and ought now to be in quiet possession thereof, but which the said Joseph unjustly withholds from him. And the said writ having been duly served and returned, when and where the same was returnable, and the action having been duly entered and continued, from term to term, to this term; and the said Joseph having appeared and pleaded, and thereby defended the right of the said David and his seizin, and put himself thereof on the country, and prayed recognition to be made whether he, the said Joseph, had not greater right to hold the tenements aforesaid, to him and his heirs, as tenants thereof, as he now holds the same, or the said David, as he has demanded the same in and by his said writ and declaration; and the plaintiff having joined the issue tendered, and the jury having been duly impanelled to try the same, the plaintiff, to prove the issue on his part, offered in evidence a deed from the commonwealth of Massachusetts to Williams College, dated February 15th, 1820, of a certain township of
*363] land, of which the demanded premises are a part, a copy of which deed is hereunto annexed, *marked A., makes part of this bill of exceptions. He next offered in evidence a deed from the same Williams College to Nathaniel Ingersoll, dated the same 15th day of February, 1820, of the same township, but which said deed was not delivered until June 5th, 1827, the deed having been in the meantime deposited as an escrow with the agent of the College. He also

offered in evidence a deed from the said Nathaniel Ingersoll to William Hodgkins, dated 15th February, 1820. Also, a deed from said Nathaniel Ingersoll to Eleazer Greeley, dated May 16th, 1821. Also, a deed [from] said William Hodgkins to said Nathaniel Ingersoll and Samuel T. Mallett, dated May 7th, 1825. Also a deed from said E. Greeley to same Samuel T. Mallett, dated June 5th, 1827. Also a deed [from] said Nathaniel Ingersoll to said Samuel T. Mallett, February 6th, 1828; copies of all which deeds are hereunto annexed and marked B, C, D, E, F, and G, make a part of this bill of exceptions.

"He then introduced the records of a meeting of the proprietors of the township, called and organized according to the laws of the State of Maine, for the purpose of making a partition of the lands in the township among the several owners, &c. The meeting being holden on the first day of July, 1828, by adjournment from the 16th April, 1828. Portions of the record, so far as they relate to the matter in controversy, were read; a copy of which, marked B, is hereunto annexed, and makes a part of this bill of exceptions. He also offered in evidence and read to the jury, a deed from said Samuel T. Mallett to David Mallett, the plaintiff, dated August the 12th, 1829, purporting to convey to the said David two certain lots, being the demanded premises, a copy of which is hereunto annexed, marked H, and makes a part of this bill of exceptions. And the defendant, to maintain the issue on his part, offered in evidence, and read to the jury, a resolve of the Commonwealth of Massachusetts, dated the 19th day of February, 1805, and another resolve of the same Commonwealth, dated the 27th day of January, 1820; copies of which said resolves are hereunto annexed, and marked No. 1 and No. 2, and make part of this bill of exceptions. Also the deed from the same Commonwealth to Williams College, and the deed from said College to said Nathaniel Ingersoll, hereinbefore referred to, marked A and B, having been offered in evidence by the plaintiff. Also a bond from the said Nathaniel Ingersoll and others to the said Commonwealth, dated March 17th, 1820, a copy of which is hereunto annexed as a part of this bill of exceptions, marked No. 3. Also a deed from Nathaniel Ingersoll foresaid, dated 5th June, 1827, to Samuel T. Mallett aforesaid. Also a deed of mortgage from Samuel T. Mallett aforesaid to said Williams College, dated the same 5th June, 1827; copies of both which deeds are hereunto annexed, marked No. 4 and 5, and make a part of this bill of exceptions. Also the record of the writ and judgment for the foreclosure of said mortgage, *by the said Williams College, [*364

against the said Samuel T. Mallett, a copy of which is hereunto annexed, marked No. 6, and makes a part of this bill of exceptions. Also a deed from said Williams College to John Webber, dated May the 11th, 1835, assigning said mortgaged premises to him. Also a deed from John Webber to said defendant, dated the 19th June, 1835, conveying one undivided half of said mortgaged premises to him, said defendant; copies of which two last-mentioned deeds are annexed, and make a part of this bill of exceptions, marked No. 7 and 8. Also the proceedings in partition, instituted by the said Webber and Foxcroft, and the record of the assignment and judgment thereon, in the Supreme Judicial Court of the state of Maine, being the highest court of record in said state, a copy of which proceedings and record is annexed, marked No. 9, makes a part of this bill of exceptions. Also a deed from said John Webber to said defendant, dated November the 4th, 1836, of the residue or remaining moiety of the mortgaged premises conveyed to said Webber by said Williams College; a copy of which deed is marked No. 10, and annexed hereto, and makes a part of this bill of exceptions.

"It was stated and admitted as a part of this cause, that at the time said proprietors' meeting was held, Samuel Fessenden, the agent of Williams College, resided in Portland, the place of said meeting, but was not present at said meeting.

"Upon this evidence, the honorable justice who presided at said trial ruled that the mortgage deed offered in evidence by the defendant, given to the said trustees of Williams College, dated the fifth day of June, 1827, marked 5, does not comprehend and cover the two lots, 11th in the 4th range, and 11th in the 5th range, being the premises demanded. And the said honorable justice did then and there declare and deliver his opinion aforesaid, that the mortgage deed aforesaid does not comprehend and cover the two lots, namely, No. 11 in the 4th range, and No. 11 in the 5th range, being the premises demanded, to the jury aforesaid, and with that direction left the said cause to the jury, and the said jury then and there gave and returned the following verdict, to wit:—'The jury find that the said David Mallett hath greater right to hold the lands and tenements described in his writ in said suit, as he has demanded the same, than said Foxcroft, the tenant, has to hold the same.' Whereupon the counsel of the defendant did, then and there, on behalf of the said defendant, except to the aforesaid opinion of said honorable justice, and insisted that said mortgage deed did comprehend and cover the said two lots No. 11 in the 4th range, and No 11 in the 5th range, being the premises demanded. And inasmuch as the said

several matters so produced and given in evidence on the part of said plaintiff and defendant, and by their counsel aforesaid insisted upon, do not appear by the record of the verdict aforesaid, the said counsel for said defendant *did [*365 then and there propose their aforesaid exception to the opinion of the said justice, and requested said justice to put his seal to this bill of exceptions, containing the several matters so produced and given in evidence, on the part of said defendant, as aforesaid; and thereupon the said honorable justice, at the request of said counsel of said defendant, did put his seal to this bill of exception, on the eighth day of October, in the year of our Lord one thousand eight hundred and forty-three.

[L. S.] "JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

"We, the undersigned, certify, that this bill of exceptions is satisfactory to us.

"FESSENDEN & DEBLOIS & FESSENDEN,
For the defendant.
"WILLIS & FESSENDEN,
For plaintiff."

Upon this bill of exceptions, the case came up to this court.

It was submitted upon printed arguments, by *Mr. Webster*, for the plaintiff in error, and *Mr. Evans*, for the defendant.

The points made by *Mr. Webster* were the following:—

1. By the resolve of January 27th, 1820, and the deed of the 15th of February, 1820, A, the fee in the township passed to the President and Trustees of Williams College, unencumbered by any condition as to settlers to be placed on said township,—the settling duties being secured by bond.

2. By the deed B, Noble to Ingersoll, the fee in the township passed to Ingersoll, unencumbered by any condition as to the duty of putting on, as settlers, thirty families.

3. By the deed No. 4, Ingersoll to Mallett, the fee in six thousand acres in said township, in common and undivided, of a certain portion of it, passed to Mallett, by the delivery of the deed, subject to the condition subsequent, to perform his part of the settling duties in proportion to the land conveyed.

4. That the settling duties to be performed by Mallett could not mean that he should, within three years from the making of the grant, put settlers on said township, because, when the deed was made to Mallett, these three years had elapsed.

5. Mallett was not bound by the condition to appropriate any part of the six thousand acres to settlers; but it would

be a good performance of the settling duty incumbent on him according to his deed, had he, Mallett, within a reasonable time after the division of the township and the assignment of his share to him, placed settlers on any part of said township which he, Mallett, might acquire by purchase.

*366] 6. It would be a good performance of the condition, to pay his proportion of the bond made to secure the settlement of thirty families on said township.

7. That it did not and does not appear that the settling duties secured by the condition in the deed from Ingersoll to Mallett had not been performed.

8. There was no evidence offered to show that Ingersoll or his heirs ever entered for a breach of any condition in that deed, and therefore that the fee remained in Mallett or in his grantees, the President and Trustees of Williams College.

9. Ingersoll or his heirs were the only persons who could enter for a breach of the condition, and, as they did not, the presumption is that the condition was not broken.

10. By the deed in mortgage, Mallett to the President and Trustees of Williams College, No. 5, the fee in mortgage of the whole six thousand acres, in common and undivided, in the residue of the whole township, passed to the grantees simultaneously with the fee which Mallett took from Ingersoll.

11. That the condition assumed by Mallett to perform settling duties, whatever might be the import of that condition as between Mallett and the President and Trustees of Williams College, and the obligation to fulfil that condition, was not transferred from Mallett to the President and Trustees of the College by Mallett's deed of mortgage to them.

12. By the division made by the proprietors, and the assignment to each of his share, sixty-eight lots were assigned to Mallett, and he became seized thereof in fee and in severalty, as well those assigned by direct vote as those assigned by draft, according to a vote.

13. That, by operation of law, when such division was made, the President and Trustees of Williams College became seized, as tenants in common with Mallett, by operation of the mortgage deed to the whole sixty-eight lots in proportion as sixty to sixty-eight.

14. That the proprietors had no power to deduct any portion of the lands assigned to Mallett as his share from the lien which attached to them by the mortgage to the trustees; nor have they so done.

15. Neither had Mallett any such power. It is expressly determined by the Supreme Judicial Court of Maine, in the

case of *Williams College* v. *David Mallett et al.*, 4 Shep. (Me.), 88,—"That the mortgagor of an undivided portion of a tract of land cannot, without the consent of the mortgagee, by any after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed."

In 1839, at the July term of the Supreme Judicial Court, the *President and Trustees of Williams College, [*367 in a suit brought on the mortgage of Samuel T. Mallet to foreclose, recovered judgment for the possession for six thousand acres of land in the town of Lee, by which name the township in which are the lands in controversy are situate.

And having assigned the mortgage to John Webber by deed (see No. 7), during the pendency of their suit against Samuel T. Mallett to foreclose the mortgage, the judgment inured to Webber, the assignee of the mortgage. *Williams College* v *Mallett*, 4 Shep. (Me.), 84.

16. By lapse of more than three years, the fee in the six thousand acres thus recovered has become absolute in the assignees of the mortgage.

17. By judgment for partition and the proceedings thereon, which judgment and proceedings stand unreversed and in full force, the assignees of the mortgage became sole seized of the lands set off to them by the commissioners appointed by the court, whose doings were accepted and by judgment of court confirmed.

See No. 9, and by which it appears the lots in controversy were assigned to the petitioners to hold in severalty.

18. By the deeds of Webber to Foxcroft, No. 8 and No. 10, the whole fee in those lots passed to Foxcroft, the plaintiff in error.

The question at bar involves the construction of a grant by deed of real estate within the State of Maine. This deed and the construction of it have been made the special subject of judicial decision by the Supreme Judicial Court of Maine. The construction of that deed on the very question at issue has been solemnly settled by the highest judicial tribunal, and is no longer an open question.

The practice under the laws of a state furnishes a rule by which the Circuit Court sitting in that district may proceed. *Brown* v. *Van Braam*, 3 Dall., 344.

In cases depending on the statutes of a state, and more especially those respecting titles to land, the court adopts the construction of the state where that construction is settled, and can be ascertained. *Polk's Lessee* v. *Wendal et al.*, 9

Cranch, 87; *Shipp et al.* v. *Miller's heirs*, 2 Wheat., 316, *Elmondorf* v. *Taylor et al.*, 10 Id., 152.

The Supreme Court adopts the local law of real property, as ascertained by the decisions of the state courts, whether these decisions are grounded on the statutes of the state, or form a part of the unwritten law of the state which has become the fixed rule of property. *Jackson ex dem. St. John* v. *Chew*, 12 Wheat., 152; *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall., 105.

Mr Evans, for the defendant in error, made the following points.

*368] *I. With regard to that part of the case prior to the mortgage given by Mallett to the College.

1. *Of fact.* That Ingersoll and Mallett had, previous to the delivery of the deed, College to Ingersoll, been engaged as proprietors in placing settlers upon the township, under the provisions of the act of 1816.

That the title of Mallett to his six thousand acres was perfected by the deed of Ingersoll to him, and by the delivery of the deed, College to Ingersoll, being parts of one transaction, both necessary to perfect the title of Mallett.

That the condition inserted in the deed to Mallett was but the giving a legal and binding effect to a previous stipulation between the parties, under which they had both been acting.

2. *Of law.* That whether the facts above supposed were true or not, Ingersoll, as proprietor, had a right to impose the condition under consideration, contained in his deed as an original condition.

That such condition must be construed and understood by a reference to the act of 1816, referred to in the resolve.

That it must be construed according to the intention and meaning of the parties.

That it could not have been performed by payment of money under the bond, or in any other way than by getting on the specified proportion of settlers, of the description contained in the act of 1816.

That the performance of it necessarily involved an appropriation of a certain portion of the land conveyed to settling purposes, and necessarily contemplated a specific appropriation of the quantity of land required, in proportion, for those purposes.

That the condition thus imposed operated as a specific charge and burden upon the land thus conveyed.

II. And with regard to the remaining part of the case, the following points, namely:—

1. That the delivery of the deed to Ingersoll, and the execution of the deeds, Ingersoll to Mallett, and Mallett to the College, being at the same time, and the two latter being witnessed and sanctioned by the agent of the College, who delivered the former, the College was thereby affected with notice of the contents of all, and is bound thereby.

2. That whether affected with actual notice or not, the reference in the deed to the College to the deed from Ingersoll to Mallett incorporates the whole of the former deed in the latter, and subjects the College to all its reservations, burdens, and conditions, so far as regards the title and description of the land conveyed.

3. That the reservations and conditions in the deed, Ingersoll to Mallett, being before the *habendum*, may all be considered as *part of the description, and are therefore, on the principles assumed by the plaintiff in error, incorporated in the deed to the College, by the reference contained therein. [*369

4. That by this reference, Mallett, the grantor, reserves to himself, necessarily, as mortgagor, the right to discharge the burdens and obligations imposed upon the land by the deed from Ingersoll.

5. That such reservations and conditions are not repugnant to the covenants in those deeds, and no more repugnant to the covenant in a mortgage deed than in any other.

6. That the proprietors of the township had the power to divide the whole or a part of the same among those interested, and that the legality of their proceedings is admitted so far as the division is concerned, both parties claiming under it.

7. That it is not competent for the plaintiff in error to affirm the legality of the assignment to Mallett for one purpose, and deny its validity for another. If that assignment was invalid in part, it was so in the whole; and the lands thus assigned remain common lands; and, in consequence, the plaintiff in error could not have them specifically assigned to him in partition, and his title fails.

8. That the action of the proprietors in assigning fourteen lots to Mallett, "as so much towards his share," with the words, "being lots which he has sold to settlers," operated as a conveyance to Mallett of those lots in trust for the persons to whom he had sold, or contracted to sell them.

9. That the rights of the College were not thereby infringed, inasmuch as by that assignment the condition of the grant from Ingersoll was saved, and the title of the College secured. That Mallett, as grantee, and also as mortgagor, had not only

the right, but was also under a moral obligation to have the burden upon the six thousand acres removed. And that the assent of his co-tenants, as expressed by their votes at the meeting, operated as a confirmation of his proceedings.

10. That no land has been subtracted from the operation of the mortgage, as contended by plaintiff in error, but that by purchasing and owning thirteen hundred acres in the township, besides that covered by the mortgage, Mallett had, within a fraction of one hundred acres, in fact relieved the mortgage from the burden of settling duties; leaving in allotted and common lands six thousand acres in the township, within a fraction of a lot, untouched, and exposed to the operation of the mortgage, with all burdens discharged.

11. That whatever lien the College might have had upon the lots assigned, that lien was divested by the action of the proprietors, and these lots freed from the operation of the mortgage.

12. That neither the case *Williams College* v. *Mallett*, *Randall* v. *Mallett*, nor *Webber* v. *Mallett*, cited by plaintiff
*370] in error, *considers the questions at issue in this case, or gives any construction to the deeds, nor were any such questions presented in either of those cases.

13. That the assignment having been made to Mallet for the use of the settlers, a conveyance might be enforced against him in equity,—or, if he had given deeds, the title acquired by vote of the proprietors would inure to his grantees, as settlers in the township.

14. That it is not competent for the College to avail itself of the assignment of these lots for one purpose; namely, to protect its title, and then seek to divert the assignment from those to whose use it was made, and appropriate it to its own.

15. If the plaintiff in error has any title, it is under the mortgage alone. If, therefore, the lots in question are not covered by the mortgage, he is a mere stranger, and cannot inquire as to the title of the defendant in error.

16. The proceedings in partition do not involve a consideration of the point in issue in this case, or a construction of the deeds.

17. Neither does the judgment in partition affect, in any manner, the right of property.

18. By the deed of Samuel T. Mallett to David Mallett, the fee in these lots passed to David Mallett, and his title cannot be questioned by any one, not a creditor, a purchaser for a valuable consideration, or a *cestui que trust* of the lands. And the plaintiff in error sustains neither of these relations.

Mr. Justice WOODBURY delivered the opinion of the court.

This is a writ of error, founded on an exception taken to the ruling of the Circuit Court, in the Maine District, as to the construction of a deed.

The action below was brought to recover lots No. 11 in the 4th range, and No. 11 in the 5th range, in the town of Lee, in said District; and the construction objected to was, that a mortgage, executed June 5th, 1827, by Samuel Mallett to Williams College, under which institution the plaintiff in error claims, did not comprehend or convey the demanded premises.

In order to judge of the correctness of this construction, and its bearing on the rights of the parties, it will be necessary to examine the circumstances under which the deed was made, as well as its phraseology.

The demanded premises were part of township No. 3, north of Bingham's Penobscot purchase, conveyed by the Commonwealth of Massachusetts to Williams College, the 15th of February, 1820, under certain resolves, passed by the legislature, February 19th, 1805, and January 27th, 1820. The only conditions in those resolves material to what is now under consideration were, that "the *grantees or their [*371 assigns," shall give security that they, "within three years, will place on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine; also reserving in said township the usual public lots." By the act referred to for "promoting the sale and settlement of the public lands in the District of Maine," it was provided (in section sixth), "that in every township to be laid out pursuant to this act, the commissioners shall set apart fifty lots, of one hundred acres each, of average quality and value, no two lots of which shall be contiguous to each other, which shall be granted and conveyed to the first fifty settlers in said township, upon the payment of five dollars for each lot" (Statute, February 15th, 1816, p. 172). The fifth section authorized the commissioners to take a commutation from grantees of any settling duties they were held to perform.

The resolve, granting this township, reduced the number of settlers from fifty to thirty; and, instead of reserving the right to the commissioners to execute such deeds, provided, that the grantees might give security to the state to do it, and perform the other duties, as to the settlers, under the before-mentioned act. Accordingly, Williams College having conveyed this township to Nathaniel Ingersoll, on the 15th of

February, 1820, and not having given the before-mentioned security themselves, procured him to do it, and he, by bond, dated March 17th, 1820, stipulated with the state, among other things, to place, within three years, "on said township thirty families, as settlers, of the description named in the act for promoting the sale and settlement of the public lands in the District of Maine."

Matters being thus situated, Ingersoll, on the 5th of June, 1827, conveyed to Samuel T. Mallett a portion of said township, under the following description, reservations, and conditions:—

"Six thousand acres of land, in common and undivided, in the township of land lying in the county of Penobscot, as the same township was surveyed by Alexander Greenwood, Esq., in the year one thousand eight hundred and eleven, the same being township numbered three in the second range of townships north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same conveyed to me by the President and Trustees of Williams College, as described in their deed, dated February fifteenth, one thousand eight hundred and twenty, and this day delivered to me, reference thereto being had; excepting and reserving the lots marked as settlers' lots on a plan of said town, made by John Webber, and excepting also the lot on which I have improved, which are not to be subjected to a draft; subject, however, to the condition that the said Mallett shall perform his part of the settling duties in proportion to the land conveyed, and also
*372] that from said six thousand acres a part of the public lands reserved shall be *taken, in proportion as said six thousand acres bears to the whole township."

On the same day, to secure the consideration for the purchase, and to pay the same to Williams College, in behalf of said Ingersoll, still indebted to the College, Mallett conveyed the same premises, by mortgage, to the College, under the following description:—

"Six thousand acres of land, in common and undivided, in the township of land lying in the county of Penobscot, as the same township was surveyed by Alexander Greenwood, 1811, the same being township number three in the second range north of the Bingham Penobscot purchase, and numbered four by said Greenwood, being the same this day conveyed to me by Nathaniel Ingersoll, as by his deed, reference thereto being had."

What passed by this conveyance is the chief difficulty in the case. The question arises in this way.

The debt, secured by that mortgage, not being paid, the

College instituted a suit to foreclose the same, in the year 1832, and recovered judgment June 20th, 1839. In the mean time, namely, May 11th, 1835, it transferred the rights under the mortgage to John Webber, who, in June of the same year, conveyed a moiety of them to Foxcroft, the plaintiff in error.

Webber and Foxcroft then, in July, 1836, petitioned the Superior Court of Maine for a partition of what they held in common with others; and, after various proceedings, these lots, No. 11 in the 4th, and No. 11 in the 5th range, were set off to them in severalty; and on the 4th of November, 1836, Webber released all his rights in them to Foxcroft. This, it is contended, vested the title in him, derived under the mortgage; and it might have done so, in one view of the case, had nothing else occurred to prevent or defeat it. But Samuel Mallett, after the conveyance to him by Ingersoll, and the mortgage to the College, proceeded to put on the land various settlers, under the reservations and conditions in the deed to him; and, at a meeting of the proprietors of the township, for the purpose of dividing the same, April 16th, 1828, No. 11 in the 4th range, and No. 11 in the 5th, were set off to Samuel Mallett, with other lots, making fourteen in all, and described as "being lots which he has sold to settlers, as so much towards his share in said lands;" and on the 12th of August, 1829, he executed a deed of those lots to the demandant.

The case, then, stands thus. If the title to these lots passed under the mortgage from Samuel Mallett to the College, without condition, except as security for the debt, the plaintiff in error is now possessed of them in severalty, and should retain them. But if the title to them did not pass at all by that mortgage, on account of the exceptions or reservations, either in it or the prior deed, which are applicable to the premises; or if it passed on conditions which *have [*373
since vested these lots in David Mallett, as settlers' lots under the act to encourage the sale and settlement of lands in Maine, —then he, as settler and grantee of the same, ought now of right to possess them. The general aspect of the whole case is, we think, strongly in favor of the right set up by the demandant.

On the construction made in his favor by the court below, he will recover only what the laws of the state intended such settlers as he should have; and which it was expressly provided they should have in the deed from Ingersoll to Samuel Mallett of the tract including these premises.

But should the opposite construction, contended for by the tenant, prevail, the College and its assignees will get back, under a mortgage to secure a part of the consideration, about

one fourth of the township, free from any charge or deduction on account of settlers' claims, when the College was originally entitled to it under the resolve only as burdened with that charge, and has paid nothing since to relieve the land from it; and when the immediate grantee of the College conveyed it so burdened, and has done nothing since to remove the encumbrance. Again, it was a leading principle of public policy with the state, in order to increase its population and wealth, that settlers should be placed upon the land at an early day, and, as an inducement for them to come, should have lots for a very small consideration. The College took the original grant under stipulations to effect this, and were bound to effect it, to the number of thirty families.

Yet, on the construction set up by the tenant, Ingersoll, under his bond, and his assigns, under the clauses in their deeds from him, would be compelled to effect this so far as regards one fourth of the town, without allowing them any consideration therefor, or permitting them to make it a permanent charge on the land itself, as it originally was and would naturally continue to be.

But general considerations like these may be counteracted by express agreements and special provisions between the parties; and it is necessary to ascertain next whether any such different and opposing agreements have been entered into here. When Ingersoll, being the second grantee and the obligor in the bond to the State for the performance of duties as to settlers, proceeded to convey about one fourth of the township to Samuel Mallett, it is clear that he preferred making the performance of the duties to settlers in that portion of the township a charge on the land itself, by a condition in the grant, as had formerly been the usage, rather than taking another bond or other collateral security for it to himself. Such a course was also likely to be the safest, and was competent or legal, if he chose to adopt it. Accordingly, at the close of the description of the premises, in his deed to Mallett, he adds, "*excepting and reserving* the lots marked," &c., which
*374] are not those now in dispute, and concludes,—"*subject*, however, *to the CONDITION, that the said Mallett shall perform his part of the settling duties in proportion to the land conveyed, and also, that from said six thousand acres a part of the public lands reserved *shall be taken*, in proportion as said six thousand acres bears to the whole township." There can be no doubt, that this language, whether following or preceding the description of the premises, was intended to constitute an integral part of the deed itself, and to limit the extent and nature of the grant. A condition or reservation

may be inserted in any part of a deed. Shep. Touch., ch. 6; 5 T. R., 526; 1 Saund., 60, note.

Nor is such a provision inconsistent with the general covenants, as has been contended by the plaintiff in error. They must be construed as relating only to the subject-matter, looking to the whole deed, and the obvious intent of the parties in the whole.

What, then, is the effect of these particular clauses? Clearly to except out of and reserve from passing at all, by the grant, so much of the six thousand acres as "the lots marked as settlers' lots on a plan of said town by J. Webber," and also the lot on which Ingersoll had improved. These were not to be considered as held in common or "subjected to a draft," but were entirely excluded from any future division of the six thousand acres. These, however, are not now in controversy.

What more do these clauses provide? The whole land, which did pass under the grant, was to be held "subject" "to the condition, that the said Mallett shall perform his part of the settling duties," or, in other words, put on his proportionate number of families, and convey to the head of each a hundred acre lot for only five dollars, and also allow a proportionate share of the public lands reserved in said township to "*be taken*" from this six thousand acres. This is the important provision bearing on the present case. For aught which appears, the settlers had not then removed upon the land. The public lots reserved in the township had not then been set apart. But the parties virtually agreed, that, when settlers were put on and when the public lots were set apart, one fourth, or thereabouts, of the land in the whole town belonging to settlers should, on the payment of a mere nominal consideration, come out of these six thousand acres, and in like manner, one fourth of the public lots should be taken therefrom.

This being the special agreement of the parties, the next inquiry is, has it been carried into effect in a manner so as legally to sustain the judgment rendered below?

The controverted expressions in the deed seem, in their most obvious import, either to except from the land conveyed the lots which settlers should select, or to make it a condition of the grant, that the title to those lots should afterwards be vested in them. The form of the ruling of the court leaves it a little uncertain *on which of these grounds [*375
the opinion rested, as, after a recital of the evidence in the case, the bill of exceptions says:—

"Upon this evidence the honorable justice, who presided at said trial, ruled that the mortgage deed offered in evidence by

the defendant, given to the said Trustees of Williams College, dated the 5th day of June, 1827, marked 5, does not comprehend and cover the two lots, 11th in the 4th range, and 11th in the 5th range, being the premises demanded."

At the first blush, it might be inferred that the judge held these lots did not pass at all under the mortgage, having been considered as excepted or reserved. *Mallett* v. *Foxcroft*, 1 Story, 477. But we are inclined to think, that so stringent a view of his ruling is not indispensably necessary; and if it were, we see no reason why the judgment is not to be sustained, as right in substance, and according to the merits of the case,—if, at the time the writ of right was brought, the title to these lots was not in the mortgagee or his grantees, but was rather in the demandant, under one of the views or constructions before mentioned.

The learned judge might well mean, that the mortgage "does not comprehend and cover the two lots" in dispute, as matters stood, after the settling, partition, and conveyance to David Mallett, and he would thus regard the provision as a condition which had been executed. This would be free from much difficulty. On the contrary, it is supposed by the plaintiff that he regarded it as an exception or reservation of the last lots. This would be, in the spirit and intent of the parties, as the former clause had been, an *excepting* or *reserving* of the first named lots. If deciding so (1 Story, 477), he doubtless considered, that the last lots would ere long be set apart and marked, and thus become certain on the principles contained in the deed and in the statutes as to settlers and partitions by the proprietors of towns; and he, therefore, may have felt justified in regarding now as sufficiently certain what could be afterwards made certain, *id certum est quod certum reddi potest* (*Jackson* v. *Lawrence*, 11 Johns. (N. Y.), 191). But, in some respects, it is not quite so natural or safe a view to regard this last clause as a reservation or exception, nor does the judge call it so in the ruling. An exception or reservation is sometimes void for uncertainty, and sometimes for being in favor of third persons. 4 East, 464; *Thompson* v. *Gregory*, 4 Johns. (N. Y.), 81; 9 Id., 73; Co. Litt., 143, *a*.

Those objections have been urged in this case; and it may, therefore, be least exceptionable to regard the last clause, as it is called in the deed, a condition. *Rice* v. *Osgood et al.*, 9 Mass., 43; *Gray* v. *Blanchard*, 8 Pick. (Mass.), 284. This view seems well sustained both by the language used and the nature of the transaction. The preceding clause is in words, *eo nomine*, *excepting* or *reserving*, while this is *eo nomine* on "*condition*"; and the lots *there referred to were

*376]

previously set apart, marked, and identified, while these were not so set apart, but still held in common and in some degree uncertain. The phraseology was also changed in the last clause from "excepting and reserving" to "condition," probably because the latter expression was deemed more appropriate as to lots not then selected or identified, but which were intended and virtually agreed to be, afterwards.

Such an agreement would in its spirit, no less than words, be a condition, as it would be "a bridle" or restraint on the grant, which is one of Shepherd's definitions of a condition. Shep. Touch., ch. 6.

The nature of a transaction, as well as the language, may well be regarded always in deciding whether a case is a reservation or a condition. 13 Me., 31; 15 Id., 216; 4 Johns. (N. Y.), 82; 1 T. R., 645; Shep. Touch., ch. 6, p. 122; 12 Pick. (Mass.), 156.

A charge like this, imposed in a deed by the state, though using words of reservation, was adjudged to be a condition in *Hovey* v. *Deane*, 13 Me., 31; and same case, 15 Id., 216; *Dunlap* v. *Stetson*, 4 Mason, 349. So a provision may be inserted in an instrument as to land, which will be construed either a condition or a covenant, as seems most appropriate. Bac. Abr. *Condition*, G. And words of limitation may be taken for a condition. Com. Dig. *Condition*, A; 11 Mod., 651.

But whichever the last clause should be considered as operating, consistent with legal principles, the result on the interests of the parties would be much the same. In the former view, as an exception or reservation, the land afterwards set apart for these lots would be regarded as never passing at all to the mortgagee or his grantees, while, in the latter view, as a condition, it would pass, but only on condition of being vested in the settlers, so soon as set apart and conveyed to them; and as the latter has already been done, the title would not be now in the tenant, under either of these views.

Were it necessary to give validity to the clause, and it would be bad either as a reservation, exception, or condition, it would be no unusual stretch of construction to consider it as a covenant to stand seized to the use of the settlers, and in this way reach a like result. *Jackson* v. *Swart*, 20 Johns. (N. Y.), 87; Bedel's case, 7 Co., 40.

A deed is, if possible, to be made operative in some way; and the construction should be liberal, in order to effect that object, and enforce the original design. 2 Wils., 75; Willes, 682; 5 Barn. & C., 106; 2 Saund., 96, note; Prest. Conv., 41; Broom Leg. Max., 238, 239.

Making these important clauses, then, in the deed from

Ingersoll, operative, and near as may be in conformity to the original design, which was both legal and laudable, why should they not bind subsequent mortgagees and grantees?

*377] Samuel Mallett, having obtained no interest in the six thousand *acres, so far as regards the lots then marked and reserved, and none whatever in the whole tract, free from the condition and charge we have been describing, —of other lots to be afterwards marked and assigned, as these have been, to settlers,—how could he pass to others, by a mortgage, a greater interest than he obtained?

That condition or charge was on the land, as an encumbrance, by the very terms of the deed to him; and he could not, if he tried, convey a title to the land which should be free from it. Such a condition attaches to the land wherever it goes, "although the same pass through the hands of a hundred men" (Shep. Touch., ch. 6; Perkins, § 818, 2 Prest. Conv., 412; 1 Co. Litt., 230, *b*). In our view, it operates like a covenant, which runs with the land; and all assignees are bound by covenants real, that run with the land. Spencer's case, 5 Co., 15–17; Co. Litt., 47, *a;* Shep. Touch., 161, ch. 6, 176; Com. Dig., *Condition;* 3 T. R., 393; 1 Paige, (N. Y.), 412, 455.

The condition, or charge, was also public,—on record, *in extenso*, in the deed from Ingersoll. That deed was expressly referred to in the mortgage to the College; and the value of the whole, in Samuel Mallett's hands, or in those of his mortgagees, would be known by all to be, at that time, reduced in proportion.

By proceeding afterwards to get the partition made by the proprietors, and to execute the deed to David Mallett, so as to perform his duty in respect to this condition, he did not, as seems to be contended, reduce further the value of the land to himself or mortgagees, or part with any portion of it not before subject to be thus taken.

The extent and nature of his title being spread upon record, nobody could be misled, and nothing could pass by his mortgage, free from the same conditions and reservations under which it had come to him; and whenever certain lots should afterwards be set apart and conveyed to settlers,—it being in conformity with the condition,—they could not and ought not longer to be held or retained under the mortgage deed. Nor is the subsequent setting apart of the premises, and the conveyance of them to settlers, a withdrawal of any part of the mortgaged security, as is argued by the plaintiff in error; because that security embraced the six thousand acres only as subject to such an event; and its

happening was provided for, and was an open and express condition of the title to the property which was held as security.

It is likewise urged by the plaintiff in error, that Mallett might, like Ingersoll, have agreed to perform the duties towards settlers, in money. But he did not. So, without any agreement, he might have done it with money, and not left it to become an actual charge on the land, in his mortgage, though placed as a conditional charge on it by Ingersoll. But he did not. So it is said the condition here is a subsequent one, and the title vests, subject to be divested *only by a breach and an entry for condition broken, [*378 and which entry has never been made. *Rice* v. *Osgood et al.*, 9 Mass., 38; 2 Cruise, title 13, § 15.

But it has not been broken, and hence no entry, by Ingersoll or others, is necessary for condition broken. On the contrary, the condition has been fulfilled, by a performance of the duty to the settlers, in getting their lots set apart and conveyed to them; and thus the title to those lots is vested in them now, as the condition prescribed, rather than remaining in the grantee or mortgagee. *Rice* v. *Osgood et al.*, 9 Mass., 44.

There is no difficulty, then, about a breach and an entry, as every thing has been fulfilled in the manner it ought to have been done. So, in answer to another objection, it is clear that this fulfilment was attended to as properly by the mortgagor, before a foreclosure, as by the mortgagee. 18 Mass., 87; *Bradley* v. *Fuller*, 23 Pick. (Mass.), 9; 2 Greenl. (Me.), 132. The mortgagor was in charge of the land, and was still the owner, for all purposes except the security of the creditor. That security is not lessened by what he did in this respect.

Another point has been much argued in relation to the mortgage, which, in this view of the subject, is not material. It is, that the mortgage deed does not contain the condition. After describing the premises, it is true that it does not go into details as to the several exceptions, reservations, and conditions in the deed to Samuel Mallett, but merely adds, "being the same this day conveyed to me by Nath'l Ingersoll, as by his deed, reference thereto being had." This reference, it is contended, is not broad enough to include or cover the exceptions and conditions. But it could not be considered a forced construction to hold that the whole of the deed referred to should be regarded and considered as showing he intended to reconvey for security all, and no more or less, in any view, than what had just been conveyed to him. *Field* v. *Huston*, 21 Me., 69, 72; 22 Id., 327; *Foss et al.* v. *Crisp*, 20 Pick.

(Mass.), 121. The reference to the deed might as properly be considered to indicate the interests as the premises just received. In either view, the lots reserved would be reached, as they were connected not only with the title but the quantity of land meant to be conveyed. So as to any charges in the form of a condition imposed on the land, they would be embraced, even under a reference to the premises, as those charges are contained in the same sentenee, and tend to show a diminished quantity of land passing absolutely.

Both deeds were also parts of one transaction, and may well be construed together, as having a like object in respect to the extent of the interests no less than the premises. But was the conclusion different, the case would, in the view first *379] taken by us, and which is the legal view, be merely that of a grantor undertaking to sell or *mortgage a larger interest than he possessed, or an interest unencumbered, which was in fact encumbered; and the remedy for such an excess in the conveyance is an action on the covenants, and not to construe the deed as granting more than the grantor himself possessed.

There have been some other questions raised in the argument of this case, which it is not material to consider under the only ruling at the trial which is excepted to, and which relates entirely to what passed by the mortgage.

One of them is the effect of a former recovery by Foxcroft and Webber against Mallett, in the proceedings for a partition, where the title of the latter to the lots now in controversy was questioned and tried; but this, being a writ of right, is probably not barred by any prior recoveries between these parties. *Mallett* v. *Foxcroft*, 1 Story, 477. Another of these questions is the correctness of the partition made by the proprietors of this township, when the two lots in controversy were set off to Samuel Mallett. Such a partition, however, though the ruling on it is not excepted to in the record, is supposed to be valid under the statutes of Maine, and the usages that have long prevailed in New England among land proprietors of townships situated there. Smith's Laws of Maine, 175; 3 Shep. (Me.), 401; 12 Pick. (Mass.), 534; 3 Fair. (Me.), 398; 10 Mass., 146; 3 Pick. (Mass.), 396; 12 Mass., 415; 2 Greenl. (Me.), 213; 4 N. H., 99; 3 Vt., 290; 6 Id., 208.

In conclusion, it has been urged against the judgment we have formed in favor of the right of the demandant, that several actions have been tried in Maine, where his interests have been brought in question as to the premises, and decisions had against him; and that such local adjudications in

respect to the titles to real estate should control the opinions of this court. 9 Cranch, 87; 2 Wheat., 316; 10 Id., 152; 12 Id., 153; 2 Gall., 105. But on examining the particulars of the cases cited to govern this (3 Fair. (Me.), 398; 4 Shep. (Me.), 84, 88; 14 Me., 51), it will be seen that the construction of the mortgage to the College, in respect to this reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. 3 Sumn., 136, 277.

Let the judgment below be affirmed.

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*JAMES STIMPSON, PLAINTIFF IN ERROR, *v.* THE [*380
WEST CHESTER RAILROAD COMPANY, DEFENDANTS.

The practice of excepting, generally, to a charge of the court to the jury, without setting out, specifically, the points excepted to, censured. The writ of error not dismissed, only on account of the peculiar circumstances of the case.[1]

Where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the renewed patent, proof of the use of the thing patented during the interval between the original and renewed patents will not defeat the action.[2]

The seventh section of the act of March 3, 1839, has exclusive reference to an original application for a patent, and not to a renewal of it.

An original patent being destroyed by the burning of the patent-office, and

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[1] Where the charge is excepted to *in mass*, if any one of the propositions laid down by the judge be correct, even though others contain error, the exception will be overruled. *Rogers* v. *The Marshal*, 1 Wall., 644; *Harvey* v. *Tyler*, 2 Id., 328; *Johnston* v. *Jones*, 1 Black, 209. In *Harvey* v. *Tyler*, *supra*, the court, per MILLER, J., say: "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. This opportunity is not given when pages of instructions are asked in one prayer, and if refused as a whole, are excepted to as a whole. We might rightfully expect of counsel who prepare cases for this court, that they shall pay some attention to the rules which we have framed for their guidance in that preparation; as well as to those principles of law referred to, which are necessary to prevent the prayer that counsel has a right to make to the court for laying down the law to the jury, from being used as a snare to the court, and an instrument for perverting justice." (p. 339).

[2] APPLIED. *Battin* v. *Taggert*, 17 How., 84. CITED. *Henry* v. *Francestown Soapstone Stove Co.*, 2 Bann. & A., 223; *McWilliams Manuf. Co.* v. *Blundell*, 11 Fed. Rep., 421; see *Agawam Co.* v. *Jordan*, 7 Wall., 607.

the only record of the specifications being a publication in the Franklin Journal, the claim is not limited by that publication, because the whole of the specifications are not set forth in it.

Whether a renewed patent, after a surrender of a defective one, is substantially for a different invention, is a question for the jury, and not for the court.

As the thirteenth section of the act of 1836 provides for the renewal of a patent, where it shall be "inoperative or invalid by reason of a defective or insufficient description or specification," "if the error shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," the fact of the granting of the renewed patent closes all inquiry into the existence of inadvertence, accident, or mistake, and leaves open only the question of fraud, for the jury.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for East Pennsylvania.

It was a suit brought, in the Circuit Court, by Stimpson against the Railroad Company, for violation of his patent right.

On the 23d of August, 1831, Stimpson took out letters patent for an improvement in the mode of turning short curves on railroads. These letters were not given in evidence upon the trial, having been burned in the conflagration of the patent-office, in December, 1836, and no copy could be found. Secondary evidence was given of their contents by the following publication in the Franklin Journal.

"For an improvement in the mode of turning short curves on railroads, such as the corners of streets; James Stimpson, city of Baltimore, August 23.

"37. The plan proposed is to make the extreme edges of the flanches flat, and of greater width than ordinary, and to construct the rails in such a manner that where a short turn is to be made, the extreme edge of the flanch shall rest upon it, instead of upon the tread of the wheel, thus increasing the effective diameter of the wheel in a degree equal to twice the projection of the flanch. The claim is made to 'the application of the flanches of railroad carriage-wheels to turn short curvatures upon railroads or tracks, particularly turning the corners of streets, wharves, crossing of tracks or roads, and passing over turnabouts,' &c." Franklin Journal, vol. 9, p. 124.

[3] APPLIED. *Battin* v. *Taggert*, *supra*. COMMENTED ON. *Cahart* v. *Austin*, 2 Cliff., 528, 534. FOLLOWED. *Thomas* v. *Shoe Machine Manuf. Co.*, 3 Bann. & A., 559; *Combined Patents Can Co.*, v. *Lloyd*, 11 Fed. Rep., 151. RELIED ON *in dissenting opinion*. *Brooks* v. *Fiske*, 15 How., 228. CITED. *Seymour* v. *Osborne*, 11 Wall., 543; *Smith* v. *Merriam*, 6 Fed. Rep., 718. S. P. *Carver* v. *Hyde*, 16 Pet., 513; *Turrill* v. *Railroad Co.*, 1 Wall., 491; *Foote* v. *Silsby*, 1 Blatchf., 445; S. C., 14 How., 218; *Tyler* v. *Boston*, 7 Wall., 327; *Bischoff* v. *Wetherell*, 9 Id., 812; *Tillotson* v. *Ramsay*, 51 Vt., 309.

*On turning to pages 270 and 271, vol. 4, there will be found specifications of two patents granted to James Wright, of Columbia, Pennsylvania, for the mode of turning curves claimed by Mr. Stimpson. The only difference is, that Mr. Wright proposes to adapt his cars to several different curves by having three or more offsets in his wheels when necessary.

On the same day, namely, the 23d of August, 1831, Stimpson took out, also, letters patent for an improvement in the mode of forming and using cast or wrought-iron plates or rails, for railroad carriage-wheels to run upon. These letters being also destroyed, the following extract from the Franklin Journal was given in evidence:

Franklin Journal, vol. 9, p. 125. "39. For an improvement in the mode of forming and using cast or wrought-iron plates, or rails, for railroad carriage-wheels to run upon; James Stimpson, city of Baltimore, Maryland, August 23 (1831).

"The claim in this case is to 'the application of cast or wrought-iron plates for the use of railways on the streets or wharves of cities or elsewhere. The objects of said improvement being to employ rails that will not present any obstacles to the ordinary use of streets, or sustain injury therefrom, and so to form the plates at the intersections of streets or other crossings, that cars will readily pass over them, and also on circles of small radius.'

"The rails are to be formed with a groove in them to receive the flanches of the wheels; on one side of the groove, the width is to be sufficient for the tread of the wheel, on the other, it need not exceed three quarters of an inch. These rails are to be laid flush with the pavement of the streets. At corners to be turned, the rails are to be cast, or made of the proper curvature, one of them only being provided with a groove, as the flanch is to run upon the other, upon the principle described in No. 37. Provision is to be made by scrapers or brushes, preceding the carriages, to clear the grooves of dust, ice, and other obstructions."

In 1835, the first mentioned of these letters, namely, for an "improvement in the mode of turning short curves on railroads," were surrendered on account of a defective specification, and on the 26th of September, 1835, a renewed patent was issued for the term of fourteen years from the 23d of August, 1831. The schedule referred to in this patent was as follows:

"*Short Curves*,

"23*d August*, 1831.—*Renewed* 26*th September*, 1835.

"To all whom these presents shall come: Be it known, that

I, James Stimpson, of the city and county of Baltimore and state of Maryland, have invented a new and useful improvement in the mode of turning short curves upon railroads with
*382] railroad carriages, particularly those round the corners of streets, wharves, &c., and *that the following is a full and exact description of said invention or improvement, as invented or improved by me, namely:—I use or apply the common peripheries of the flanches of the wheels for the aforesaid purpose, in the following manner: I lay a flat rail, which, however, may be grooved, if preferred, at the commencement of the curvation, and in a position to be centrally under the flanches of the wheels upon the outer track of the circle, so that no other part of the wheels which run upon the outer circle of the track rails shall touch or bear upon the rails, but the peripheries of the flanches; they bearing the whole weight of the load and carriage, while the opposite wheels, which run upon the inner track of the circle, are to be run and bear upon their treads in the usual way, and their flanches run freely in a groove or channel; which treads are ordinarily about three inches in diameter less than the peripheries of the flanches.

"Were the bearing surfaces of the wheels which are in contact with the rails while thus turning the curve to be connected by straight lines from every point, there would thus be formed the frustrums of two cones (if there be four wheels and two axles to the carriage), or if but one axle and two wheels then but one cone; which frustrums, or the wheels representing their extremities, will, if the wheels are thirty inches in diameter, and are coupled about three feet six inches apart, turn a curve of about sixty feet radius of the inner track rail. The difference in diameter between the flanches and treads before stated, the tracks of the usual width, and the wheels coupled as stated, would turn a curve of a somewhat smaller radius, if the axles were not confined to the carriage in a parallel position with each other; but this being generally deemed necessary, the wheels run upon lines of tangents, and these upon the inner track being as wide apart in the coupling as the outer ones, keep constantly inclining the carriage outwards, and thus cause the carriage to tend to run upon a larger circle than the difference in diameter of the treads and flanches would otherwise give; but the depth of the flanches and the couplings may be so varied as to turn any other radius of a circle desired.

"What I claim as my invention or improvement, is the application of the flanches on the wheels on one side of railroad carriages, and of the treads of the wheels on the other

side, to turn curves upon railways, particularly such as turning the corners of streets, wharves, &c., in cities and elsewhere, operating upon the principle herein set forth.

"JAMES STIMPSON.

"Witnesses,—JAMES H. STIMPSON,
GEORGE C. PENNIMAN."

In October, 1840, Stimpson brought his action against the *West Chester Railroad Company for a violation of this renewed patent, and laid the infringement to have taken place in 1839. [*383

In April, 1842, the case came on for trial.

The plaintiff produced his patent, and gave evidence that the defendants had used upon their road several curves of this description.

The defendants disputed the originality of the invention of the thing patented, under which head of defence much evidence was given; and also contended that the groove was not claimed in the first patent of 1831, and therefore was not included in the renewed patent of 1835. The evidence of Dr. Jones upon this last head being referred to by the court below, it is proper to insert that part of it.

"*Interrogatory fifth.* What are the contents of the specification of the alleged improvement of August 23, 1831? What are your means of knowing what were their contents? If you know them, are they dissimilar or similar to those of the plaintiff's specification of September 26, 1835, a copy of which, marked A, is hereto annexed? If dissimilar, state in what particulars, and whether they are as to matters of form and substance, and particularly describe the difference, if any. Answer fully."

"To the fifth interrogatory, I answer, that the plaintiff exhibited to me the specification in question, previously to his filing the same in the patent office; as he likewise did at the same time the specification of a patent for 'forming and using cast-iron plates or rails for railroad carriage-wheels to run upon,' which last patent is noticed on page 125, vol 9, second series, of the Journal of the Franklin Institute. I then examined them cursorily, and expressed an opinion, that the improvements described in the two specifications might have been embraced in one, and that it would have been better to have pursued that course. The specification of the mode of turning short curves appeared to me incomplete; an essential feature of it being contained in that for 'forming and using cast-iron plates,' &c. The papers, however, remained as drawn up by Mr. Stimpson's legal adviser, and when the patents

were subsequently surrendered in 1835, it was thought best to preserve the division into two; it was probably in fact necessary to pursue this course, as I am not aware of any precedent for uniting two patents into one, although one may be divided into two or more.

"Nearly ten years have elapsed since I first saw the specifications upon which these patents were first issued, and nearly six years since I last read them; and my recollection of them extends to certain prominent points only. The claim under the patent for turning short curves, as given in vol. 9, p. 124, of my journal is, I have no doubt, literally correct. There has been an omission in the printing of inverted commas ["] *384] after the word 'turnabout,' &c. In this specification it was proposed to make the extreme *edges of the flanches flat, and of greater width than ordinary; this, however, did not enter into the claim, and it is not probable that I should have recollected the fact, had it not been noted in my journal, or called up by some other collateral circumstance. The main defect, in my judgment, of the original specification, in the patent for turning short curves, was the omission of the mention of the groove in the inner rail. I believe, however, that it was alluded to in this specification, but the description of it was contained principally, if not wholly, in the specification of the patent for 'forming and using cast-iron on wrought plates,' &c., above noticed; as may be inferred from a reference to my journal, vol. 9, p. 125, patent 39.

"*Cross Interrogatories.* 1. Did you or did you not prepare the papers of the plaintiff when his patent for short curves was surrendered and renewed? What was the object of such surrender and renewal? Was it or was it not that the claim of running over or across tracks at right angles might not continue any longer to be incorporated in the same patent with the claim for short curves, as it had been theretofore?

"To the first interrogatory, I answer, that I did prepare the papers of the plaintiff when his patent for turning short curves was surrendered for re-issue; that the object of such surrender and renewal was to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts; and to define the subject-matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained for 'forming and using cast or wrought-iron plates,' &c."

The bill of exceptions taken by the plaintiff was to the following part of the charge of the court to the jury, namely:—

"Having thus presented you with a view of the rules and principles of the common law applicable to the renewal of patents, as laid down by the Supreme Court, together with the provisions of the different acts of Congress on this subject, we will now state to you what is, in our opinion, their legal result.

"To authorize the surrender of an old patent and issue of a new one, consistently with the provisions of the original patent law of 1793, and the decisions of the Supreme Court, independently of any act of Congress conferring such power, there are these requisites indispensable to the power arising. (1.) The original patent must be inoperative or invalid for the causes set forth in the act of 1832,—the non-compliance with the third section of the act of 1793, for the want of a proper specification of the thing patented, through inadvertence, accident, or mistake, without any fraudulent or deceptive intention. This being the only case embraced in the law to which the authority conferred applies. (2.) 1, The defect in the specification, which makes it incompetent to secure the rights of the patentee, must have arisen from inadvertence, accident, *or mistake, and 2, not from any fraud [*385 or misconduct. The re-issue of the patent by the appropriate officer is presumptive evidence that the requisites of the law have been complied with, on the production of such evidence or proof otherwise as justified it; but the question of the validity of the new patent is a judicial one, depending on the fact of inadvertence or fraud, as you shall find it; and the opinion of the court on matters of law involved in the inquiry. 14 Pet., 458; 6 Id., 243; 7 Id., 321; Act of 1839 (5 Lit. & Brown's ed., 353). The reason why there must be an inquiry into both the inadvertence and fraud arises from the settled construction of the act of 1793, that where the defect is not owing to fraud, the defendant is entitled to a verdict and judgment in his favor, but not to a judgment that the patent is void for the defect, unless he shows that the defect was owing to fraud. 1 Baldw., 6 Pet., 246. You must then be satisfied, affirmatively, that the defect of the patent arose from the inadvertence of the patentee, and negatively, that it did not arise from his fraud or misconduct, or, in the words of the acts of 1832 and 1836, 'without any fraudulent or deceptive intention.' The finding the fact of inadvertence may negative the fact of fraud, but in this, as in other cases, fraud may be inferred from gross inadvertence or negligence, such as may be the indication of a design to deceive the public. The defects in the old patent must be in the specification, when it does not comply with the requisites of the third section of the

act of 1793, calling for a correct description of the thing patented (6 Pet., 247); a new one may be issued on compliance with those requisites, which are there prescribed. But the new patent must be confined to the thing patented by the old one,—the thing invented or discovered,—'*the same invention;*' it cannot embrace another substantive and essential matter, which was not before patented; the thing, the invention, must be the same in both patents; the only object in the renewal being to cure a defect in the description, not to supply the omission of an essential part of the invention; the new patent cannot be broader than the old one. If the thing patented is the same in both patents, its public use did not, under the former laws, amount to an abandonment, or such an acquiescence as to affect the new patent on the ground of delay or negligence in the assertion of the right of the patentee, from the date of the old patent to its re-issue. But when an essential part is omitted, and the patentee suffers it to remain unpatented till it has come into public use, before the new patent issues, it will be subject to the same rules which apply to an original patent, making it incompetent to protect the patentee in his claim to such part in virtue of the patent re-issued, if it was not described in the one surrendered. The thirteenth section of the act of 1836 authorizes a new *386] improvement, invented since the first patent, to be added in a renewed *one; no law gives any authority to add an improvement, which had been invented by the patentee before the original grant; for it is not and cannot be any part of the description or specification of another distinct improvement. A patent for the combination of the parts of an old machine must show wherein such combination exists; what parts compose it; how they are combined in their action; if the description is defective, it may be corrected by a new one; the correction, however, must not extend beyond the combination of the parts first specified, as the introduction of other parts, not before specified, makes an entire new combination; consequently the thing patented becomes essentially different, being not the same invention, but a new one, made by a combination of a part not combined before, which might be a proper subject of an original patent, yet would not be authorized in a renewed one.

"These are the tests which the law applies to the description of the thing patented, in order to ascertain whether, in the words of the act of 1832, the old patent was 'invalid or inoperative' by reason that the conditions of the former law not having been complied with, or, in the language of the Supreme Court, the patent 'is found to be incompetent to

secure the reward which the law intended to confer on the patentee for his invention.' In such case, the patent may be surrendered for re-issue, in order to correct the defects which invalidated the first, but the law expressly makes the new patent 'in all respects liable to the same matter of objection and defence' as the old one, and imposes on the patentee the obligation 'of compliance with the terms and conditions prescribed by the third section of the act of 1793.' This is done by showing, according to its requisitions, what was the invention, the thing patented, by a designation of the invention principally, made in fuller, clearer, and more exact terms than those used, so as to give it validity and effect, and secure the same invention, which is the only legitimate office of the renewed or re-issued patent. A specification consists of two parts,—description and claim; the descriptive part is the explanation of the improvement in all the particulars required by the law; the claim or summary, at the close of the description or specification, is the declaration of the patentee of what he claims as his invention, by which he is bound, so that he can claim nothing which is not included in the summary, and could disclaim nothing which was included in it till the passage of the act of 1837. But the summary may be referred to the description, and both will be liberally construed to ascertain what was claimed, and if the words will admit of it, both parts will be connected in order to carry into effect the true intention of the patentee, as it may appear on a judicial inspection of the whole specification. This makes it a question of law what is the thing patented, depending not on the actual or supposed intention of the patentee, but the conclusion of the law *on the language he has used to [*387 express it; a part of the description may be construed as a claim, and carried into the summary, and made a part of the thing patented, the effect of which is the same as if it was included in the summary in express terms. *Cooper* v. *Matheys*, C. C. MSS. To authorize a recovery for the violation of a patent right, the plaintiff must show that he is the inventor of every thing he claims as new, that it is embraced in the patent, and that every thing so claimed and patented has been infringed by the defendant; thus, where the patent is for a particular combination of the parts of an old machine, and the defendant has not used the whole combination as specified in the description, and carried into the summary, the plaintiff cannot recover. *Prouty et al.* v. *Ruggles*, 16 Pet., 336."

The court then proceeded to state the substance of the plaintiff's declaration, and referred to the patent of 1835, and the specification thereto attached, in order to ascertain the

thing patented by that patent which was stated therefrom, they then inquired what was the thing patented in 1831, by referring to the evidence of Thomas P. Jones, contained in the deposition aforesaid, in connection with the Journal of the Franklin Institute referred to by him. The court, remarking that there being in evidence no copy of the patent of 1831, any drawing or specification of the thing patented, or other proof of the contents of either than was contained in the deposition and Journal aforesaid, then gave their opinion to the jury, that, on this evidence, the use of grooves was not claimed, and was no part of the thing patented in 1831 for turning short curves, but was a part of the thing patented in 1835. That it was an essential part of this invention, as Jones testified, and without which all the witnesses agreed that the invention was useless; as without the groove the cars would run off the road, and that the patent was not for any parts of the machine which were new, but for a new combination of the old parts. It was then submitted to the jury, whether, on the evidence aforesaid, the omission of the groove in the patent of 1831 arose from inadvertence, and if it was done contrary to the advice of Jones, and in conformity with the opinion of the legal adviser of the plaintiff, and whether, without the groove, the description of the thing patented was sufficient, under the third section of the act of 1793, which was read and commented on by the court, who then proceeded as follows:

"The Secretary of State is a ministerial officer, who must issue a patent if the requisites are performed. 6 Pet., 241. The question of inadvertence or mistake is a judicial one, which the Secretary cannot decide, nor those judicial questions on which the validity of the patent depends. He issues the patent without inquiry. The correct performance
*388] of all the preliminaries to the *validity of the original patent are always examinable in the court where the fact is brought. 6 Pet., 242, 6, 47.

"In the application of the law to the evidence before you, the first inquiry is into the state of facts existing at the time of granting the patent of 1835; did they present a case for renewal, under the rules of law on which we have given you our instructions? Whether the original patent was invalid or inoperative is more a question of law than fact, to be ascertained on a judicial inspection of the patent, specification, drawings, models, and the evidence of the contents; the court must construe all written evidence; but as depositions are considered merely as oral testimony, a jury must decide what parts are proved by them. The court must take as true the

statements of witnesses as they are made, and lay down the law on the assumption of their credibility, and both court and jury must take an agreed or admitted uncontested state of facts to be their rule of action; a jury may deem a witness unworthy of credit, or not believe his statement, but ought to do neither without good cause. Whether the defects in the old patent arose from inadvertence or otherwise is also a mixed question of law and fact,—of law so far as depends on written, and of fact as to parol evidence; on this subject you have the evidence of Dr. Jones, who officially examined the old patent, &c., and made out the new, and we are mainly left to ascertain the facts in relation to both patents from him. In laying down the law to you, we assume his verity in all he says, and, taking his statement as proof of the facts there existing, our opinion is, that, connected with the publication in the Journal of the Franklin Institute, in 1832, when the matter was fresh in his recollection, and the specification in the new patent, the old one was invalid and inoperative, by reason of non-compliance with the requisites of the act of 1793. That it did not embrace the groove, which was essential to its validity, that the new patent is not for the same invention, and that the plaintiff has not made out a case of such inadvertence, accident, or mistake as justified the issue of the new patent, inasmuch as it appears from the patent for plates on railroads, issued at the same time with the one for short curves, that he had known and described the grooves.

"It is for you to say, whether you will take this evidence as we do; if you discredit it, in whole or in part, you will find accordingly.

"Another important question arises in this case, on the construction of the seventh section of the act of 1839, taken in connection with former laws, which is, whether the plaintiff can sustain an action for the use of his invention, in the construction of his curves, before the granting of the patent of 1835.

"This section provides,—'That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to *the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such [*389

invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent.'

"Though this act is retrospective in its effects on then existing patents, it is not void on that account; it was within the constitutional power of Congress to enact it as a rule for all cases to which its words and intentions apply, by its fair and legal interpretation, which we must ascertain by looking at the old law; the mischief and the remedy, which must be traced through the decisions of the Supreme Court; and the acts of Congress on the same subject.

"In 1808, an act was granted to Oliver Evans, renewing his patent, which had expired by its own limitation; in the interval, the defendant had constructed a machine of his invention, and continued to use it; after the new patent issued, he was held liable, according to the words of the law, for such subsequent use, but the Supreme Court thus express their opinion of the case, had it rested on general principles:—'The legislature might have proceeded still further, by providing a shield for persons standing in the situation of these defendants; it is believed that the reasonableness of such a provision could have been questioned by no one, &c., &c. The argument, founded on the hardship of this and similar cases, would be entitled to great weight, if the words of this proviso were obscure and open to construction.' *Evans* v. *Jordan*, 9 Cranch, 203."

And thereupon the counsel for the plaintiff did then and there except to the aforesaid charge and opinion of the said court.

The above not being enough of the charge of the court below to the jury, the counsel for the plaintiff in error applied for and obtained a writ of *certiorari* to bring up additional extracts.

The return was as follows:

On searching the record and proceedings of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the third circuit, in a certain cause therein lately depending between James Stimpson, plaintiff, and the West Chester Railroad Company, defendants, we find the following omission in the charge of the judge to the jury, which, in obedience to the annexed writ of *certiorari*, is hereby certified, to wit:—

"In *Morris* v. *Huntington*, Judge Thompson held, that after
*390] a patent was surrendered, the invention would be open to public use *without hazard, so far as depends on

such patent. 1 Paine, 355. In *Grant* v. *Raymond*, the court notice the case of the use of the invention between the date of the old and before the new patent, but remark, that that defence is not made; and the Circuit Court did not say that such defence would not be successful; and they add,—'The defence, when true in fact, may be sufficient in law, notwithstanding the validity of the new patent.' 6 Pet., 244. The court, in this and the subsequent case of *Shaw* v. *Cooper*, held, that the new patent was a continuation of the old, but gave no opinion on the question, whether damages could be recovered for the intermediate use of a machine constructed after the first.

"This question was, however, put at rest by the last clause of the act of 1832, which, assuming that damages could not be recovered for a use of the patented invention, before the new patent, provides:—'But no public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall in any manner prejudice his right of recovery for any use or violation of his invention, after the grant of such new patent as aforesaid.' The act of 1836 is still more explicit, by providing for the right of recovering damages only for 'causes subsequently accruing.'

"It thus appears, that the act of 1839 goes only one step beyond those of 1832 and 1836, and is a dead letter, if it protects the person who has purchased, constructed, or used the machine invented by the patentee no farther than from damages accruing prior to the new patent, for the same protection is given by those laws.

"To have any effect, it must be held to be, in the words of the Supreme Court, 'a shield,' which covers the party from all liability, and by so construing it, the act of 1839 embodies the very principle, and none other, which, in *Evans* v. *Jordan*, 9 Cranch, 203, the court declared to be one which they believed that no one could question its reasonableness, in order to prevent the hardship of a case precisely similar in principle to that presented. Such construction is the more reasonable, when it is considered that the protection is confined to the specific machine used before the patent, and cannot be extended to protect the use of any new or other machine, or construed to invalidate the patent, or justify the subsequent use by any other persons than those so protected.

"That such was the intention of Congress in relation to an original patent cannot be doubted, and we can perceive no reason why they should omit the very case on which the

Supreme Court had so explicitly declared their opinions, if the words of the act of 1808 would have permitted them to apply an unquestionable principle. The act of 1839 not only does not exclude its application, but authorizes and requires it. In referring to the application *for a patent, it was evidently intended to apply it to the patent on which the patentee sought to recover, the renewed one, on which alone his right rested, for the law cannot be presumed to be intended to apply to a patent which, being invalid or inoperative, as a ground of action, had been surrendered, cancelled, and cancelled by the act of the patentee himself, and was thus divested of all intrinsic efficiency by the acts of 1832 and 1836. It could have no effect without the aid of the new one, and it would be absurd to suppose that the law overlooked the application for the only effective patent, and looked only to that which derived new life from it; besides, the act of 1839 would take from a defendant the protection of the acts of 1832 and 1836, by confining its operation to the old patent, for damages could then be recoverable for the use between the date and the renewal,—a conclusion wholly inadmissible on a sound construction of either the acts in question.

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"The act of 1832 expressly declares that the new patent shall be subject in all respects to the same matters of objection and defence as the original one; from which it necessarily follows, that if the purchase or construction of a machine, before the application for an original patent, would protect a defendant from all liability to the patentee, the same defence is available when applied to the new one.

"This view of the act of 1839 suffices for the purposes of the present case; a broader one has been taken of it, in all its bearings, in another district in this circuit, which it is not now necessary to examine to decide the point now under consideration.

"In the case before us, it clearly appears that the defendants constructed their railroads with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

The case was argued by *Mr. C. J. Ingersoll* and *Mr. J. R. Ingersoll*, for the plaintiff in error, and *Mr. Miles*, for the defendants in error.

The brief of the counsel on the part of the plaintiff in error was as follows:—

This case comes up for argument upon a bill of exceptions taken by the plaintiff to the charge of the learned judge in the court below, by which, in effect, the jury were directed to find for the defendants, which they accordingly did.

The plaintiff took a patent, the 23d of August, 1831, for an invention or improvement in the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn short curves upon railroads.

It was surrendered in consequence of a defect in the specification, and a new patent taken by him the 26th of September, 1835.

*"The object of such surrender and renewal (see deposition of Dr. Thomas P. Jones, a witness for the [*392 defendant, in answer to the first cross interrogatory, *ante*, p. 384) was to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts, and to define the subject-matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained, for forming and using cast or wrought-iron plates, &c."

The action was brought at the October session, 1840. The curves used by the defendants were said to have been constructed and first used by them between the dates of the first and second patents, the use being continued by them since the date of the second patent.

The learned judge, after considering at length the law touching this part of the case, said to the jury:—

"It clearly appears that the defendants constructed their railroad with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

In *Grant* v. *Raymond*, 6 Pet., 244, the defendant made it a question, whether the patentee who took an amended patent could recover damages for the defendant's use, subsequent to the amendment of the patent, of machinery which had been constructed prior to the amendment. The court did not decide the point, thinking it did not come directly up for decision. But they said of it,—"This objection is more formidable in appearance than in reality. It is not probable that the defect in the specification can be so apparent as to be perceived by any but those who examined it for the purpose of pirating the invention."

Grant v. *Raymond* was decided early in 1832.

On the 3d of July, 1832, was passed (4 Lit. & Brown's ed. 559) the first act by which the amendment of patents for defective specifications was statutorily recognized. The third section of the act contains a proviso, that the new patent shall be open to all objections which existed against the old one, by virtue of which, if the phrase stood alone, a defendant in this case, for example, might say, I used your curves before 1835,—before the date of your patent,—that is, between the new patent and the old one, and as a use by the public prior to the date of the patent would be fatal as against the old patent, so it is against the new.

Now to meet such an argument, the same proviso goes on to say, that no use of the patented invention between the dates of the first and second patents, excepting under a surrender of the invention to public use, shall prejudice the patentee's right to recover damages "for any use" after the grant of the new patent.

We quote at length the proviso of the third section.

*393] *"*Provided however*, That such new patent so granted shall, in all respects, be liable to the same matters of objection and defence as any original patent granted under the said first-mentioned act.

"But no public use or privilege of the invention so patented, derived from or after the grant of the original, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall, in any manner, prejudice his right of recovery for any use or violation of his invention after the grant of such new patent as aforesaid."

It is submitted, that, by the terms of this statute, to use, after the date of the second patent, the patented machinery, even though the specific machine used had been constructed and used between the dates of the first and second patents, is expressly denied to the public.

On the faith of this statute of the 3d July, 1832, the plaintiff, in September, 1835, surrendered the patent granted him the 23d August, 1831, and took an amended one.

Has any act of Congress changed the law in this particular since 1832?

As any such law, so far as regards this plaintiff, would be retroactive, it ought to be clearly expressed.

On the 6th of July, 1836, was passed the new patent act, by which the whole system was recast, but the thirteenth section, which relates to amended patents, says in broad terms:—

"And the patent so re-issued, together with the corrected

description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

It is submitted that the words, "for causes subsequently accruing," are not to be strained from their natural construction, in order to be made to retroact against the rights already vested under the protection of a statute; and that the cause of action against these defendants, as far as concerns their use of the patented invention since the 26th of September, 1835, is a cause subsequently accruing, within the just and obvious meaning of the act.

In 1837, the 3d of March, was passed an amendment to the law of 1836.

The plaintiff submits that the seventh and ninth sections of the act of 1837 bear on his case, by analogy. They permit a patentee who has patented too much, and more than he invented, to make disclaimer of the excess, with the same effect, as regards the validity of the patent, as if his disclaimer were part of his original specification. That is to say, the patentee shall recover as if his patent had been originally right instead of wrong; and no exception is made in favor of parties who, like the defendants here, *use, [*394 after disclaimer, one of the patented things, which they had constructed and begun to use while the patent was too broad; the legislature being influenced, perhaps, by the suggestion of this court in *Grant* v. *Raymond*, that that party is not entitled to much favor, who scans a specification in order to pirate it.

On the 3d of March, 1839, the latest amendment of the patent laws was passed.

The seventh section of this act is cited by the learned judge, who asks, what this section means, if it do not mean that the use of a patented machine shall be free to a defendant after the patent, if he constructed it before. It reads thus:—

"Sect. 7. *And be it further enacted*, That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and to vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use, prior to the applica-

tion for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

It is admitted, in answer to the learned judge, that the seventh section of the act of 1839 was intended to protect defendants, constructers of machinery prior to the patent, in the use of such machinery after the grant to the patentee. This section, which has no reference to renewed or amended, more than to all other, patents, is believed to provide for a case, till 1839 unprovided for; namely, the case in general, whether it arise under an original patent, or under one which has been amended, or which has been modified by disclaimer of the use by a defendant, after the issuing of the letters, of a machine such as they patent, but which specific machine was purchased or constructed before their date. But it is respectfully submitted, that this prior use meant a use prior to the first or original application of the inventor for his patent, and that the legislature had not in their contemplation the second application of the inventor, when they used the words "prior to the application of the inventor or discoverer for a patent." The last clause of the section has obvious reference to the original application alone, when it is declared that "such purchase, sale, or use, prior to the application for a patent," shall not (except under certain circumstances) make the patent invalid; for it was clear already, and quite independently of this statute, that no renewed or amended patent could be worth paying for, if the use of the patented machinery by third persons, prior to the renewal, could make it invalid.

*395] *Grant* v. *Raymond*, however, furnishes the best answer to the learned judge's position, that the plaintiff's patent is liable to be damaged by what has taken place since the date of the original letters. At page 244 (6 Pet.), the court says:—

"It has also been argued, that the new patent must issue on the new specification, and on the application which accompanies it. Consequently, it will not be true that the machine was 'not known or used before the application.' But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application."

The plaintiff in error contends, that a true interpretation of the letter of these several acts, and a due regard to the spirit of all recent legislation on the subject of patent-rights, which has been kind and liberal towards patentees, enforce the con-

clusion, that it was meant, when the new patent was granted, to give to the new, in all particulars, the charter of the old, unless when restrained by express words to narrower limits. And further, that while, for obvious reasons, the acts deny to the patentee a right to recover damages, under the new patent, for a use of the invention of earlier date than the patent itself (which denial is in terms), no express words of the statutes, or fair or necessary implication from them, or leaning, can be found, in the whole course of the legislation since 1832, to warrant the conclusion that the new patent does not confer upon the grantee an entire monopoly of the fruits of his invention, from the date of the second letters to the expiration of the fourteen years from the date of the first.

The plaintiff in error therefore assigns for error the learned judge's instructions to the jury, recognizing the defendants' right to use the patented invention, after the date of the second patent, provided they had commenced its use prior to that date, and continued after that date to use only the specific machine at first used.

The learned judge also charged the whole case to be against the plaintiff upon another question, namely, that of the description of the "groove," in the original patent.

The judge was of opinion that the groove was not in the first patent, and was in the second; and therefore that the second was broader than the first, and not confined to the thing there patented, and thus was defective as an amended patent. The plaintiff's patent being, as he supposed, established fully, by judicial sanction of the highest sort, in his contest with the Trenton Railroad Company, reported in 14 Pet., 448, had not even brought with him, when he came to try his cause in Philadelphia, the original letters patent, and the drawings which accompanied them. Nor was any notice given him by the defendant to produce them.

The result of his suit against the Baltimore and Susquehanna *Railroad Company, tried in the Maryland *396
District, in April term, 1843, when both the original patent and the drawings were produced in court, proved to be quite ill founded the attempt of the defendants, in the present case, to criticise his second patent as actually varying from the first, by the addition of this new matter, the groove.

He is aware, however, that he must sustain his case as it appears by this record, and he proceeds to do so.

The whole invention of the plaintiff consisted of a new method of attaining conical action in turning short curves on railroads. And the groove had no more to do with it than this:—that when to attain this action the outer wheel was

mounted upon its flanch, the groove, by receiving the inner wheel, prevented the car from slipping off the track—a very material consideration, it is true—in turning the corner; and so was the car, or the steam-engine that drew the car; but neither of them had anything to do with the plaintiff's method of producing conical action. Without a groove, just as without steam, a horse, or other power, the corner could not be turned; and therefore, in describing the plaintiff's invention, both this power and the groove must needs be referred to; but it is respectfully denied, that more than the merest allusion to either is necessary, neither of them being any part of the invention, nor so occult as to demand, for even the most unenlightened observer, more than a mere allusion to it.

Now it was in proof from the witness called by the defendant to testify to the contents of the original specification, that it alluded to the groove.

"I believe, however, that it (the groove) was alluded to in this specification."—Evidence of Dr. Jones.

This allusion to the groove, in the first patent, the learned judge rules, in his charge, to be insufficient, and in the paragraph, *ante*, pp. 387, 388, after so holding, he goes on to declare, that the groove should have been "claimed." It may be mentioned that it is not claimed in the new patent, nor even alluded to in the summary of the specification; so collateral is it to the invention.

The plaintiff in error further assigns for error, in this portion of the charge touching the groove, the learned judge's decision against the plaintiff's right to claim under his patent, because of his alleged omission in regard to the groove; and particularly to the judge's saying, that, assuming the truth of Dr. Jones's deposition, the opinion of the court was, that the old patent was "invalid and inoperative, by reason of noncompliance with the requisition of the act of 1793. That it did not embrace the groove, which was essential to its validity that the new patent is not for the same invention."

Also, the learned judge's taking from the jury the question, *397] which came fairly up as a question of fact, namely, whether this mention *of, or allusion to, the groove was or was not too slight a description of that part of the combination to enable one skilled as an engineer to make a curve, or to stand for a compliance, by the patentee, with the requisition of the statute touching the proper description of the invention.

Also, the learned judge's deciding it to be a matter of law, and not of fact for the jury, what the thing patented in 1831 was, when the evidence of what it was lay not in a written

paper, which the judge could read and construe, but in parol evidence, and explanations *per testes*.

Also, the learned judge's not giving the due legal effect to the secretary's seal and letters patent, as *primâ facie* evidence that the second patent legitimately succeeded to the first, and to his assuming, on the contrary, that it was incumbent on the plaintiff, and not on the defendant (who assailed it), to show what the first patent contained, and what its character and defects were, and in the absence of the patent, and of any notice or call for it by the defendant, and in the absence of any satisfactory account of its contents to the learned judge, making the plaintiff, and not the defendant, responsible for the imperfectness of the proofs regarding the same.

The judge left nothing to the jury, as distinctly appears in his summing up, in regard to the groove (*ante*, p. 388), but the question whether Dr. Jones's testimony was to be believed or not. If believed, he told the jury they must find for the defendants, the old patent being defective, in not embracing the groove, and the new patent, which he said did embrace it, being therefore for a different invention altogether.

The plaintiff in error also assigns it for error, that the learned judge ruled "mistake," in the statute about amending patents, to mean inadvertence or accident only, and excluded cases of honest mistakes of judgment.

Mr. Miles, for the defendants in error, filed the following brief.

Abstract of Case.

1. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. The plaintiff in the Circuit Court is the plaintiff in error in this court. The verdict in the Circuit Court was for the defendants.

2. The action was brought to recover damages for an alleged infringement by the defendants of an exclusive right, alleged to belong to the plaintiff, to make, use, construct, and vend an improvement "in the mode of turning short curves on railroads," of which he claimed to be the original inventor, and alleged to have been secured to him by letters patent of the United States, according to the acts of Congress.

The plaintiff claimed under letters patent, dated September 26th, *1835, which recited that letters for [*398
the same improvement were granted to him on August 23d, 1831, but which were "hereby cancelled on account of a defective specification."

3. The plaintiff declared on the letters patent of September

26th, 1835, in four counts (only varying in the allegation of different modes of infringement, namely, making, constructing, selling, and using), all setting forth that "the said letters patent (that is, of August 23d, 1831) were cancelled in due form of law, on account of a defective specification."

4. The defendants pleaded not guilty, gave due notice to the plaintiff, under the acts of Congress, of a defence based upon the want of originality of invention of the thing patented on the part of the plaintiff, under the several patents of 1831 and 1835, said notice including the prior use and knowledge of other persons, and of prior printed and published descriptions of the same, &c., and under such plea and notice gave evidence to the jury.

The original letters of the 23d of August, 1831, were not in evidence, they having been destroyed in the conflagration of the patent-office in December, 1836, nor was there any copy of them given in evidence.

Their loss or destruction having been proved, secondary evidence was given of their contents. (Journal Franklin Institute, vol. 9, p. 124, No. 37; and by deposition of Dr. Thomas P. Jones).

The claim, by this evidence, under the patent of 1831, was "to the application of the flanches of railroad carriage-wheels to turn short curvatures upon railroads or tracks, particularly turning the corners of streets, wharves, crossing of tracks or roads, and passing over turnabouts," &c. No mention was made therein of the use of a groove upon the inner circle for the flanch to run in, so as to enable the wheel on the inner circle to run on its tread, without which there was evidence tending to show that the whole alleged invention was useless.

The claim under the patent of 1835 was "to the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn curves upon railways," &c., "operating upon the principles herein set forth." The specification referred to in this summary describes the use of the flanch running on the surface of the outer rail, and of the tread running on the inner rail, which is formed with a groove to receive the flanch of the wheel on the inner rail, as the essential parts, which, combined together, form the improvement.

5. Upon the trial, several questions of law and of fact arose. His honor, Mr. Justice Baldwin, charged the jury upon the law, and left the facts falling within the scope of the principles of the law, as laid down by him, to the determination of the jury.

Points of law arising under the Charge contended for by Defendants.

The third section of the act of 21st February, 1793, in substance, provides that the applicant for a patent shall give a description, in full, clear, and exact terms, of the thing invented, and its modes of application.

By the sixth section of the same act, a defendant in a suit brought on letters patent may show that the description (that is, specification) does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the desired effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing secured by patent was not originally discovered by the patentee, &c.

The third section of the act of July 3, 1832, provides, in substance, that if any patent shall be invalid or inoperative by reason of non-compliance with the terms of the third section of the act of 1793, by "inadvertence, accident, or mistake," and "without any fraudulent or deceptive intention," it may be lawful for the secretary of state, on surrender of the original patent, to grant a new patent, on compliance with the conditions of the third section of the act of 1793, for the residue of the term unexpired.

The thirteenth and fifteenth sections of the act of 4th July, 1836, which supplied the former laws enacted on the subject, contain in substance the same provisions as to the inoperation of a patent by reason of the defective description, and allowing a surrender and re-grant, where the defect arose from "inadvertency, accident, or mistake, and without any fraudulent or deceptive intention."

The seventh section of the act of March 3, 1839, provides, "that every person or corporation who has, or shall have, purchased or constructed any newly invented machine, &c., prior to the application by the inventor, &c., for a patent," may use and vend it at all times, without liability to the inventor or any person, &c.

Under these acts, the following points are submitted to have been judicially decided:

1. That where a patentee, under the act of February 21st, 1793, has not complied with the terms of its third section, even through inadvertence, accident, or mistake, the plaintiff cannot recover for an infringement prior to a surrender and new grant. *Grant* v. *Raymond*, 6 Pet., 244; *Shaw* v. *Cooper*, 7 Id., 320; *Whitney* v. *Emmett*, 1 Baldw., 303.

2. That if the patentee under the act of 1793 has not com-

plied with the terms of its third section, through fraudulent
*400] and deceptive intention, by concealment of or addition to his real discovery, his *patent, by the sixth section, is absolutely void. *Grant* v. *Raymond*, 8 Pet., 246, 247; *Whitney* v. *Emmett*, 1 Baldw., 303.

3. (1.) That a surrender under the act of 1832 and a new grant are only sustainable where the defect in the description of the first patent was the result of inadvertence, accident, or mistake. *Grant* v. *Raymond*, 6 Pet., 246, 247. (2.) That a new grant, on such a surrender, is not sustainable, but is absolutely void, if it appear that the defect in the description of the first patent, whether of concealment or addition, was the result of a fraudulent and deceptive intention on the part of the patentee. (3.) That if a patentee surrendered his first patent, and, under pretence of an inadvertence, accident, or mistake in its description, obtained a new patent, adding thereto a new material or element of which he was not the original inventor, and which is necessary to make the thing patented useful, thus in the second patent specifying another combination, constituting a mode or machine sustantially different from that described and claimed in the first, it is fraud in the patentee, and the patent is void. *Grant* v. *Raymond*, 6 Pet., 218, 244; *Philadelphia Railroad* v. *Stimpson*, 14 Id., 462; *Shaw* v. *Cooper*, 7 Id., 292.

Note. The act of 1832 (July 3d), authorizing a surrender and re-grant, shortly followed the decision in *Grant* v. *Raymond*, 6 Pet., 218, (January term, 1832), and by express enactment provided for that which had before been allowed by practice and judicial construction only.

4. That an original patent, as well as that granted on a surrender of the first under these acts, are *prima facie* evidence only of the novelty and utility of the alleged invention, and of the compliance by the patentee with the terms of the several acts of Congress entitling him to a patent; but their validity is examinable in a judicial proceeding upon any such patent, part of the inquiry being within the province of the court where the construction of written documents is to be made, and part being for the determination of the jury where questions of fact are involved. *Grant* v. *Raymond*, 6 Pet., 218; *Shaw* v. *Cooper*, 7 Id., 282; *Philadelphia Railroad* v. *Stimpson*, 14 Id., 448; *Prouty* v. *Ruggles*, 16 Id., 336.

5. If a patentee's first patent be inoperative for want of a full and exact description, and he stands by for a long and unreasonable period of time, without surrendering and remedying the defect by furnishing such a description, and obtaining a re-grant, and in the mean time permits others to use

what he subsequently claims to be his invention, with a knowledge of such use without objection or asserting his right, this is evidence from which a jury may infer his acquiescence and abandonment to the public as a matter of fact. *Shaw* v. *Cooper*, 7 Pet., 320–322.

6. Under the act of 1839, if the defendants purchased or constructed this mode of turning curves, before the application for the *patent of 1835, and this combination or mode described in that patent was newly invented by the patentee, the plaintiff cannot recover, notwithstanding the act of 1839 was subsequent to the dates of such purchase or construction, and the patent of 1835. *Shaw* v. *Cooper*, 7 Pet., 320–322; *McClurg* v. *Kingsland*, 1 How., 204; *Evans* v. *Jordan*, 9 Cranch, 201. [*401

Note 1. This statute was intended to provide expressly and in terms (designating a specific point of time) for all that class of cases of implied acquiescence and waiver in favor of the public resulting from the negligence of the patentee, by which judicial construction held that the patentee had no claim against persons using or constructing the alleged invention under such circumstances.

Note 2. This action was brought in the Circuit Court after the passage of the act of 1839, to wit, at the October session, 1840.

The charge of the court left all the facts falling within the scope of the legal principles therein stated to the determination of the jury.

1. "The question of the validity of the new patent is a judicial one, depending on the fact of inadvertence or fraud, as you shall find it." "You must then be satisfied affirmatively," &c. "The finding of the fact of inadvertence may negative the fact of fraud," &c.

2. "It was then submitted to the jury, whether, on the evidence aforesaid, the omission in the patent of 1831 arose from inadvertence," &c.

3. "Depositions are considered merely as oral testimony; a jury must decide what facts are proved by them * * * a mixed question of law and fact; of law so far as depends on written, and of fact as to parol evidence," &c.

4. "It is for you to say, whether you will take the evidence as we do; if you discredit it, in whole or in part, you will find accordingly."

Mr. Justice McLEAN delivered the opinion of the court.

The plaintiff brought an action against the defendant for an infringement of his patent, for a "new and useful improve-

ment in the mode of turning short curves on railroads." The questions for decision arise on exceptions to the charge of the court to the jury. And here it may be proper to remark, that the exceptions are to the charge as published at length, and not to the points ruled by the court, as is the correct practice. Under the peculiar circumstances of this case, the court will not dismiss the writ of error upon this ground, but it is expected that a different course will hereafter be pursued.

On the 21st of August, 1831, the plaintiff obtained a patent for an invention or improvement in the application of the *402] flanches of the wheels on one side of railroad carriages and of the treads of *the wheels on the other side, to turn short curves upon railroads. The specifications of this patent being defective, it was surrendered the 26th of September, 1835, and a renewed one obtained, in order, as proved, "to limit and confine it to the turning short curves in streets, &c., by leaving out certain matters in it respecting the crossing of tracks or roads, and the passing over turnabouts, and to define the subject-matter of the patent more clearly, without its being necessary to refer to that simultaneously obtained, or forming and using cast or wrought-iron plates," &c.

In his charge, the judge said to the jury,—"It clearly appears that the defendants constructed their railroad with the plaintiff's curves, in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

The patent was surrendered, and a new one obtained, under the third section of the "Act concerning patents," of the 3d of July, 1832; and the correctness of the above opinion is to be ascertained by a reference to the proviso of that section. It is there declared,—"No public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall, in any manner, prejudice his right of recovery for any use or violation of his invention, after the grant of such new patent as aforesaid."

The charge of infringement, in the declaration, is laid some years after the new patent, so that the question does not arise, whether an action could be sustained for a violation of the right prior to the corrected patent. The above proviso would seem to be susceptible of but one construction; and that is, that the patentee may sustain an action "for any use or violation of his invention after the grant of the new patent." Now it is plain that no prior use of the defective patent can

authorize the use of the invention after the emanation of the renewed patent under the above section. To give to the patentee the fruits of his invention was the object of the provision; and this object would be defeated, if a right could be founded on a use subsequent to the original patent and prior to the renewed one.

The thirteenth section of the act of the 4th of July, 1836, which remodelled the patent law in this respect, made no material change in the act of 1832. The words in the latter act are,—"And the patent, so reissued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing out of the original patent." Now any person using an invention protected by a renewed patent subsequently *to the date of this act is guilty of an [*403 infringment, however long he may have used the same after the date of the defective and surrendered patent.

The Circuit Court relied upon the seventh section of the act of the 3d of March, 1839, as sustaining their construction in regard to the use of the invention after the renewed patent. But that section has exclusive reference to an original application for a patent, and not to a renewal of it. We think the court erred in their instruction to the jury above stated.

In their charge, the court said:—"The use of grooves was not claimed and was no part of the thing patented in 1831, for turning short curves, but was a part of the thing patented in 1835." "That it was an essential part of the invention." And further, "in taking the statement" of Dr. Jones "as proof of the facts there existing, our opinion is, that, connected with the publication in the Journal of the Franklin Institute, in 1832, when the matter was fresh in his recollection, and the specification in the new patent, the old one was invalid and inoperative, by reason of non-compliance with the requisites of the act of 1793. That it did not embrace the the groove, which was essential to its validity, that the new patent is not the same invention, and that the plaintiff has not made out a case of such 'inadvertence, accident, or mistake,' as justified the issue of the new patent, inasmuch as it appears, from the patent for plates on railroads issued at the same time with the one for short curves, that he had known and described the grooves."

The original patent, as proved by Dr. Jones, was burnt with the patent office, and no part of the specifications is preserved, except that which was published by the witness in the

Franklin Journal. That publication does not purport to give the whole of the specifications, and, consequently, the claim is not limited by the notice in that journal. Dr. Jones, speaking of the patent issued in 1831, says,—"The main defect, in my judgment, of the original specifications in the patent for turning short curves was the omission of the mention of the groove in the inner rail. I believe, however, that it was alluded to in the specifications, but the description of it was contained principally, if not wholly, in the specification of the patent for forming and using cast-iron or wrought plates," &c.

That there was a defect in regard to the grooves in the specifications of the first patent is shown, and also that the patent was surrendered in order to remedy that defect. But whether this vitiated the patent is not a question in this case, as it does not affect the right now asserted, if the first patent were void. Whether the new patent was substantially for a different invention from the first one, was a question for the jury on the evidence. But the court ruled this point, withdrawing the facts from the jury. The witness thinks "that
*404] in the first patent the grooves were alluded to," but the *terms used are not recollected by him, and as the patent has been burnt, they cannot now be proved. We think the Circuit Court erred in not leaving the jury to act upon the facts, as regards the difference between the original and the renewed patent. On the facts, we should draw a different conclusion from that which was given to the jury by the Circuit Court. An allusion to grooves in this specification, as more particularly described in the other patent, would at least show the intention of the patentee, if it did not make good his patent.

By the thirteenth section of the act of 1836, "if the patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification," &c., "if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful" to surrender it, &c. Now, as in granting the renewed patent, the officers of the government act under the above provisions, their decision must at least be considered as *primâ facie* evidence that the claim for a renewal was within the statute. But this would not be conclusive against fraud in the surrender and renewal, which, on the evidence, would be a matter for the jury. And we suppose that the inquiry in regard to the surrender is limited to the fairness of the transaction. In whatever manner the mistake or inadvertence may have occurred is immaterial. The action of the government in renewing the patent must be considered as closing this

point, and as leaving open for inquiry, before the court and jury, the question of fraud only.

The judgment of the Circuit Court is reversed, and the cause remanded to that court, with instructions to award a *venire facias de novo*.

SAMUEL SMYTH, PLAINTIFF IN ERROR, *v.* DANIEL P. STRADER, JAMES PERRINE, AND JOHN H. WOODCOCK, LATE PARTNERS, UNDER THE FIRM OF STRADER, PERRINE, & CO.

The statutes of Alabama require the negotiability and character of bills of exchange, foreign and inland, and promissory notes, payable in bank, to be governed by the general commercial law.

If a partner draws notes in the name of the firm, payable to himself, and then indorses them to a third party for a personal and not a partnership consideration, the first indorsee cannot maintain an action upon them against the firm, if he knew that the notes were antedated.

But if the first indorsee passes them away to a second indorsee before the maturity of the notes, in the due course of business, and the second indorsee has no knowledge of the circumstances of their execution and first indorsement, he may be entitled to recover against the firm, although the partner who drew the notes committed a fraud by antedating them.[1]

But if the second indorsee received the notes after their maturity, or out of the *ordinary course of business, or under circumstances which [*405 authorize an inference that he had knowledge of the fraud in their execution or first indorsement, he cannot recover.

These things are matters of evidence for the jury.

Evidence is admissible to show that, in an account current between the first and second indorsee, no credit was given in it for the notes when they were passed from the first to the second indorsee.

So, evidence of drawing and redrawing between the first and second indorsee, alluded to in the account current, is admissible.

The testimony of one of the partners, offered for the purpose of proving the fraud committed by the drawer of the notes, is not admissible. This court again recognizes the rule upon this subject established in the case of *Henderson* v. *Anderson*, 3 How., 73.[2]

The partner offered as a witness was a party upon the record, and thus also, disqualified.

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[1] FOLLOWED. *Bradford* v. *Williams*, *post* *588.

[2] In the early case of *Walton* v. *Shelley*, 1 T. R., 296 (1786), MANSFIELD, CH. J., said: "But what strikes me is the rule of law founded upon public policy, which I take to be this: that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives credit to it. It is of consequence to mankind that no man should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." The Chief Justice laid considerable stress upon the fact that the paper sought to be overthrown was negotiable paper.

In *Smith* v. *Prager*, 7 T. R., 56, this rule is so far relaxed as to permit the borrower of the money, as a witness, to prove that the note included a usurious transaction; and in *Jordaine* v. *Lashbrooke*, 7 T. R., 597, it was held that in an action by an indorsee of a

Smyth *v.* Strader et al.

THIS case came up, by writ of error, from the Circuit Court of the United States for the Southern District of Alabama.

The facts in the case are stated in the commencement of the opinion of the Court, which the reader is requested to turn to and peruse, before reading the argument of counsel.

The case was argued by *Mr. Parke*, for the plaintiff in error, and *Mr. Sherman*, and *Mr. Willis Hall*, for the defendants in error.

Mr. Parke, for the plaintiff.

The admission of Strader as a witness was an error. A portion of the funds of the firm belonged to him, and he was

bill of exchange, against the acceptor, the latter might call the payee as a witness to prove that the bill was void in its creation. See also *Rich* v. *Topping*, 3 T. R., 27.

The Supreme Court of the United States have steadily adhered to the doctrine of *Walton* v. *Shelley*. *Scott* v. *Lloyd*, 12 Pet., 145; *Bank of Metropolis* v. *Jones*, 8 Pet., 12; *Bank of United States* v. *Dunn*, 6 Pet., 57; but that court steadily refuse to apply this rule to other papers. *United States* v. *Leffler*, 11 Pet., 86. So this rule is followed in some of the state courts. *Dewey* v. *Warriner*, 71 Ill., 198; *Shomburgh* v. *Commagere*, 10 Mart. (La.), 179; *Lincoln* v. *Fitch*, 42 Me., 456; *Drake* v. *Henly*, Walk. (Mich.), 541; *Webster* v. *Vickers*, 2 Scam. (Ill.), 295; *Walters* v. *Witherell*, 43 Ill., 388; *Rohner* v. *Morningstar*, 18 Ohio, 579; *Smithwick* v. *Anderson*, 2 Swan (Tenn.), 577, (overruling *Stump* v. *Napier*, 2 Yerg. (Tenn.), 35); *Gaul* v. *Willis*, 26 Pa. St., 259 (now abolished in Pennsylvania by statute, see *State Bank* v. *Rhoads*, 89 Pa. St., 353); *Taylor* v. *Luther*, 2 Sumner, p. 235; *Cox* v. *Williams*, 17 Mart. (La.), 18; *Treon* v. *Brown*, 14 Ohio, 482; *Bodkins* v. *Taylor*, Id., 489; *Stone* v. *Vance*, 6 Ohio, 246; *Clapp* v. *Hanson*, 15 Me., 345; *Franklin Bank* v. *Pratt*, 31 Id., 501: *Chandler* v. *Morton*, 5 Greenl. (Me.), 374; *Deering* v. *Sawtel*, 4 Id., 191; *Churchill* v. *Suter*, 4 Mass., 156; *Fox* v. *Whitney*, 16 Id., 118; in the last case it is held that the rule does not apply between the original parties, but only to a case where the paper has been put into circulation by endorsement. See also *Baker* v. *Prentiss*, 6 Mass., 430; *Packard* v. *Richardson*, 17 Id., 122; rule adhered to in *Thayer* v. *Crossman*, 1 Metc. (Mass.,) 416, but held not to apply to a note indorsed when overdue or dishonored, see *Bubies* v. *Pulsifer*, 4 Gray (Mass.), 592; *Von Schaack* v. *Stafford*, 12 Pick. (Mass.), 565.

So the Supreme Court of the United States has held that this rule of exclusion does not apply to the immediate parties, in a suit between them. *Davis* v. *Brown*, 4 Otto, 427; and in Pennsylvania it is held that it does not apply to notes endorsed after maturity. *Parke* v. *Smith*, 4 Watts & S., 287.

But it may be stated that the better opinion is that even as between the parties themselves such a note may be shown to be illegal by the testimony of the maker or payee. *Tayler* v. *Beck*, 3 Rand. (Va.), 316; *Baring* v. *Reeder*, 4 Hen. & M. (Va.), 424; *Bank of Missouri* v. *Hull*, 7 Mo., 273; *Knight* v. *Packard*, 3 McCord (S. C.), 71; *Pecker* v. *Sawyer*, 24 Vt., 459; *Parsons* v. *Phipps*, 4 Tex., 341; *Guy* v. *Hull*, 3 Murph. (N. C.), 150. *Winton* v. *Saidler*, 3 Johns. (N. Y.) Cas., 185, is overruled by *Stafford* v. *Rice*, 5 Cow. (N. Y), 23; *Bank of Utica* v. *Hillard*, 5 Id., 153; *St. John* v. *McConnell*, 19 Mo., 38; *Haines* v. *Dennett*, 11 N. H., 180; *Goshorn* v. *Carroll*, 3 Litt. (Ky.), 221; *Jackson* v. *Packer*, 13 Conn., 342; *Orr* v. *Lacey*, 2 Doug. (Mich.), 230; *Freeman* v. *Britton*, 2 Harr. (N. J.), 191; *Hunt* v. *Edwards*, 4 Harr. & J. (Md.). 283; *Slack* v. *Moss*, Dud. (Ga.), 161; *Griffing* v. *Harris*, 9 Port. (Ala.), 225.

liable to a contribution if they fell short. 1 Esp., 103; Ry. & Moo., 31; 21 Com. L. Rep., 334; 2 Pet., 186. He could not even be made a good witness by a release. 1 Whart. (Pa.), 392, 398; 2 Pa. R., 138; 2 Watts (Pa.), 347, 351. He was not only interested, but a party to the suit on the record.

There is also an error in the opinion of the court below, that whatever would be a good defence to a suit brought by the first indorser, was also to one brought by the second indorser; that all equities passed with a note as if it were a bond. But previous errors do not affect an innocent holder, where the note is taken in the ordinary course of commercial business. The free circulation and transmission of promissory notes is indispensable to commercial operations. If any loss should happen it ought to fall upon the party who is negligent. Colly. Part., 241, 242. A declaration of partnership implies confidence in the mutual integrity of the parties. 3 Kent Com., 46.

Partners are bound, as respects third persons, even by the fraudulent acts of a copartner. Story Part., §§ 108, 160; Colly. Part., 241–243.

In this case the evidence shows that the notes in question were transferred to Smyth, for goods sold by him.

But the court say, that if Stinson & Campbell knew the circumstances attending the making and first indorsement of the note, *the plaintiff, who is an innocent [*406 indorsee, shall not recover. We do not deny that these circumstances would constitute a valid defence, if the drawers were sued by Stinson & Campbell; but that is not the case. If the fraud were proved, it would not defeat our right to recover; but the only proof of fraud is in Strader's evidence, and he ought to be rejected as an incompetent witness. The court below must have founded its instructions upon his evidence. Gould says, in his testimony, that notice of the dissolution of the partnership was not published until the 23d of April, 1836, which was after the date of the notes in question. Smyth was not bound to discredit paper which bore date anterior to a public notice of the dissolution of the partnership.

Mr. Sherman and *Mr. Willis Hall*, for defendants in error. (The arguments of these two gentlemen are consolidated.)

The principle of this case has been stated by the plaintiff's counsel to be the highly equitable one, that, "of two innocent persons, the one whose laches occasioned the loss must bear it." But here the equity is all the other way; here there is no loss. Nobody has given credit to false paper. It is a

bold attempt to make our client, Perrine, pay the plaintiff a debt of $20,000, due him by Stinson & Campbell, men with whom our client never had the remotest connection. The evidence in the case warrants me in saying it is a gross fraud, from beginning to end, and all that is required to make it a successful one, is a decision of this court favorable to the plaintiff.

This high court will struggle hard, before it will be made a link in this iniquitous chain,—before it will be used as an instrument to effect one of the most palpable frauds ever exposed to the light.

The suit, though nominally against Strader, Perrine & Co., is really against Perrine alone. It is true he was a member of this unfortunate concern for "one little month,"—from the 1st of November to the 5th of December, 1835,—months before the notes on which this suit is brought are pretended to have been made. These notes are ostensibly dated in March, 1836, although really made by Stevenson, one of the partners, after the partnership was finally dissolved, and so advertised in the Mobile papers of the 23d of April, 1836. This quondam partner had then no more authority to sign the partnership name than any other person; but he antedated them to a time when the partnership was in existence, and he was authorized to sign the partnership name. This presents a case "on all fours," as the lawyers say with the case of *Wright* v. *Pulham*, 2 Chit., 121, where, in a precisely similar case, the court hold unanimously that the partnership is not bound by the note.

In the printed case, the plaintiff's only witness states that *407] the notes sued upon were received on account of a debt which accrued *in 1831, five or six years before the notes purport to be made. Other evidence shows clearly that they were received not in payment and extinguishment of the preceding debt, but for collection, the proceeds to be credited when received. This brings it within the case of *De la Chaumette* v. *The Bank of England*, 9 Barn. & C., 208, where, under similar circumstances, the property of a note was held in fact to be in the assignor, and to be affected, in the hands of the assignee, with all the equities which existed against the assignor. On the strength of this admission by the plaintiff, we had prepared to submit an argument to the court almost exclusively on this point; not by any means because this was the only ground on which a conclusive defence could be made, but because the other grounds were too obvious to require comment.

But it now appears, on examining the original record, that 1831 is a misprint for 1836. The plaintiff has made no admis-

sion that the notes were received for a preëxisting debt, and though the evidence on that point is abundant, yet, the fact not being admitted by the plaintiff, it should have been submitted to a jury, and passed that ordeal, before it can properly be urged upon the consideration of this court. We are compelled, therefore, at this late moment, to abandon our brief, and employ the few moments allowed us, at the close of the session, in commenting on the two points made by the plaintiff's counsel;—1st, the admissibility of Strader's testimony; 2d, the charge of the judge.

First. Strader is worth nothing, and resides in the state of Ohio. Under these circumstances, the great anxiety manifested by plaintiff, as admitted by his counsel, and disclosed by the numerous writs on the record, to make him a party to the suit, could have been stimulated by no motive but to deprive the defendant of the benefit of his testimony. Not having succeeded in that object, he now contends that his testimony was inadmissible.

1st. On the ground that he was one of the makers, and no man can be admitted to impeach his own name. To which it is replied, that he was in no sense a maker. The paper was, in fact, forged by one of the partners, after the partnership was dissolved. Again, it is replied, that Strader is not introduced for the purpose of discrediting the paper against the actual members of the firm at the date of the notes, but to show that Perrine had previously retired, and was in no respect liable.

2d. A second ground of objection to Strader's testimony is, that he was a *partner* in the firm of Strader, Perrine & Co., and that "one partner cannot be admitted as a witness for or against his firm."

That is certainly the general rule; but one of the exceptions is where, as in this case, it is proved by other witnesses, that the transaction is by one of the partners, without the knowledge of the partnership, on his individual account, and the copartners are *not liable, as among themselves, to contribution, then they may be witnesses for the firm. [*407
Story Part., 386; Phil. Ev. (3d ed.), 55; *Ridley* v. *Taylor*, 13 East, 175; *Le Roy et al.* v. *Johnson*, 2 Pet., 198.

Besides, Strader was not a copartner of Perrine (the sole defendant) at any time during any part of this transaction. The rule is, that instantly, on the dissolution of a firm, the copartners become witnesses, the one for the other, like other persons. Gow on Part., 202.

Although, after the withdrawal of Perrine, the name continued the same, yet, by that act, the partnership was dis-

solved, and subsequently a new partnership, under the same name, was formed. Strader, Perrine & Co. represented very different firms in November, 1835, and in March, 1836.

But the great question which decides the competency of witnesses in our day is, "Has he an interest in the event?" To ascertain this, the test universally applied is, "Can the judgment be used in any other case for or against the witness?" *Willings et al.* v. *Consequa*, Pet. C. C., 322; Chit. Bills, 669; Gow Part., 80.

Suppose Smyth fails in this suit. It is no bar to another suit against Strader, nor can it be given in evidence by either party in any possible way. On the other hand, suppose Smyth gains this suit, Perrine has to pay the money. There is no principle which will enable Perrine to recover of Strader, or of any member of the firm of Strader, Perrine & Co. He cannot make them contribute for they are not his partners; nor is there any privity between them. It is as if his house were burnt down; it is his misfortune, and he cannot divide it with his neighbors. He cannot make them pay the whole, for the recovery is had against him, if at all, on account of his laches, in not publishing his withdrawal to the world,—a matter with which his quondam partners have nothing whatever to do. But granting that Perrine, if compelled to pay the note, can recover of the firm, it can only be on the ground of its being a genuine note, which they would have been bound to pay to Smyth. They cannot, by an *ex parte* proceeding, be placed in a worse condition than they were. The constitution guarantees them a hearing, and the real parties would be deprived of this right in this case, not having been parties to the original suit brought by Smyth, if not allowed to make the same defences against the note in the hands of Perrine, as they could have made in the hands of Smyth. These elementary principles forbid the judgment obtained against Perrine from being used by him against the firm, or any member of it.

We conclude, therefore, that the judgment in this case, whichever party may succeed, cannot be used by plaintiff or defendant against the witness Strader.

*409] To illustrate this point still further. It is believed to be settled *law, in this country, that one against whom a forgery is perpetrated is a competent witness to prove it, in any suit in which he is not interested in the event. *Commonwealth* v. *Snell*, 3 Mass., 82; *The People* v. *Howell*, 4 Johns. (N. Y.), 296, 302; *Pope & Hickman* v. *Nance & Co.*, 1 Ala. (old series), 299.

The facts proved on trial make a case of forgery. It is pre-

cisely analogous to the case supposed by Lord Coke, in 3 Inst., 169. "It is forgery to make a deed of feoffment to A, and then make another of prior date to B, which, at the time, he had no power to make."

We cordially unite with the learned counsel for the plaintiff in soliciting the court to give full instructions to the inferior tribunal, with respect to the admissibility of Strader's testimony, in the possible event of a new trial. We do not anticipate such a decision, nor comprehend upon what principles of law it can be made. But it is prudent in all cases to be prepared for the worst. In that spirit it is, that we ask the court, should they be induced by any technical view of the case to send it back for a new trial, to give minute directions as to the availability of notes received merely as contingent payment of a precedent debt.

The evidence in this case shows the notes were not transferred to the plaintiff in payment and extinguishment of any thing, and that no credit, no new consideration was given for them, but that they were in fact deposited with the plaintiff for collection, the amount to become payment on the double contingency, 1. that the notes should be collected by the plaintiff; 2. that in the mean time the original debt should not be paid. But this evidence not having been distinctly admitted by the plaintiff, or submitted to the jury, cannot be brought to the attention of this court, except in reference to the possibility of a new trial.

In all cases where notes are given in payment, but not extinguishment of a preceding debt, that is, where they are to become payment only in case of collection, the assignee is the mere agent of the assignor, and they continue his property, and at his risk, and subject to all equities against him as much as if in his actual possession.

I am aware of the decisions in *Riley & Van Amringe* v. *Anderson*, 2 McLean, 589, and *Swift* v. *Tyson*, 16 Pet., 1. Both these decisions are in strict conformity with the principle. In the first case it was distinctly left to the jury to say whether the notes were received in payment or not; they returned that they were, and the court held, that though it was an old debt, yet the assignee, having received them in payment, held them for value. The same doctrine is held in *Swift* v. *Tyson*, which was an undisputed case of absolute payment of an old debt. All that is decided by those two cases is, that it is immaterial whether the note is given at the inception of a transaction, or subsequently, if it is given in *absolute payment. In that case, the assignee holds it [*410
for value. It is true that there are some *dicta* thrown out in

the case of *Swift* v. *Tyson*, which require explanation and perhaps limitation; for example, at page 20, it is said,—"We are prepared to say that receiving a note in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business." This certainly cannot be intended to mean that if the note is received, not in payment, not in pursuance of an original arrangement, and not for any new consideration, it can be held against the true owner. The court certainly do not intend to overrule the doctrine of Chief Justice Marshall in the case of *Coolidge* v. *Payson*, 2 Wheat., 66, which is quoted and relied upon in the *per curiam* opinion in this very case of *Swift* v. *Tyson*. That memorable judge says, that although a note may be taken for a pre-existing debt, yet "in all such cases the person who receives such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due him." That is, the payment must be an extinguishment of so much of the pre-existing debt. So in the case of *Brush* v. *Scribner*, 11 Com., 388, another case on which the court relies for their doctrine in *Swift* v. *Tyson*. Extinguishment as well as payment is considered essential to give validity to the transfer of a note assigned for a pre-existing debt. The *dictum* therefore, in *Swift* v. *Tyson* is not to be understood as conflicting with the doctrine of these two cases.

The cases in 13 Wend. (N. Y.), 505, 12 Id., 593, 10 Id., 85, and other cases in the New York courts, are considered by this court, in *Swift* v. *Tyson*, as maintaining the doctrine, that notes transferred in payment of pre-existing debts were not valid in the hands of the holder. This, I apprehend, is not the doctrine they support. They must be taken in connection with the doctrine pre-established in the Court of Errors, *Murray* v. *Gouverneur et al.*, 2 Johns. (N. Y.), Cas., 441; "that a bill shall not be a discharge of a precedent debt, unless so expressly agreed between the parties." Taken in this connection, the doctrine they decide is, that payment without extinguishment is not available to the holder against the equitable owner, which is precisely the doctrine of Marshall, in *Coolidge* v. *Payson*. The dispute is nothing but a revival of the old question. What is payment? that is, what is payment and extinguishment? and what is merely contingent payment? And the New York courts have taken Lord Holt's side of the question. In the case of *Ward* v. *Evans*, 2 Ld. Raym., 930, that eminent judge remarked,—"Taking a note is sometimes payment when a part of the original transaction, but paper is no payment when a precedent debt. I am of opinion and always was (nothwithstanding the noise and

ory that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street), that the acceptance of such a note is not actual payment; for when such a note is given in payment it is always *intended to be [*411 taken on this condition, to be payment if the money be paid thereon in convenient time."

The *dictum* under consideration not only says receiving a note in payment, but "as security for a pre-existing debt, is according to the known usual course of trade and business." The court here must mean to restrict the receiving it as security to the cases, 1. where it is a part of the original agreement; 2. where some new consideration is given.

The peculiar province of this species of paper is, to facilitate the exchanges of value from place to place, and from person to person; to be deposited as collateral, though a possible, is not an appropriate or natural function of bills of exchange, any more than it is of money. *Bay* v. *Coddington*, 5 Johns. (N. Y.), Ch., 54; *Collins* v. *Martin*, 1 Bos. & P., 648; *Coggs* v. *Bernard*, 2 Ld. Raym., 917; *Harrisburg Bank* v. *Meyer*, 6 Serg. & R. (Pa.), 537; *Evans* v. *Smith*, 4 Binn. (Pa.), 366.

Whether money or bills of exchange are deposited as collateral security, the transaction is not governed by the laws which govern the payment of money, or the negotiation of bills, but by the ordinary laws which govern pledges or pawns. Story Bail., p. 198, § 290. *Assigns of Horseman* v. *Eden*, 1 Bos. & P., 398.

Three principles of that law apply:—

1. The depositor or pledger can pledge no more or greater interest than he has in the property pledged. Code Lib., 8, tit. 16, l. 6; *Hoare* v. *Parker*, 2 T. R., 376; 1 Dane Abr., ch. 17, art. 4, § 7; Story Bail., p. 214, § 22; id. p. 215, § 324. [Bills of exchange are said to be an exception to this rule. The exception is believed to relate to the power, not the right, of transferring the property.]

2. The absolute legal title is not changed, the pledger receiving nothing but a special property, amounting to a lien for his advance, together with a right of possession. Story Bail., p. 197, § 287.

An advance *boni fide* made upon property improperly pledged may be required to be returned. *Cortelyou* v. *Lansing*, 2 Cai. (N. Y.), Cas., 200; *South Sea Co.* v. *Duncomb*, 2 Str., 919; 2 Kent Com., 450; 1 Dane Abr., ch. 17, art. 4, § 9. But if no consideration be advanced, none can be required.

3. The contract of pledge is a distinct and substantive contract, and requires a legal motive or consideration to support it, as much as any other.

The conclusion is that the court, by the word payment in the *dictum*, in *Swift* v. *Tyson*, before referred to, mean payment and extinguishment, not contingent payment; and the expression "may be received as security," must be qualified by adding, but it cannot be held against the equitable owner unless it was part of the original contract or induced by some new consideration.

*412] *But it is believed the court will not be called upon to investigate this subject. There are other sufficient grounds for affirming the judgment. We hasten therefore to reply to the objections to the charge of the court below.

The charge is, in substance, "that if Stevenson (one of the partners) made and assigned the notes on his own account, without the consent of his partners, and Stinson & Campbell (the assignors of the plaintiff) knew it, and if Perrine retired from the firm before the notes bear date, and Stinson & Campbell knew it when they took the notes, that the jury must then find for the defendant Perrine."

This charge is justified by three considerations.

1st. By the statute of Alabama, which authorizes the defendant to file a sworn plea denying the execution. Toul. Dig., ch. 10, § 3, p. 462. This is construed to operate as notice to the plaintiff, and throw the burden of proof upon him. *Rolston* v. *Click et al.*, 1 Stew. (Ala.), 526. The plaintiff has gone to trial without any replication, which is construed a direct denial of all the material facts stated in the plea. *Lucas* v. *Hitchcock*, 2 Ala., 287. What, then, were the facts put in issue by the plea and denial? (1.) That Perrine withdrew from the firm in December, 1835, and Stinson & Campbell knew it. (2.) That the note was not made at the time of its date. (3.) That it did not come into the hands of Stinson & Campbell till after the 17th May, 1836. (4.) That he did not make the note.

It was certainly incumbent on him to prove all the affirmative facts which he asserted by joining issues. For instance, he asserts that the notes were in the possession of Stinson & Campbell before the 17th of May. This is an essential fact; for if Stevenson delivered them after publication that the partnership was dissolved, made on the 23d of April, 1836, the notes never received any vitality from the firm. One of the partners had no more power to bind them after dissolution than one who had never been a partner. *Bell* v. *Morrison*, 1 Pet., 371; *Tombeckbee Bank* v. *Dumell*, 5 Mason, 56. He makes no attempt to prove his assertion. He does not make out his case. Of course the court would have been justified

in nonsuiting him in the first place, or in subsequently telling the jury to find for defendant.

2d. The state of the pleadings warranted the charge. A plea denying the making is authorized by statute, but its form is not prescribed. He chooses to join issue instead of replying over. He thereby binds himself down to the single point that Perrine made the notes. To prove which, he must show either that he signed them himself, or that he authorized some one else to do it. But, so far from proving this, the proof is, they were made by Stevenson, without authority, long after Perrine had withdrawn from the firm. If he had intended to hold Perrine by reason of his laches in not *advertising [*413 his withdrawal, he should have replied that specially to Perrine's sworn plea of *non est factum*.

3d. The charge is justified by the statute of Alabama, which enables the defendant to set up the same defences against the assignee of a note as he could have made against the assignor, if the note had not been assigned. Toul. Dig., ch. 2, p. 69. This extends to all legal defences. *Rolston* v. *Click et al.*, 1 Stew. (Ala.), 526. And the law has been construed to apply to notes negotiable and payable in bank, if not held by the bank. *M'Murran* v. *Soria et al.*, 4 How. (Miss.), 154.

A similar law prevails in most of the new and less commercial states and has been found to work well in practice. The business world has undergone a wonderful change within the last century. Bonds, bills single, and many other common law instruments have disappeared; their occurrence is almost as rare as that of the mammoth, or of the mastodons of old. All kinds of business are now transacted by notes of hand. The farmer gives his note to the merchant, the laborer to the farmer, the client to the lawyer; but the technicalities of commercial paper have not been so extensively introduced; and if the rigorous rules of the counting-house are to be applied to the notes of the farmer and of the rough-hewer of the wilderness, the most wide-spread injustice will be the consequence.

Mr. Parke, in reply, said that the argument drawn from the construction of the statute of Alabama was not in the brief of the opposing counsel, and had been suddenly sprung upon the court. The volume containing the entire law was not in court, and was procured very recently. But it did not cover the ground contended for by the other side, which was that an indorsee was placed precisely upon the same footing with a payee. The law of 1812, it is true, allows payments and set-

offs to be pleaded if they existed before an assignment was made. But subsequent laws vary this.

It appears to be admitted by the argument upon the other side, that the case depends on Strader's evidence. But is he a good witness? It is said that we made great efforts to have process served upon him for the purpose of disqualifying him. But it was our interest to make him a defendant. He has never become a bankrupt, and ought to bear his share in paying the debts of the partnership. If he had withdrawn in fact from active participation in its affairs, others continued to carry on the same business under the same name until the 23d of April, 1836.

Mr. Justice McLEAN delivered the opinion of the court.

The plaintiff brought his action as the second indorsee of two promissory notes in favor of E. Stevenson, purporting to be signed by Strader, Perrine & Co., which partnership consisted of Daniel *P. Strader, James Perrine, E. Stevenson, and John H. Woodcock. The notes were assigned by Stevenson to Stinson & Campbell, of New Orleans, and by them to the plaintiff. Stevenson died before the commencement of the suit, and the process was served only on Perrine and Woodcock. At the fall term of 1842, Woodcock pleaded a discharge under the bankrupt law, and Perrine pleaded that the partnership of Strader, Perrine & Co. commenced in November, 1835, and that in December of the same year he withdrew from it. That at the time of leaving the firm he sold, for one thousand dollars, his interest to Stevenson, who, by Stinson & Campbell, through one Primrose, paid him the above sum; and that they knew of his withdrawal. That the notes were antedated, and were not in possession of Stinson & Campbell, or assigned to them, till after the 17th of May, 1836.

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Issues being joined on these pleas, the case was submitted to a jury, who found in favor of Perrine, and that Woodcock had been discharged under the bankrupt law.

The questions for decision arise on a bill of exceptions, taken by the plaintiff.

The plaintiff proved, by the deposition of Hood, that Stevenson was a member of the firm of Strader, Perrine & Co., and that he executed the notes, and that they are dated before any public notice was given of the dissolution of the firm. That the firm of Stinson & Campbell were indebted to the plaintiff, in a large sum, in the summer of 1831; and that in part payment, the notes, before maturity, were assigned to

him, for which a credit on their account was entered. And here the plaintiff's evidence closed.

The defendant, Perrine, proved, "that he withdrew from the firm the 6th of December, 1835, but that there was no public advertisement, giving notice of the dissolution of the firm, until the 23d of April, 1836, although the fact was known to Stinson & Campbell at the time of Perrine's withdrawal."

The defendant also proved, by John Test, that in August, 1836, he saw in the hands of the plaintiff's agent an account current between him and the firm of Stinson & Campbell; that he made a copy of the same, which he produced, and from which it appeared that no credit had been entered for the notes sued on.

The plaintiff's counsel moved the court to exclude from the jury all testimony as to the transactions between Stevenson and the firm of Stinson & Campbell, or between Stevenson and the other members of the firm of Strader, Perrine & Co., there being no proof of any notice to the plaintiff of any of these matters insisted on by the defendant in his defence But the court overruled the motion, and "instructed the jury, that if they believed the said notes were made by Stevenson, *415] without the knowledge and consent of his partners, and that he passed them off to the said Stinson & *Campbell without the knowledge or consent of his partners, and that if the said Stinson & Campbell, at the time of their receiving the notes, knew that, prior to that time, to wit, on the 6th of December, 1835, Perrine had withdrawn from said firm, and was not then a partner, and that if it was also proved to them that the said notes were passed to the said Stinson & Campbell by Stevenson for his individual benefit, and not for the interest and benefit of the said firm, and that this was known to the said Stinson & Campbell when they received the said notes, that then the jury must find for Perrine, the defendant." To the above ruling and instruction, exceptions were taken by the plaintiff.

From the instruction of the court, it appears the notes in controversy were considered as governed by the law merchant. By the Alabama statute of 1812 (Clay Dig., 381), the assignee of "bonds, obligations, bills single, promissory notes, and all other writings for the payment of money," may sue in his own name; but all equities and grounds of defence remain open as fully as though the instrument had not been assigned, until the defendant had notice of the assignment. But by the act of 1828 (Clay Dig., 383), it is provided, "that the same remedy on bills of exchange, foreign and inland, and on promissory

notes payable in bank, shall be governed by the law merchant, as to days of grace, protest, and notice"; and, by the succeeding section, all other contracts for the payment of money, &c., are made "assignable as heretofore, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit."

The phraseology of this section would seem to place all other instruments, for the payment of money, &c., on a different footing from those described in the preceding section. The provision of that section appears only to relate to the remedy on bills of exchange and promissory notes payable at bank under the law merchant, as regards the days of "grace, protest, and notice." But as the following section defines the rights of the assignee of "all other contracts in writing for the payment of money," &c., it may perhaps, be fairly inferred that the legislature intended the negotiability and character of the instruments above named should be regulated by the general commercial law. Such seems to be the opinion of the Supreme Court of Alabama. In the case of *McDonald* v. *Husted*, 3 Ala., 297, it was held, "that a note made negotiable and payable at bank is not subject to offset, in the hands of a *bonâ fide* indorsee, who has acquired it previous to maturity, although it has never been negotiated at the bank where it is made payable." Also in *Beal* v. *Bennett*, 6 Ala., 156, the same principle is recognized.

*416] However fairly Stevenson may have acted in the execution of these notes payable to himself, it is clear that he could not have *sustained on them an action at law. A partner of a firm cannot, at law, sue it, for that would be to sue himself. But a *bonâ fide* assignee of Stevenson might maintain an action. *Jones et al., Assignees*, v. *Yates*, 9 Barn. & C., 532; *Bosanquet et al.* v. *Wray*, 6 Taunt., 597; *Aubert* v. *Maze*, 2 Bos. & P., 371; *Smith* v. *Lusher*, 5 Cow. (N. Y.), 688. Stevenson, in executing the notes to himself, under the circumstances proved, committed a fraud against his partners; and this fraud was greatly aggravated, if, as alleged, he antedated the notes so as to charge Perrine as partner. That he assigned the notes to Stinson & Campbell, if for any consideration, for one that was personal to himself, and wholly disconnected with the partnership, is not controverted. These facts, or a part of them, of which Stinson & Campbell must have had knowledge, would have defeated a recovery by them. Every "contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of

his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm." Story Part., 193. This rule as well applies to the indorsement of negotiable instruments as to other contracts.

But the fraud of Stevenson, and the knowledge of that fraud by Stinson & Campbell, do not necessarily defeat the plaintiff's action. And the charge of the court on this point was clearly erroneous. If, before the maturity of the notes, in the due course of business, and without any knowledge of the circumstances of their execution and first indorsement, the plaintiff received them, he may be entitled to recover, notwithstanding the fraud. By "forming a partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns." Story on Partnership, 161. On this principle, the firm is bound for the frauds committed by one of its partners. Where one of two innocent persons must suffer by the act of a third person, the rule is just, that he shall suffer who reposed the higher confidence and credit in such person.

But if the plaintiff received these notes after their maturity, he holds them subject to all the defences which might have been set up against them in the hands of Stinson & Campbell. Or if he received them out of the ordinary course of business, without consideration, or under circumstances which authorize an inference that he had knowledge of the fraud in their execution or their first indorsement, he cannot recover. These are matters of evidence for the jury.

The testimony of John Test, which was excepted to, [*417
we think *was rightfully admitted. He proved, that, in August, 1836, he saw in the hands of an agent of the plaintiff an account current between him and the firm of Stinson & Campbell. That he copied the account, which copy he exhibited, and from which it did not appear that a credit had been entered for the notes in controversy. As this, compared with the evidence of the plaintiff, might conduce to disprove the consideration alleged to have been paid for the notes by the plaintiff, it was properly admitted. The relevancy of the deposition of Charles, which was also excepted to, is not very apparent. It shows that Stinson & Campbell, in 1836, drew a large amount of drafts on the plaintiff, in part payment of drafts which he had previously drawn on them. This drawing and redrawing constituted no part of the account current spoken of by Test, but at the foot of the account a memorandum was made of these drafts. As this deposition conduced to show

the nature of the accounts between the plaintiff and the firm of Stinson & Campbell, no very strong objection is perceived to its admission as evidence. It could not have misled the jury.

The deposition of Strader, which was also excepted to by the plaintiff, was not admissible under the decisions of this court. He was one of the firm of Strader, Perrine & Co., and his testimony conduced to show the fraud of Stevenson in the execution of the notes. In case of the *Bank of the United States* v. *Dunn*, 6 Pet., 57, this court said,—"It is a well settled principle, that no one, who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it." The same principle was held in *Bank of Metropolis* v. *Jones*, 8 Pet., 12. This was decided in the case of *Walton et al.*, *Assignees of Sutton* v. *Shelley*, 1 T. R., 296; and although that decision was overruled by the King's Bench in the case of *Jordaine* v. *Lashbrooke*, 7 T. R., 601, this court, in the cases cited, and in several subsequent cases, have established the rule as above stated. In the state courts, there is a great diversity of judgment on this point.

Strader was a party on the record, and that rendered him an incompetent witness. *Scott* v. *Lloyd*, 12 Pet., 149; *Stein* v. *Bowman et al.*, 13 Id., 219.

Upon the whole, the judgment of the Circuit Court is reversed, and a *venire de novo* awarded.

Mr. Justice CATRON.

In this case, my opinion is founded on considerations that differ so much from those proceeded on in the principal opinion, that I am under the necessity of stating my own views, or of dissenting, which I am not prepared to do.

In the first place, Stevenson had been one of the firm of Strader, Perrine & Co. He made the note payable to himself, and signed the name of the firm to it. Being both a maker and the payee, the *note was void on its face, or at least could have no legal effect; when negotiated, that is, when it was indorsed by Stevenson, and sold to Stinson & Campbell, it could only become a binding instrument in their hands on Strader, Perrine & Co., as Stinson & Campbell could enforce payment. The time of negotiation, therefore, is the true date of the note.

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It is in proof, that the firm of Strader, Perrine & Co. was dissolved on the 23d of April, 1836, and that the usual advertisement was then made of the fact. This bound all persons who had not had previous dealings with the firm; nor is there any proof found in the record, showing that either Stinson &

Campbell, or Smyth, the plaintiff, had had any such dealings. If the note was negotiated, therefore, to Stinson & Campbell, after the dissolution of the partnership, it was void, and does not bind Perrine, inasmuch as Stevenson had no power to bind him.

2. Perrine is proved to have withdrawn from the firm in December, 1835. But as no regular notice was given of this fact, it rests on him to bring home knowledge of it to the holder of the paper. If Stinson & Campbell had knowledge, when they took the note from Stevenson, then they could not have recovered from Perrine on it.

So again, if Stinson & Campbell took the note from Stevenson in discharge of the individual debt of the latter, they could not recover from Perrine, whether he was or was not a partner at the date of its negotiation. The proof of either of these events is imposed on the plaintiff. But having shown either of the two last circumstances, then the plaintiff is bound to prove "under what circumstances, or for what value, he became the holder." I need only refer to Chit. Bills (9th ed.), 648, for the established rule. If the plaintiff fails to show, in such case, that he came by the note in the due course of trade, and before it fell due, then the defendant is entitled to a verdict.

3. In regard to the question of the competency of Strader's evidence, I have found much difficulty. The competency of Strader to depose, in the principal opinion, is held to be governed by the cases of *United States Bank* v. *Dunn*, 6 Pet., 51, and *Bank of Metropolis* v. *Jones*, 8 Id., 12. In the one case, Carr, the first indorser, was introduced by the second indorser, Dunn, who was sued to make out a defence. In the second case, Jones, the indorser and defendant, introduces Mr. Blake, the maker of the note, to establish a defence; and, in each instance, this court held that the witness was incompetent to invalidate the negotiable paper to which he was a party; and the decision in *Walton* v. *Shelley*, 1 T. R., 296, was followed. Of this case, Mr. Chitty says (669),—"Though it was formerly held, that no party should be permitted to give testimony to invalidate an instrument he had signed, a contrary rule now prevails;" and refers to *Bent* v. *Baker*, 3 T. R., 36, and **Jordaine* v. *Lashbrooke*, 7 T. R., 601. "The [*419 general rule is," says Chitty, "that it is no objection to the competency of a witness, that he is also a party to the same bill or note, unless he be directly interested in the event of the suit, and he be called in support of such interest; or unless the verdict, to obtain which his testimony is offered, would be admissible evidence in his favor in another suit."

This was the principle on which the cases of *Bent* v. *Baker*, and *Jordaine* v. *Lashbrooke* proceeded. By the statute of 3 and 4 Will. IV., ch. 42, § 26, for the amendment of the law, the rule was enlarged, so as to let in parties to negotiable paper as witnesses for or against whom the verdict and judgment might be evidence, the statute providing that the record should not be evidence for or against them. And thus the law of evidence, in this regard, now stands in the courts of Great Britain. It is also settled, and had been, long before 1832, when the decision in the *Bank of the United States* v. *Dunn* was made, in a large majority of the states of this Union, in accordance with the principles laid down in *Jordaine* v. *Lashbrooke*, and *Bent* v. *Baker;* and the question now is for this court to determine how far the United States Circuit Courts, when acting in the States, shall enforce the doctrine laid down in Dunn's case, and which was very properly applied in that of Jones. The decision is,—"That no man who is '*a party*' to the note or bill shall, by his own evidence, invalidate it." But suppose he is no *party* to it, and that his name has been put on it, or to it, by forgery, and he is called on by another to establish that the defendant's name was forged, as well as that of the witness, is he then competent? He gave no credit to the paper; and, if the evidence of all those who could prove the defence is cut off, by the mere name appearing, nothing more would be required to effectuate the fraud, than to put on the names of all persons who could prove the fraud. In such an instance, I feel sure the rule laid down by this court does not apply. Nor can I, satisfactorily to my own mind, distinguish the case put from one where a fraudulent note is made in the name of a firm, by one of the original partners, after the dissolution of the partnership, when he had no authority to use the name of those he attempts to bind. Indeed, it is difficult to say that Stevenson was not guilty of forgery, if he made the notes, and passed them off to Stinson & Campbell, after the dissolution of the partnership, in discharge of his own debt, and with the intention to defraud his former partners. In the cases that have heretofore come before this court, the witnesses proved in advance that they gave credit to the paper, by signing their names; and that they were, beyond dispute, *parties* to it, as well as the defendant.

The principle assumed in *Walton* v. *Shelley* is in violation of one of the most familiar and general principles of evidence known to courts of justice; that is to say, that any person of sufficient *age and sanity can be a competent witness to depose in any cause where he is not directly inter-

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ested in the event of the suit. To this rule there are exceptions, but they are almost uniformly favorable to the admission of the testimony, are of comparatively recent origin, founded on experience, and conducive to the due administration of justice in a high degree.

Again, the act of May 19, 1838, declares that "the forms and modes of proceeding in suits in the courts of the United States (in states admitted into the Union since 1789), in those of common law, shall be the same in each of those states respectively as are now used in the highest court of original and general jurisdiction of the same."

That the court below proceeded, in the admission of Strader as a witness, according to the modes of proceeding in the Circuit Courts of the state of Alabama, is not questioned. The method and manner of administering justice in the state courts is the *mode* referred to in the act of Congress, as I understand it; and I cannot resist the conclusion, that the modes prescribed by the act of Congress to the federal courts held in that state embrace the rules in regard to the competency of evidence; without evidence there can be no proceedings; rules for its admission are indispensable; these rules must be derived from some authority; from statutes they cannot be, and therefore Congress has said the state courts shall furnish them to the foreign tribunals administering the laws there,—and this for the plain reason, that the measure of justice shall be the same in the foreign that it is in the domestic tribunals, and evidence is the measure of justice in great part.

There can be no objection to the competency of Strader because he was a party of record. The original writ issued against him and Perrine jointly; but Strader was not found, and a *nolle prosequi* was entered as to him, and Perrine was declared against alone.

I concur that the charge of the Circuit Court was erroneous in so far as it assumed that the instruments sued on were subject to the same equities in the hands of Smyth that they were when held by Stinson & Campbell. The courts of Alabama have construed the statutes of that state affecting negotiable paper, and held they did not apply to notes payable in bank; of which description are the ones sued on. The charge, therefore, violated the commercial rule, that the innocent indorsee takes the paper discharged of a previous infirmity.

*Isabella L. Mackay, Executrix of James Mackay, Zeno Mackay, George Anthony Mackay, James Bennett Mackay, Reuben Coleman and Eliza Lucy, his wife, William Coleman and Amelia Ann, his wife, Louis Guyon and Mary Catherine, his wife, David Bowles and Julia Jane, his wife, and Isabella Louisa Mackay by Isabella L. Mackay, her guardian, *v.* Patrick M. Dillon.

The jurisdiction of this court, when a case is brought up from a state court under the twenty-fifth section of the judiciary act, does not extend to questions of evidence ruled by that court, unless it is sought to give such evidence effect for other purposes over which this court has jurisdiction.[1]

Under the act of 1805, providing for the appointment of commissioners to examine and decide on certain claims to land, and the act of 1812, confirming those claims, Congress did not intend to adopt the boundary-lines of the claims according to the surveys which had been laid before the commissioners; nor adopt, for any purpose, the evidence which has been presented to the board.[2]

A decision of the court below, cutting off all proof of the correctness or incorrectness of such surveys, was therefore erroneous.[3]

A survey, made at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to the commons, in due form, to the board of commissioners, was in its nature a private survey, not binding on the United States, and having no binding influence on the title of subsequent litigants.

By what description of surveys the United States are bound, and those claiming under them governed, reference is made to a preceding case in this volume, of *Jourdan and Landry* v. *Barrett*, (*ante*, p. 169), and for the effect of a legal survey of the commons of St. Louis, to the succeeding case of *Les Bois* v. *Bramell*.[4]

This case was brought up from the Supreme Court of the State of Missouri, by a writ of error, issued under the twenty-fifth section of the judiciary act.

The suit was originally brought in the Circuit Court (State court) for the county of St. Louis, but the venue changed to the county of St. Charles.

It was an ejectment, brought by the heirs of Mackay against Dillon, to recover a tract or parcel of land in the county of St. Louis, containing two hundred arpents or more, bounded on the north by land formerly belonging to Auguste Chouteau, called the Mill tract; on the south by land formerly belonging to Anthony Soulard, deceased; on the east by the road leading from the city of St. Louis to the village of Carondelet; on the west by land formerly of the royal domain.

[1] S. P. *White* v. *Wright*, 22 How., 19.

[2] Reviewed. *Guitard* v. *Stoddard*, 16 How., 508.

[3] Explained. *Bissell* v. *Penrose*, 8 How., 339.

[4] See also *Dent* v. *Emmeger*, 14 Wall., 313.

As the instruction asked by the defendant, and granted by the court, referred to the copy of the claim given in evidence, it is necessary to set forth the whole of this evidence upon which the claim of the defendant rested; and also to state the title of the plaintiffs.

The plaintiffs showed title as follows:

1st. Mackay's will, the production of which was afterwards rendered unnecessary, by the admission of the defendant, that the plaintiffs were the wife and children and sons-in-law of James Mackay deceased.

*2d. The admission of the defendant, that, at the commencement of the suit, he had in his possession [*422 thirty acres, part of the tract in the declaration described, all of which, thus in his possession, laid west of the eastern line of the tract claimed as the commons of St. Louis, and was embraced in the survey of the commons as made by James Mackay in the year 1806.

3d. Mackay's petition for a concession, and the order of the Lieutenant-Governor thereupon, both in 1799, and a survey in 1802.

4th. Proceedings of the board of commissioners established by the act of Congress, passed on the 2d of March, 1805.

5th. Proceedings under the act of Congress, passed on the 13th of June, 1812.

6th. Extracts from the decision of Mr. Bates, under the same act.

7th. Proceedings of the board of commissioners established by the acts of Congress, passed on the 9th of July, 1832, and 2d of March, 1833.

8th. The act of Congress, passed on the 4th of July, 1836.

9th. The certificate of the surveyor of the public lands, dated the 5th of December, 1840.

10th. The deposition of Soulard.

11th. Proof of the location and value of the land.

These points will be taken up in order. Nothing more need be said with regard to the first and second.

3. Mackay's petition for a concession, the order of the Lieutenant-Governor, and survey:

"To Don Charles Dehault Delassus, Lieutenant-Governor and Commander-in-chief of Upper Louisiana.

"James Mackay, commandant of St. André, of Missouri, has the honor to represent, that, having often sundry reports to make to government, on which account his presence is required in this town, he would wish to have a place of residence

in the same; therefore, considering that all the town lots are conceded, he has the honor to supplicate you to have the goodness to grant to him, to the south of this town, a vacant tract of land of about two hundred and some arpents in superficie, which tract of land is bounded as follows:—To the north, by the land of Mr. Auguste Chouteau; to the south, by lands of Mr. Antoine Soulard; to the east, by the public road going from this town to Carondelet; and to the west, by his Majesty's domain. The petitioner, confiding in your justice, hopes that his zeal for his Majesty's service, and the small salary which he enjoys, shall be strong motives in the opinion of a chief who, like you, makes his happiness consist in distributing favors to the officers who have the honor to serve under his orders. *In this belief, he hopes to obtain of your justice the favor which he solicits.

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JACQUE MACKAY.

"*St. Louis, October* 9, 1799."

"*St. Louis of Illinois, October* 9, 1799.

"Cognizance being taken of the foregoing memorial of Mr. James Mackay, and due attention being paid to his merits and good services, the surveyor of the Upper Louisiana, Don Antonio Soulard, shall put the interested party into possession of the land which he solicits, in the place designated in this memorial, and this being executed, he shall draw a plat of his survey, delivering the same to the party, with his certificate, in order that it shall serve to him to obtain the concession and title in form, from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting all classes of lands of the royal domain.

CARLOS DEHAULT DELASSUS.

"Truly translated. St. Louis, 20th February, 1833.

JULIUS DE MUN."

Translation of the Spanish Survey.

"The bounds and corners are all indicated on the survey. All the line-trees are marked with a blaze above, and two notches below, and the right and left blazed only. Marked in book A, fol. 55, No. 94.

"Don Antoine Soulard, particular surveyor of Upper Louisiana, certify that, on the 24th of this present year, in virtue of the decree which accompanies of the Lieutenant-Governor and sub-delegate of the royal estate, Don Carlos Dehault Delassus, in date of the month of October, of the year 1799, I went to the land of Don Santiago Mackay, the admeasurement of which I have taken in presence of the proprietor and

of the neighbors who bound thereon, with the perch of Paris of eighteen feet long, according to the custom adopted in this province of Louisiana, and without regarding the variations of the needle, which is seven (7) degrees and thirty (30) minutes, as appears by the plat that precedes; which land is situate to the south of the little river of the mills, situate near the town of St. Louis, bounding north by the lands of Don Auguste Chouteau; south, in part, by another piece of land of Don Antonio Soulard and the royal domain; east, in part, by the land of Don Auguste Chouteau, and by the royal road from the town to the village of Carondelet; west, by the lands of the royal domain; and in order that it may appear when fitting, I give the present with the plat that precedes, in which are indicated the dimensions and natural and artificial limits which surround the said land. St. Louis of Illinois, 17th of December, 1802.

ANTONIO SOULARD, *Particular Surveyor.*"

*4. Proceedings of the board of commissioners established by the act of Congress, passed the 2d of March, 1805. [*424

This act provided for the appointment of three persons, who should examine and decide on all claims submitted to them, and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress.

"*July* 22*d*, 1806.

"The board met agreeably to adjournment. Present the Honorable John B. C. Lucas, Clement B. Penrose, and James L. Donaldson, Esquires.

"James Mackay, claiming two hundred arpents of land, or thereabouts, situate in the fields of St. Louis, produces a concession from Charles D. Delassus, dated October 9th, 1799, and a survey of the same, dated the 24th of November, and certified the 17th of December, 1802.

"Auguste Chouteau, being duly sworn, says, that the said tract of land was surveyed in 1804 or 1805; that he never heard of a concession having been granted for the same until the survey was taken; that the said tract is adjoining a tract claimed by the witness, and that the same interferes with a tract claimed by the inhabitants of St. Louis as a common. The board, from the above testimony, are satisfied that the aforesaid concession is antedated. On motion, adjourned to to-morrow, 9 o'clock, A. M. See minutes No. 1, pp. 412, 413, 417, and 419."

"*Friday*, *July* 31*st*, 1807. 3 *o'clock.*

"The board met agreeably to adjournment. Present the Honorable John B. C. Lucas, Clement B. Penrose, and Frederick Bates, Esquires. James Mackay, claiming about two hundred and eighty-two arpents in the common of St. Louis, produces a concession from Charles Dehault Delassus, dated the 9th of October, 1799. Survey and certificate dated the 17th of December, 1802. Laid over for decision. The board adjourned until to-morrow, 9 o'clock.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

"See book No. 3, pp. 19–21."

"*Saturday*, *November* 4*th*, 1809.

"Board met. Present, John B. C. Lucas, Clement B. Penrose, commissioners. James Mackay, claiming two hundred and eighty-two arpents of land, situate on the commons of St. Louis. See book No. 1, p. 417; book No. 3, p. 21. It is the opinion of the board that this claim ought not to be confirmed. Board adjourned till Monday next, 9 o'clock A. M.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.

"See book No. 4, pp. 185–187."

*425] *5. Proceedings under the act of the 13th of June, 1812.

"*St. Louis*, *December* 28*th*, 1813.

"James Mackay claims about thirty arpents of land near the town of St. Louis, produces a concession from Charles D. Delassus, Lieutenant-Governor, for about two hundred arpents, dated the 9th of October, 1799. Survey of two hundred and eighty-eight arpents, 17th December, 1802 (certified).

"M. P. Leduc, as agent of claimant, abandons all but about thirty arpents; the part abandoned supposed to be comprehended by the survey of the commons. It appearing from the minutes, book No. 1, p. 417, that no testimony has been introduced on the merits of this claim. A witness is now admitted.

"Antoine Soulard, duly sworn, says that this claim was granted to claimant by C. D. Delassus, Lieutenant-Governor, on the recommendation of his successor, Z. Suedeau, who had promised the same. It was surveyed under the Spanish government, and has ever since been considered as property of

claimant; that corn was raised on premises for claimant, during three or four of the last years.

"*Note.* No more abandoned than may fall within the commons, should they be confirmed. See Bates's minutes, pp. 116, 117."

6. Extracts from the decision of Mr. Bates under the same act, and act of 3d March, 1813.

Plaintiffs then read in evidence extracts from Bates's decision, opinions of the recorder of land titles for Missouri Territory, as to claims entered under act of 13th June, 1812, and proven before 1st January, 1814, as provided by the act of the 3d of March, 1813, comprehending also the claims in the late district of Arkansas, which, by act of 2d August, 1813, were permitted to be entered until 1st January, 1814, and proven until 1st July, 1814, together with the extensions of quantity provided by fourth section of act of 3d March, 1813, and confirmations under the act of 12th April, 1814.

Warrant or order of survey.	Survey.	Notice to the recorder by whom.	Quantity claimed.	Where situated.	Poss'n, inhab. or cultivation.	Opinions of the recorder.
Con. fr. C. Delassus, Lt. Gov. 9th Oct. 1779, for about 200 arp's.	17th Dec., 1802, for 288 arpents.	James Mackay.	30 arp's of the surplus abandoned commons of Saint Louis.	By cultivation as falling within the ——	Cultivation in corn from 1810 to 1813.	Confirmed 30 arp's O.S.B. p. min. 1, p. 417, N. M. 117. No more abandoned than may fall within the commons should they be confirmed.

* "RECORDER'S OFFICE,
St. Louis, Missouri, 5th December, 1840. [*426

"I certify the above to be truly extracted from page 36 of book No. 2, except the caption, which is truly copied from page 1, of book No. 1, being two of the five small books, with the following indorsement on the first, and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit:—

"These five small books are originals in the proper handwriting of the undersigned, being his decisions on land claims since the adjournment of the late board. These were arranged and fairly transcribed for report to the commissioner of the

general land-office, but not yet recorded in the books, because they have no authority till sanctioned by government.

"FREDERICK BATES, *Recorder of Land Titles.*

"*St. Louis, November 1st*, 1815.

"All on file in this office. F. R. CONWAY,
U. S. Recorder of Land Titles in the State of Missouri."

This decision the plaintiffs alleged to have been confirmed by the act of 29th April, 1816. 3 Lit & Brown's ed., 328.

7. Proceedings of the board of commissioners, established by the acts of 9th July, 1833, and 2d March, 1833.

The act of 1832 authorized commissioners to examine all the unconfirmed claims to land in Missouri, &c., to class them, and, at the commencement of each session of Congress during said term of examination, lay before the commissioner of the general land-office a report of the claims so classed, &c., to be laid before Congress for their final decision upon the claims contained in the first class. The act of 1833 directed the commissioners to embrace every claim to a donation of land, held in virtue of settlement and cultivation.

Plaintiffs then read in evidence, from the report of the recorder and commissioners for the adjustment of land titles in Missouri, under the acts of Congress of the 9th of July, 1832, and 2d of March, 1833, printed by authority of Congress, all under the head of No. 54 (James Mackay claiming two hundred and more arpents,) pp. 174–177 of said report.

"*Monday, February 18th*, 1833.

"F. R. Conway, Esq., appeared pursuant to adjournment, having been authorized by a resolution of the board of commissioners of the 1st of December last, to receive evidence. James Mackay, by his legal representatives, claiming two hundred and more arpents,—it being a special location. See book B, pp. 433, 434; minutes, No. 1, p. 417; minutes of recorder, p. 117. The claimant further refers to book B, *427] p. 486, in order to show that the claim for the commons of St. Louis does not interfere with this *claim; also, to book No. 5, p. 552. Produces a paper purporting to be a concession from Carlos Dehault Delassus, dated October 9, 1799. See Bates's decision, p. 36.

"M. P. Leduc, being duly sworn, saith, that the signature to concession is in the proper handwriting of the said Carlos Dehault Delassus. Book No. 3, p. 21; No. 4, p. 186. For further testimony of M. P. Leduc in behalf of this claim, see

next claim below. Antoine Soulard, claiming two hundred and four arpents forty-eight perches, to wit: deponent further says that he informed Mr. Soulard that in case he would abandon the part of his claim which was included in the commons of St Louis, Mr. Bates would confirm the balance of said claim; thereupon Soulard called upon Mr. Bates, and made the abandonment, upon which Bates confirmed the part of said claim which lies east of the common, and at the same time, Soulard, as agent for Mackay, made the same abandonment on Mackay's claim, and that since that time Soulard told the deponent that Mackay disapproved of said abandonment, and that he, the said deponent, never acted as agent for Mackay in said claim; that he does not know that Soulard ever was authorized by Mackay to make said abandonment; that since the time of said abandonment, Mackay remained as ostensible owner and claimant of said land; that he built thereon a house, and lived and died in it. The deponent further says, that what he understands by these claims interfering with the commons of St. Louis, is the part of said claims included in the survey of said commons, made by Mackay in 1806, as recorded. Deponent believes that taxes were paid by Mackay and Soulard on said lands until 1820; and that the part of Mackay's claim which was not confirmed was sold under an execution as being the property of said Mackay. Adjourned until to-morrow, at 10 o'clock, A. M.

F. R. CONWAY."

See book No. 6, pp. 102–104, and 107.

"*Thursday, November 7th*, 1833.

"The board met pursuant to adjournment. Present, L. F. Linn, A. G. Harrison, F. R. Conway, commissioners. James Mackay claiming two hundred and more arpents. See p. 103 of this book. The board, after minutely examining the original papers in this case, see no cause for entertaining even the suspicion of the concession being antedated, as expressed by the former board, and they are unanimously of opinion that this claim ought to be confirmed to the said James Mackay, or to his legal representatives, according to the concession. The board adjourned until to-morrow, 9 oclock, A. M.

L. F. LINN.
F. R. CONWAY.
A. G. HARRISON."

See book No. 6, pp. 304, 306, and 307.

*8. The act of Congress passed 4th July, 1836.
By this act, Congress confirmed the decisions in [*428

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favor of land claimants made by the above commissioners, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice; and the second section declared, that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase, &c., &c.

9. The certificate of the surveyor of the public lands, dated 5th December, 1840, accompanying which was a plat.

"*St. Louis, 5th of December*, 1840.

"The above plat of survey No. 3,123, containing $225\frac{10}{100}$ acres, in the name of James Mackay, or his legal representatives, is correctly copied from the approved plat on file in this office. The said survey is the tract confirmed to said James Mackay, or his legal representatives, by the act of Congress, approved the 4th of July, 1836, entitled 'An act confirming claims to land in the state of Missouri, and for other purposes,' it being No. 54 in the report of the commissioners referred to in the above designated act of Congress. No separate survey has been made of the thirty arpents of said tract, confirmed by an act of Congress, approved the 29th of April, 1816. WILLIAM MILBURN,

Surveyor of the Public Lands of the states of Illinois and Missouri."

10. The deposition of Soulard.

Plaintiffs then read in evidence the deposition of Garlon Soulard, namely:—

"We do hereby agree, that the deposition of James G. Soulard be taken on this 30th of November, 1839, to be read in evidence in the trial of a certain cause now pending in the Circuit Court of St. Charles county, state of Missouri, wherein the heirs of James Mackay, deceased, are plaintiffs, and Patrick M. Dillon is defendant. On the part of the plaintiffs, L. E. Lawless; H. R. Gamble for defendant. James G. Soulard, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, on his oath says, I was very well acquainted with the late James Mackay, who died at his residence in St. Louis county, in the fall or winter of 1823 or 1824; I think in 1823. He left several children, who are still living; namely, Zeno, Eliza, wife of Reuben Coleman, Cath-

erine, wife of Louis Guyon, Julia, wife of David Bowles, Antoine, James, Amelia Ann, wife of William Coleman, Louisa, lately married to some person in Kentucky, whose name is Baker, as I am informed; he also left a [*429 widow, who is still living; her name is Isabella L. Mackay. The residence of James Mackay, and where he died, is part of the building now known as the convent, in the south part of the city of St. Louis. The confirmed part of the tract of land on which said house is built is outside and east of the line of the St. Louis commons; and all the land there inclosed and occupied by Mr. Mackay, at the time of his death, was east of the commons. He had about three acres inclosed (as near as I can remember). The part occupied by him was understood to be that part of said land which was confirmed to Mr. Mackay. Mr. Mackay left a will and appointed executors; namely, Anthony Soulard, my father, Isabella L. Mackay, the widow, and Zeno Mackay, under certain conditions, and Gabriel Long. The widow of James Mackay remained in possession of the mansion-house, after the death of her husband, two or three years, I think, by herself and her tenants; after she ceased to occupy it, I think Mr. Mullanply took possession; after which time neither my father nor Mr. Mackay ever had possession of any part of the said tract as executors of James Mackay.

"JAMES G. SOULARD."

"Sworn to and subscribed, before me, this 30th of November, A. D., 1839.

"P. W. WALSH, *Justice.*"

11. Proof of the location and value of the land.

Plaintiffs then proved that land in the possession of Dillon was on the east end of the United States survey offered in evidence, west of the dotted line representing front line of commons; that the land on the extreme west end of said survey was worth three hundred dollars per acre, and increased in value as you proceed east in said survey, and that the monthly value of the premises in possession of Dillon was one cent per month. (Here the plaintiffs closed their case.)

The defendant, to sustain his title, gave in evidence the following documents, and referred to the following laws:—

1. Proceedings of Syndics.

2. Survey of the tract claimed as commons, by Mackay, in 1806.

3. Proceedings of the board of commissioners under the act

of Congress passed in 1805, the same law which was referred to by the plaintiffs, as above mentioned.

4. Act of Congress passed 13th of June, 1812.

5. Act of Congress passed 26th of May, 1824, and the testimony taken under it.

6. Act of Congress passed January 27, 1831.

*430] *7. Evidence of Pascal Cerre.

8. Two deeds from the city of St. Louis to Dent and Dillon respectively.

1. Proceedings of Syndics.

"We, the undersigned, Syndics named by the meeting of inhabitants holden in the government-chamber, the 22nd of the month of September of this year, 1782, by Mr. Don Francis Cruzat, Lieutenant-Colonel Grad, of infantry, commander-in-chief and lieutenant-governor of the western part and districts of the Illinois, to establish fixed and unalterable rules for the construction and maintenance of the streets, bridges, and canals of this village, clothed with the authority of the public, which have selected us for these ends, have determined in the said government-chamber, and in the presence of the aforesaid Mr. D. F. Cruzat, this day, the 29th of the same month, the following, which is to be regularly conformed to, in future.

"1. There shall be held, the first day of every year, in the government-chamber, and in the presence of Monsieur the Lieutenant-Governor, a meeting of all the inhabitants of this post, wherein, by a plurality of voices, there shall be named two Syndics, who shall together ('unanimously') superintend the maintenance of the streets, bridges, and canals of the village, and who shall be obliged to cause to be observed and fulfilled strictly the following articles:—

"2. The first duty of the Syndics, immediately after their election, shall be, to examine for themselves the interior locality of the village, and to cause without delay the streets, canals, and bridges, to be repaired by the persons who are bound so to do, and whom we indicate below; and that if any one refuse to conform thereto, they have recourse to law to compel them to fulfil an object so indispensable for the public convenience.

"3. All the inhabitants fronting upon a street along which a run (streamlet) shall pass shall be obliged to give a course to the water to the Mississippi, to make the canals and bridges necessary to maintain them, and keep the streets at all times practicable for the convenience of carriages and public cars.

"4. Besides the specifications in the aforegoing articles, the streets in general shall be repaired and maintained in good condition by the proprietors of the grounds fronting on them, it being understood that those opposite to each other shall co-operate in equal portions, if the case require it.

"5. Finally, the little river bridge, as well as all the roads which are outside of the village, shall be made (and) maintained by the public.

"Done and passed in the government-hall, and in the presence *of Monsieur the Lieutenant-Governor, who has signed with us the said day and year *ut supra*. [*431

PERRAULT.
BRAGEAUX.
CERRE.
RENE KIERCERAUX.
AUGUSTE CHOUTEAU.
CHAUVIN.
Ordinary mark of JOSEPH + TALLON.
" " " JOSEPH + MOINVILLE.

"Signed, FRANCIS CRUZAT."

"We, the undersigned, Syndics named by the meeting of the inhabitants which was holden in the government-chamber, the 22d of the month of September of this year, 1782, by Monsieur Don Francis Cruzat, Lieutenant-Colonel Grad, of infantry, commandant-in-chief and lieutenant-governor of the western part and districts of the Illinois, to establish fixed and unalterable rules for the construction and maintenance of the inclosures of the commons of this village, clothed with the authority which elected us for these ends, have determined in the said government-chamber and in the presence of the aforesaid Mr. Don Francis Cruzat, this day, the 29th of the same month, the following, whereunto conformity for the future shall be regularly observed.

"1. The first day of every year there shall be named publicly in the government-chamber, in the presence of Monsieur the Lieutenant-Governor, a Syndic, and immediately afterwards eight arbiters, who shall make the first examination of the inclosures of the commons.

"2. The inclosures of the said commons shall be made and completed every year by the 15th of April, at the latest, and shall be accepted by the eight arbiters the first Sunday after this fourth.

"3. The aforesaid arbiters shall not accept the inclosures, unless they be constructed in such manner that the animals

cannot escape from the commons and do damage to the seedings of the inhabitants.

"4. It shall be the duty of the said arbiters to render an account of the examination of the inclosures which they shall have made to the Syndic, who thereupon shall immediately nominate eight others, to verify the exactness or negligence of the first. And if there shall be found inclosures which are not in the condition required to be accepted, and the first arbiters shall not have made their report thereof to the Syndic, they shall be condemned to pay each a fine of ten pounds.

"5. Whensoever it shall come to the knowledge of the *432] Syndic, that any inclosure is not in the state decreed by the third article of *this ordinance, it shall be his duty to give notice thereof to the proprietor, in order that, without delay, he may apply to it the proper remedy; and if the latter shall, through caprice or otherwise, neglect this first duty, the Syndic shall cause it to be repaired at his cost.

"6. If the last who shall have made the visit of examination to the inclosures shall not have given notice to the Syndic of the condition in which he shall have found them, and if, in the interval between his visit and that which is subsequently to be made, it shall be proved that the animals have escaped, and that they have done any damage, he shall be forced to pay for it; and if it happen that the Syndic, having been warned of the bad condition of the inclosures, shall have neglected to give notice thereof to the proprietors, then he shall be responsible for the damage, and be constrained to pay it himself. In like manner, in the case of the proprietors of the inclosures having been notified by the Syndic to go and repair them, and their failure to do so immediately, they shall undergo the same penalty.

"7. If it happen that at any time when the animals shall have escaped, and shall have done damage, that several inclosures are defective, in order to remedy the vexatious consequences which usually result from similar facts, it is ordered, that the damages be paid in equal portions by those whose inclosures are defective. Nevertheless, if it should occur that, in the interval between one visit and another, the inclosures having been found in good condition by the Syndic or other persons appointed for that purpose, the animals shall have escaped through any breach made by unknown malefactors, or from any other unexpected event, the damage following thereupon shall rest upon him upon whom it has fallen.

"8. If the animals which shall be turned loose come to be taken up in the fields, without the owners having co-operated

in their egress, they shall not be held to pay either the caption or the supposed damage which they may have occasioned.

"9. Whensoever it shall be proven, that the gate-keeper shall have allowed animals of any sort whatsoever to escape, by his negligence or otherwise, he shall be forced to pay the damage which may be done.

"10. So soon as the inclosures shall have been accepted, it shall not be permitted to any person whatsoever to pass over them, upon pain of paying for the first offence ten pounds, and for the second twenty-four, and suffer an imprisonment of twenty-four hours.

"11. Malefactors surprised in making a breach in the inclosures, whether to pass themselves, or to allow the animals to pass, whatsoever be the motive, shall be condemned to pay, besides the damages they may have caused, a fine of fifty pounds, and to undergo an imprisonment of fifteen days.

*"12. It is ordered, that all those who may find any one committing the crime specified in the preceding [*433 article, shall give the promptest advice thereof to Monsieur, the Lieutenant-Governor, and shall themselves conduct the criminal to prison, if it be possible for them to arrest him; but if any one, through a mistaken indulgence, or any private interest, shall not strictly fulfil this duty, and if it shall be proven that he has stated to other persons that he had surprised any one in such case, he shall be reputed an accomplice in the crime, and condemned to pay the same fine and damages, and undergo the same privation, as hereinbefore provided.

"13. The proprietors of each inclosure shall be obliged to place thereupon a stamp, with their name in full, under penalty of fifteen pounds fine.

"14. He who takes a horse in the prairie, to make use of him, without the consent of the master, shall be condemned to pay twenty-five pounds fine, and punished with twenty-four hours' imprisonment; and if any unlucky accident shall befall the horse, he shall pay therefor according to the estimate which shall be made thereof.

"15. If horses or animals tied in the prairies break their rope, and come to be taken up in the fields, he who takes them up shall receive five pounds per head; and the proprietor of the land whereon they are so taken shall demand the damages, which shall be assessed to him by the arbiters.

"16. Whensoever it shall be proven, that any one has taken the rope of an animal fastened in the prairie, he shall pay ten pounds therefor, without prejudice to the five pounds for the taking, and the damages which he shall have occasioned,

according to the estimate of the arbiters, which shall be made thereof.

"17. It shall not be permitted to any person whatever to tie horses or other animals upon the lands of others, without their consent; otherwise the owner of the land shall seize the animals, and exact of him to whom they belong five pounds per head, and shall have the right to claim the supposed damages which they may have done.

"18. Whensoever any slaves shall be found to have violated any of the foregoing articles, their master shall pay the fines, costs of taking up, and damages prescribed; and the aforesaid slaves shall be punished with the lash, according to the exigency of the case.

"19. All the fines shall be deposited in the hands of the Syndic, designated by the Lieutenant-Governor, of the two who shall be annually named, for the police and maintenance of the village, and they shall be convertible to the public works of the community.

*434] *"Done and passed in the government hall, in the presence of *the aforesaid Lieutenant-Governor, who has signed with us the same day and year *ut supra*.

"Signed, PERRAULT.
CERRE.
RENE KIERCERAUX.
BRAGEAUX.
Ordinary mark of JH. + TAILLON.
" " JH. + MOINVILLE.
CHAUVIN.
AUGUSTE CHOUTEAU.

"FRANC. CRUZAT."

2. Survey of the tract claimed as commons, by Mackay, in 1806.

"I do certify, that the above plat represents four thousand two hundred and ninety-three arpents of land, situated joining the town of St. Louis, and surveyed by me at the request of the inhabitants of the said St. Louis, who claim the same as their right in common, and at whose request I have included in the said common seven different pretensions of different individuals, as appears on the above plat, besides those which are unknown to me, and not surveyed. Given under my hand at St. Louis, the 22d day of February, 1806.

"JAMES MACKAY.

"Received for record, St. Louis, 27th February, 1806.

ANTOINE SOULARD,
Surveyor-General of Territory of Louisiana."

3. Proceedings of the board of commissioners, under the act of Congress, passed in 1805 (2 Lit. & Brown's ed., 324), and in connection with this the second volume of American State Papers, "Public Lands," 549, 377.

Copied from the original documents on file and of record, in book B, pages 486–488.

"*May* 10*th*, 1806.

"The board met agreeably to adjournment. Present, Honorable Clement B. Penrose, Esq.

"The inhabitants of the town of St. Louis, claiming four thousand two hundred and ninety-three arpents of land as a common, produce a certificate of survey of the same, dated 22d of February, 1806,—a set of regulations of the inhabitants, having for object the keeping in order or repairing of the inclosure of said commons, and imposing penalties on such as should neglect or refuse to repair the same. Said regulations, signed by the then Lieutenant-Governor, Cruzat, and dated September 22d, 1782. Auguste Chouteau, being duly sworn, says, that the inhabitants never had a concession for said commons. That he has always known it as such, although of a much smaller extent at first; that it was first fenced in the year 1764, at the expense of the inhabitants, who *always kept it in repair; and further, that every [*435 person, inhabitant of the village, was in the habit of pasturing his cattle in the same, and of cutting wood; and further, that he has known the said commons, as surveyed and fenced, for upwards of fifteen years hence. Gregoire Sarpee being sworn, says that he arrived in the country about nineteen or twenty years ago; that he has always known said commons as such; that the same had then acquired its present size; that when he arrived he found the same fenced in, and that every inhabitant was obliged, under certain penalties, to attend to and make such repairs as the said inclosure or fence required; and further, that Sylvester Labbadie having, in the year 1792, obtained a concession for lands forming part of said commons, and having, in consequence thereof, begun his improvement of the same, the inhabitants remonstrated against it to the governor, who prevented him from cultivating the same, until such time as the intendant should have decreed otherwise.

"William H. Lecompte, being also sworn, says, that he has been an inhabitant of the country for upwards [of] forty-four years; has known the commons from his first arrival in it. That said commons has increased in proportion to the population of the village; that he has known it of the size it now is for upwards of ten years; that the old commons is included

in the present one, and that the regulations passed respecting the same were always considered as laws, and enforced as such; and further, that other regulations were had respecting the same, and also put in force. The board reject his claim, for want of actual inhabitation and cultivation, and a duly registered warrant of survey (carried to page 311 for remarks of the board). See commissioner's minutes, book No. 1, pages 288–290."

"*July* 14*th*, 1806.

"The board met agreeably to adjournment. Present, the Honorable John B. C. Lucas, Clement B. Penrose, James L. Donaldson, Esquires.

"In the case of the commons of St. Louis, pp. 289, 290, the board remark, that this claim originated under the French government; that grants of commons were usual under the French and Spanish governments, and in conformity with their respective laws,—they deem it to be equitable under Spanish law. On motion, adjourned to Monday, the 16th instant, 9 o'clock, A. M. See minutes, book No. 1, pp. 310–312."

"*Thursday*, *January* 2*d*, 1812.

"Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners. Inhabitants of the town of St. Louis, claiming 4,293 arpents of land as a common. See book No. 1, pp. 289, 311.

*436] "It is the opinion of a majority of the board that this claim *ought not to be granted; Clement B. Penrose, commissioner, voting for a confirmation thereof under the usages and customs of the Spanish government. Board adjourned till Monday next, nine o'clock, A. M.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

"See commissioner's minutes, book No. 5, pp. 551–553."

4. Act of Congress, passed the 13th of June, 1812 (2 Lit. & Brown's ed., 748).

This act, amongst other things, enacted, "That the rights, titles, and claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c. &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto; provided, that nothing

herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory."

5. Act of Congress, passed on the 26th of May, 1824 (4 Lit. & Brown's ed., 5), and the testimony taken under it.

Testimony relating to town and village lots, out lots, and common field lots in, adjoining, or belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, Ste. Genevieve, New Madrid, New Bourbon, Little Prairie, and Mine a Burton, in Missouri, and the village of Arkansas, in the Territory of Arkansas, as directed by an act of Congress, passed May 26th, 1824.

THEODORE HUNT, *Recorder of Land Titles.*

See Hunt's minute book, No. 1, p. 1.

The mayor, aldermen, and citizens of the city of St. Louis produce Henry Douchonquette and Joseph Charleville, for the purpose of having their depositions recorded as relates to the St. Louis commons.

Henry Douchonquette, being duly sworn, says he is sixty-six years of age, and has lived in St. Louis upwards of forty years, and during this time, until the change of government took place, he always knew there was a common belonging to the inhabitants of the town of St. Louis, and that there was a fence round it, and that he has often assisted to make and keep in repair the said fence. As near as he can describe it, it was bounded as follows:—The fence began near to where Mr. Reynard now lives, above the town, and run back of the town; and from thence to the Carondelet field *fence, or to the River des Peres; and the ground thus taken in was considered the commons. [*437

HENRY DOUCHONQUETTE.

Sworn to before me, November 22d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

Joseph Charleville, being duly sworn, says he has resided thirty-five years in the town of St. Louis, and is fifty-five years old, and has had the deposition of Henry Douchonquette read to him, and of his knowledge he knows it to be true.

JOSEPH CHARLEVILLE.

Sworn to before me, November 22d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

Mackay Wherry, being duly sworn, says he has truly translated and read to Henry Douchonquette and Joseph Charleville the above depositions before they signed the same, and they said they were true. M. WHERRY.

Sworn to before me, November 22d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

See Hunt's MS. book, No. 3, p. 79.

John Bap. Lorain, senior, being duly sworn, as relates to the commons of St. Louis, says he is about eighty-four years of age, and it is about fifty years since he first came to reside in St. Louis, it being when Piernas was lieutenant-governor of this country; and he, this deponent, says, when he first came to reside at St. Louis, the land fenced in between the Mississippi river and the common field fence (excepting the town and such small grants as were made within the said limits) was a common for the use of the inhabitants of the town of St. Louis; certain he is, that it was always used as such by the inhabitants, from the time he first came to reside in St. Louis until he removed to Florisant, about twenty-five years ago; and this deponent further says, that when he first came to St. Louis, the commons extended to the River des Peres; but after that, when Carondelet was laid out, there was an agreement made between the inhabitants of St. Louis and the inhabitants of Carondelet, that the common field fence of St. Louis should join the common field fence of Carondelet, and that all east of the St. Louis field fence should belong to the inhabitants of St. Louis, and west, to Carondelet.

his
JOHN BAPTISTE + LORAIN, Pere.
mark.

Sworn to before me, November 23d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

Baptiste Dominee, being duly sworn, says he is seventy-five years of age, and will have resided forty-six years in St. Louis *next February, and that he has had the deposition of John Baptiste Lorain, pere, read to him, and that he knows it to be true.

*438]

his
BAPTISTE + DOMINEE.*
mark.

Sworn to before me, November 3d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

Alexander Gremaux, dit Charpentier, being duly sworn, says he is sixty-six years of age, and has resided in St. Louis

forty-four years, and has heard read to him the deposition of John B. Lorain, senior, and knows it to be true; and he further knows, that the commons was surveyed by Antoine Soulard, in the time of the Spanish government.

his
ALEXANDER + GREMAUX, dit Charpentier.
mark.

Sworn to before me, November 23d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

Mackay Wherry, being duly sworn, says, that he has truly translated and read to John Baptiste Lorain, senior, the aforegoing deposition of his, before he signed the same, and that he said it was true; and that he likewise translated and read to Baptiste Dominee and Alexander Gremaux, dit Charpentier, the deposition of John Baptiste Lorain, senior, and that they said it was, to their knowledge, true; and this deponent further says, that he has translated and read the depositions of Baptiste Dominee and Alexander Gremaux to each of them before they signed the same. M. WHERRY.

Sworn to before me, November 23d, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

See Hunt's minutes, book No. 3, pp. 82 and 83.

Baptiste Rivieré del Bacané, being duly sworn, in relation to the St. Louis commons, says, the bounds of the commons began where the ox-mill now is, and thence west, up the hill; thence southwardly, in the rear of where Joseph Papen now lives; after it crossed Mill Creek, it went to the Prairie des Noyer; thence southwardly, about an arpent or two below the place called the Pain Sucre, which place is a little in the rear of where the shot-tower now is; and eastwardly by the Mississippi, passing by the spring of Beneto Vasquez. And this deponent says, that for upwards of sixty years the land contained within these limits was the St. Louis commons, and he believes was granted by St. Ange; and he does not live in St. Louis, nor has any lot there.

his
BAPTISTE + RIVIERE.
mark.

*Sworn to before me, November 23d, 1825. [*439

THEODORE HUNT, *Recorder of Land Titles.*

M. P. Leduc being duly sworn, says he has truly translated and read the above to Baptiste Riviere. M. P. LEDUC.

THEODORE HUNT, *Recorder of Land Titles.*

Pierre Chouteau, senior, being duly sworn, as relates to the

St. Louis commons, says, that he came to this town about six months after the foundation of the same, and from that time he, of his knowledge, knows that the commons was recognized and allowed by the different lieutenant-governors, as well French as Spanish; and he further says, that as the town enlarged, there were meetings held of the inhabitants at the lieutenant-governor's, for the purpose of enlarging the commons. This was done more than once, and, as it was determined on at said meetings, the fence was removed, so as to enlarge the same for the use of the inhabitants of said town of St. Louis; and he further says, all land lying between the common field fence (excepting the ancient concession) and the river was considered as commons for the use of the inhabitants of St. Louis. He, this deponent, further says, that about twelve years ago he understood that Madame Laquaifee had a lot at the upper part of the town, adjoining the half-moon battery, but before that time he never heard of such a claim, and he, of his knowledge, knows it never was possessed or occupied by any person before or at the time the change of government took place from France to the United States.

PRE. CHOUTEAU.

Sworn to before me, November 24th, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

See Hunt's minutes, book No. 3, pages 84 and 85.

Joseph Papen, being produced by Baptiste Douchonquette, was duly sworn, and says that he was born in the town of St. Louis, and is forty-five years of age, and has always lived in said town of St. Louis; that to the knowledge of this deponent there was no inclosure or common field lots below the town of St. Louis. This deponent further says, that he is the grandson of Veuve Chouteau, the mother of Auguste Chouteau, and recollects perfectly well, that, when a small boy, the hands of the then commandant drove the hands of his grandmother from off the land which his grandmother claimed, below the town of St. Louis, called the Little Prairie; and further this deponent says, he never heard of the claims of Ortes and Cambras, and Gervais, that is said was situated in this same prairie. JOSEPH PAPIN.

Sworn to before me, August 29th, 1825.

THEODORE HUNT, *Recorder of Land Titles.*

*440] *Francis Caillon, being duly sworn, says he has resided in the town of St. Louis for fifty-eight years, and to his knowledge there never was an inclosure in the Little Prairie south of the town of St. Louis. About thirty-five years ago, to the knowledge of this deponent, Madame Chou-

teau sent a man, Dubois, to cultivate the land she claimed in the said Little Prairie, and to the knowledge of this deponent, the then citizens of St. Louis complained to Perez, the then commandant [—] forbid that any inclosures or cultivation should be made there, and they immediately desisted; and this deponent says, he never has heard of any attempt to cultivate or inclose *and* of the said Little Prairie, south of the town of St. Louis. This deponent further says, that he was well acquainted with Ortes, and Cambras, and Gervais, and, to his knowledge, they, nor neither of them, ever did inclose, or cultivate, or claim any land in this said Little Prairie, south of the town of St. Louis.

his
FRANCOIS + CAILLON.
mark.

Sworn to before me, August 29th, 1825.
THEODORE HUNT, *Recorder of Land Titles.*

Baptiste Dominé, being duly sworn, says he has resided in the town of St. Louis for forty-five years, being occasionally absent for three or four months at a time, and, to his knowledge, during these forty-five years, there never was any land inclosed or cultivated in the Little Prairie, south of the town of St. Louis.

his
BAPTISTE + DOMINE.
mark.

Sworn to before me, August 29th, 1825.
THEODORE HUNT, *Recorder of Land Titles.*

Regis Vasseur, being duly sworn, says he has resided in the town of St. Louis for forty-eight years, and during the whole of this time the Little Prairie, south of the town of St. (Louis) belonged to the inhabitants of said town as a commons, and during this time never was cultivated or inclosed.

his
REGIS + VASSEUR.
mark.

Sworn to before me, August 29th, 1825.
THEODORE HUNT, *Recorder of Land Titles.*

Horatio Cozens, being duly sworn, that he has translated and explained truly the above depositions to Joseph Papen, Francois Caillon, Baptiste Dominé, and Regis Vasseur, respectively, before they swore to the same.

HORATIO COZENS.

Sworn to before me, August 29th, 1825.
THEODORE HUNT, *Recorder of Land Titles.*

See Hunt's minutes, book No. 2, pages 171–173.

*Recorder's Office,
St. Louis, Missouri, 5th Sept., 1839.

I certify the foregoing, in part, to be truly copied from the original documents on file, and the balance to be truly transcribed from the books all on file and of record in this office, being a full and complete transcript of all that appears of record in this office in relation to the claim of the inhabitants of the town of St. Louis to a common.

F. R. Conway,
United States Recorder of Land Titles in the state of Missouri.

To the admission of all this evidence the plaintiff objected, which objection the court overruled; to which decision of the court overruling the objection of plaintiff, and admitting said documents in evidence, plaintiff excepted, and prayed that said exception be allowed, signed, and sealed by the court here and made part of the record in this cause.

Signed, Ezra Hunt. [seal.]

6. Act of Congress passed January 27th, 1831. (4 Lit. & Brown's ed., 435.)

This act declared,—"That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., &c., all the right, title, and interest of the United States in and to the town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of Congress, entitled, &c., passed on the 13th day of June, 1812."

In the course of the trial a transcript of a record and deed were offered in evidence on the part of the defendant, and objected to by the plaintiff. The court sustained the objection, to which opinion the defendant excepted; but the Supreme Court having no jurisdiction of the matter, it is unnecessary to notice it further.

7. Evidence of Pascal Cerre.

"Pascal Cerre, being sworn, on his oath stated:—I have resided in St. Louis I may say since 1787. I was then fourteen years of age. I was a boy before then,—and was in St. Louis before then,—but cannot say that I remember anything except since 1787. I was pretty familiar with the tract of land called St. Louis commons, since 1787, and also acquainted with Mr. Mackay's claim, from the time he built his brick house. The land lying south of the Chouteau mill tract was

owned by the inhabitants of St. Louis, or most of them, as a common. I knew the situation of the Barriere des Noyers field,—but not the situation of the common fence in relation thereto. I cannot tell whether common fence was west of Mackay's claim. The common fence began at the windmill, which is at the upper end of the town of St. Louis, at Menard *house, betwixt the windmill and ox-mill, and [*442 run up in a western direction, passing by a little mound south of Ashley's premises to the front line of the forty arpents tract; then south along that line, near Madame *Leioux*, now Colonel Johnson's premises; then took a west direction towards the mill-pond, and went by a place used to be called Motard's plantation, now ; from then it went west to the front line of the forty arpents in Prairie des Noyers, in a southeast direction from Fontaine's house, and running south passed by the spring in A. Gamble's, now McDonald's, plantation, ten or twenty feet east of said spring; then in a southern direction to the northeast corner of the Carondelet common field; and thence I heard the Carondelet fence joined in, and went to the River des Peres. From the northeast corner of the Carondelet field, the fence went eastwardly to now the shot-factory. The house where Mackay lived and died is now the convent. The land that lies west, to wit, the land described in the United States survey as Mackay's claim, between the line there designated and dotted as front boundary of St. Louis commons and Motard, on the west of said claim, was used as common, as well as the balance of the common. Motard's place is in the Cul-de-Sac, north of the fence. Where the spring of Motard is and his house was north of the fence; and Motard had no improvement south of the fence. The common fence never went to Stokes's place before it turned south, but went more to the left. There was no improvement south of Motard's fence; but all was brush and commons. The western part of the United States survey was always used as commons for grazing, to separate the cattle from the common fields, which were open. The inhabitants of the village got their wood on said land used as commons, when there was timber on it. My father did so. The land included in Mackay's survey, which was shown to witness, was used as commons until 1796 until the reign of Zenon Trudeau, when they ceased fencing the same as commons. It was continued to be used *as* wood and pasturage from that till 1804, and since. I believe that after 1796 all the country round St. Louis was used as common and indiscriminately, whether within or without the limits of where the commons fence stood. I went within the commons to get horses and hunt while the

fence stood. There were plantations on the bank of the Mississippi,—Brazeau, Tayon, and others. Brazeau, Tayon, and others had separate fences, including all their cultivated ground, but did not go west further than the Carondelet road, which run then more easterly than now. My father had property within the commons, seventy-two arpents; he had a fence on it at all times until now. Vasquez had formerly a cabin in the commons, east of A. Gamble's, in the commons where Carr Lane now owns. A negro man lived in the cabin, and had a small inclosure, and was called Benete's spring,—
*443] *la fontaine à Benéte.* He lived there in 1788 and 1789. I don't *know whether he had a concession. Brazeau, Joseph, had property within the commons, and his fence there, his family and stock. Settlement, I knew of none but the settlement the negro lived in, within the commons, west of the Carondelet road. The other plantations went no further west than the Carondelet road. The Soulard property, which came from my father, went back to the Carondelet road, and no farther. I do not know that horses were continued to be pastured at liberty, except on the commons. I only heard of Mackay's claim till about twenty-four or twenty-five years ago, when he went and built his house. I have heard of Marie Nicol claim, which went by the name of *Lefeore* de Marie Ni Colle. It is in the commons on the northeast end of the commons, west of William Russell's, or rather northwest. The common fence was in good order in 1787. In 1782, I was in St. Louis, but can[not] say whether the fence was there."

8. Two deeds from the city of St. Louis to Dent and Dillon respectively. The deed to Dillon was dated on the 7th of April, 1836.

To the admitting of which in evidence plaintiffs objected; which objection the court overruled; to which judgment of the court overruling the objection of plaintiffs, and admitting said documents in evidence, plaintiffs excepted. Here the defendant closed this cause.

Thereupon defendant moved the court to give the jury the following instruction:—

"That the claim of the inhabitants of the town of St. Louis to commons, as exhibited upon the copy of the claim given in evidence, was confirmed by the act of Congress of the 13th June, 1812, to the inhabitants of said town according to the claim, and that the title to the land so confirmed is a valid title against the title of the plaintiffs under the confirmation, by the act of Congress of the 4th July, 1836."

Given,—to the giving of which instruction plaintiffs objected;

which objection the court overruled; to which judgment of the court overruling plaintiffs' objection, and giving the said instuctions, plaintiffs excepted; and thereupon plaintiffs moved the court to give the jury the following instructions:—

"That Mackay's survey of common, preserving Mackay's claim on the northeast part thereof, is conclusive that the claim of commons did not extend over Mackay's claim, as between those claiming the common and Mackay or his heirs. That Mackay's survey of commons, including his claim, is good evidence to go to the jury that the claim of commons did not extend over and cover Mackay's claim. That the deed from the city to Dent conveyed no title under which defendant may justify in this action. That the deed from the city to Dillon conveyed no title under which defendant may justify in this action."

**Refused*,—all and each of which instructions the court refused to give; to which judgment of the court [*444 overruling plaintiff's motion, and refusing to give the said instructions, or any of them, plaintiffs excepted. These were all the instructions asked for, or given, or refused. And plaintiffs pray that their said several exceptions herein contained and set forth may be allowed, signed, and sealed by the court here and made part of the record in this cause.

EZRA HUNT. [SEAL.]

The other bill of exceptions is in the words and figures following, to wit:—

"ISABELLA MACKAY ET AL. *v.* PATRICK M. DILLON.

"*Ejectment.*

"ST. CHARLES CIRCUIT COURT:

"Be it remembered that plaintiffs moved the court for reasons filed, to wit:—

"ISABELLA MACKAY ET AL. *v.* PATRICK M. DILLON.

"*Ejectment.*

"Plaintiffs move the court to set aside the verdict rendered in this cause, and grant them a new trial, because,—

"1st. The court misinstructed the jury.

"2d. Because the court refused to give the instructions prayed for by plaintiffs.

"3d. Because the jury found against law and evidence.

"4th. Because the jury found against the weight of evidence.

"5th. Because the court admitted evidence that ought to have been excluded.

"6th. The allusions and instructions of the court operated as a surprise upon the plaintiffs.

"Isabella Mackay et al., plaintiffs, by their attorney, Bryan Mullanphy, moved the court to set aside the verdict in this cause, and grant them a new trial, which motion the court overruled; to which judgment of the court overruling said motion, and refusing to set aside said verdict, and grant plaintiffs a new trial, plaintiffs excepted; all evidence and matters in the cause being preserved in a previous bill of exceptions in this cause, plaintiffs pray that this exception now here taken be allowed, signed, and sealed by the court here, and made part of the record in this cause.

"EZRA HUNT. [SEAL.]"

Under these instructions of the court, the jury found a verdict for the defendant; and upon the bills of exceptions the case was carried up to the Supreme Court of Missouri, which, on the 24th of May, 1841, affirmed the judgment of the court below.

To review this opinion and judgment, a writ of error brought the case to this court.

*445] *The cause was argued by *Mr. Lawless*, for the plaintiff in error, and *Mr. Gamble* and *Mr. Bates*, for the defendant in error. The great but necessary length of the statement by the reporter renders it impossible to report these arguments, which were printed, and occupied forty pages.

Mr. Justice CATRON delivered the opinion of the court.

The record before us is brought here by a writ of error to the Supreme Court of Missouri, under the twenty-fifth section of the judiciary act. The action was an ejectment for land, to which each party claimed title by virtue of an act of Congress confirming interfering Spanish claims.

The evidence on part of the plaintiffs having been introduced in the state court of original jurisdiction, the defendant offered to read copies of certain documents and depositions taken in 1806 and 1825, certified by the United States recorder of land titles in the state of Missouri, as truly copied from the originals on file and of record in his office. These were objected to, on the part of the plaintiffs, as incompetent to go to the jury; the objection was overruled, the evidence admitted, and an exception taken. And the first question is, was the evidence thus offered competent? It is set out in the report of the case, and need not be further described. As the objection draws in question the nature and character of the evidence, it is deemed proper to state here what they are;

less for the purpose of disposing of the ruling of the court on this point, than as preparatory to the decision of others that follow, each involving the effect and character of the evidence more or less.

By the third article of the treaty of 1803, by which Louisiana was acquired, the inhabitants were to be maintained and protected in the free enjoyment of their property in the ceded territory. To carry the treaty into execution, as regarded titles and claims to land, Congress, by the act of March 2d, 1805, provided that a board of commissioners should be appointed by the President, and also a recorder of land titles; which was accordingly done. The board for Louisiana (now Missouri and Arkansas) sat at St. Louis, as at that place the recorder's office was established, and is yet kept.

By the fourth section of the act, all those asserting claims to land founded on concessions or other assumptions of right to obtain titles from the United States, and which claims originated with the French or Spanish governments prior to the 20th of December, 1803, were required, on or before the 1st day of March, 1806, to deliver to the recorder written notices of claim, stating the nature and extent thereof, together with a plat of the tract claimed, and written evidences tending to establish the right. The notice, plat, and evidences were to be recorded in books to be kept by *the recorder for that purpose. This recorded notice [*446 and evidence formed the foundation in each case for the action of the board; although other evidence might be required by it, or be adduced by the claimant. The board was to decide in a summary way, according to justice and equity, on all claims thus filed.

It was directed to appoint a clerk, whose duty it should be to enter in a book full and correct minutes of the proceedings and decisions of the board; together with the evidence on which each decision was made; the book on the dissolution of the board, was to be deposited with the recorder of land titles; but the clerk was first to make two copies, one of which he was to forward to the Secretary of the Treasury, and the other was to be deposited with the surveyor-general in said district. According to this law, the inhabitants of St. Louis filed their notice of claim, plat, and evidences, in 1806, asking to have the town common confirmed to them.

By the first section of the act of 1812 (June 13th), Congress confirmed the claim to commons adjoining and belonging to St. Louis; with similar claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there any thing in the act of 1812, from which

a court of justice can legally declare that the land set forth by the survey, and proved as commons by witnesses, in 1806, is the precise land Congress granted; in other words, the act did not adopt the evidence laid before the board for any purpose; and the boundaries of claims thus confirmed were designedly (as we suppose) left open to the settlement of the respective claimants, by litigation in the courts of justice, or otherwise.

The confirmation extended to town lots, out lots, common field lots, and commons in, adjoining, or belonging to the several towns or villages. And the act of 1812 made it the duty of the principal deputy-surveyor of the territory, as soon thereafter as might be, to survey, or cause it to be done, and marked, the out-boundary lines of the several towns, so as to include the out lots, common field lots, and commons; of this out-boundary survey, he was to make plats, and transmit them to the surveyor-general, who was to forward copies to the commissioner of the general land-office and the United States recorder of land titles in Missouri. The object of this proceeding, on part of the government, was to sever the confirmed claims in a mass from the remaining lands of the United States, and others outside of the boundary, and nothing more.

The act of May 26th, 1824, supplemental to that of 1812, authorized further proofs to be taken before the recorder in regard to town lots, out lots, and common field lots, confirmed by the act of 1812, as respected inhabitation, cultivation, or
*447] possession, and the boundaries and extent of each claim; but the provision does not *extend in terms to the commons. In virtue of this act, however, the evidence found in the record, and taken before the recorder in 1825, was filed in the recorder's office further to establish the extent of the town commons.

The objection taken in the State Circuit Court was to the whole evidence certified from the recorder's office, without discrimination, and the question turns on its competency for any purpose.

The powers of the Supreme Court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an

act of Congress, &c., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact.[1] But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction,—and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant.

2. The following instructions were next asked on part of the plaintiffs, and refused:—"That Mackay's survey of common, preserving Mackay's claim on the northeast part thereof, is conclusive that the claim of commons did not extend over Mackay's claim, as between those claiming the common and Mackay or his heirs. That Mackay's survey of commons, including his claim, is good evidence to go to the jury, that the claim of commons did not extend over and cover Mackay's claim."

The survey referred to was the one made in 1806, at the instance of the inhabitants of St. Louis, for the purpose of presenting their claim to commons in due form to the board. It was in its nature a private survey, not binding on the United States; and to avoid any implication to the contrary, the act of February 28th, 1806, was passed, which extended the powers of the surveyor-general of Louisiana over the land in controversy, and made it his duty to appoint principal deputies; over these, the commissioners at St. Louis had power given to them, by which surveys could be ordered of private claims. When the board desired surveys to be made, they ordered them to be executed at the expense of the party interested. *And the law declares, that [*448 every such survey, as well as every other survey, by whatever authority heretofore executed (those of legal and complete titles only excepted), shall be held and considered as private surveys only; and all tracts of land, the titles to which may be ultimately confirmed by Congress, shall, prior to the issuing of patents, be re-surveyed, if judged necessary, under the authority of the surveyor-general. It follows, that Mackay's survey of 1806 had no influence on the title of either party, and that the instructions asked were properly refused.

[1] APPLIED. *Kennedy* v. *Hunt*, 7 How., 594.

3. The following instruction was asked for, and given, on part of the defendants:—"That the claim of the inhabitants of the town of St. Louis to commons, as exhibited upon the copy of the claim given in evidence, was confirmed, by the act of Congress of the 13th of June, 1812, to the inhabitants of said town, according to the claim, and that the title to the land so confirmed is a valid title against the title of the plaintiffs under the confirmation, by the act of Congress of the 4th of July, 1836."

It assumes, as matter of law, that the act of 1812 adopted Mackay's survey, and the evidence given in its support; that they are part of the grant, as to its extent and legal effect; and conclusive as against the plaintiffs' confirmation. On the trial, both parties admitted that the land in dispute lies within the survey of 1806, and therefore the instruction took the case from the jury, and cut off all proof to the contrary of this being the true boundary; whereas the survey was a mere private act, as already stated, and concluded nothing for either side; and in holding the contrary the state court erred, and for which the judgment must be reversed.

By what description of surveys the United States are bound, and those claiming title under them governed, we have already, during the present term, been called on to decide, in the case of *Jourdan* v. *Barrett* (*ante*, p. 169), and need not repeat. Nor is it necessary to inquire here what the effect of a legal survey of the St. Louis common is, as the question has been directly presented in the cause of *Les Bois* v. *Bramell*, heard and decided concurrently with this, and on the same arguments, and to the opinion in which, in this respect, we refer.

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*449] *MARIE NICOLLE LES BOIS, PLAINTIFF IN ERROR, *v.* SAMUEL BRAMELL, DEFENDANT.

A private survey of land, claimed under an old Spanish concession and presented to the board of commissioners appointed under the act of 1805, is not conclusive against the party presenting it to show the boundaries of the claim, but is proper evidence to go to the jury, who are to decide upon its limits.

Under the acts of 1824, 1826, and 1828, the District Court of Missouri was authorized to receive petitions of claimants to land, until the 26th of May, 1829. In 1831, when claims which had not been presented were standing under a bar, Congress confirmed the title of the inhabitants of the town of St. Louis to the adjacent commons. This act was valid, unless the opposing claimants then possessed a vested interest which was protected by the Louisiana treaty.

By the third article of that treaty, the inhabitants were to be protected in their property.

But land held under a concession and survey was not finally severed from the royal domain and converted into private property.

The power of granting the public domain was in Morales, who resided in New Orleans. His regulations were in force in Upper Louisiana, and by them the title to land held under a concession and survey was not perfected until ratified by him and a final grant issued.

This power was in a great degree a political power, and, by the treaty, the United States assumed the same exclusive right to deal with the title, in their political and sovereign capacity. The courts of justice cannot, without legislation, execute the power, because the holder of an incomplete title has no standing in court.[1]

A confirmatory act, passed by Congress in 1836, does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself, or a board of commissioners, or the District Court, acting under its authority.[2]

In the act of 1836, Congress had in view the situation of persons whose titles were, by that act, confirmed to lands which had been previously granted to others, and, in order to meet the case, provided that such confirmed claimants might take up, elsewhere, an amount of public land equal to that which they lost.

The confirmatory act of 1836 must, therefore, be construed to exclude the commons which had been granted, by previous acts, to the town of St. Louis.[3]

These acts, and a survey by the proper public officer in 1832, placed the title of the town in the same condition as if a patent had been issued.[4]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

It was exactly the same, in most of its points, with the case of *Mackay and others* v. *Dillon*, reported in a preceding part of this volume. Reference will be made to that case in all the points which are similar.

It was an action of ejectment brought by Les Bois, in the Circuit Court, to recover two hundred and forty-four arpents and fifty perches of land, claimed under a Spanish concession. The defendant, Bramell, claimed title under the acts of Congress of 1812 and 1831, granting a right of common to the town of St. Louis.

The plaintiff's title was as follows:

1. A petition, concession, and survey.

2. Proceedings of the board of commissioners established by the act of Congress passed on the 2d of March, 1805.

*3. Proceedings of the board of commissioners established by the acts of July 9th, 1832, and March 2d, 1833. [*450

4. The act of Congress passed on the 4th of July, 1836.

5. A certificate of the surveyor of the public lands, dated September 6, 1838.

[1] REVIEWED. *Berthold* v. *McDonald*, 22 How., 341. CITED. *Willot* v. *Sandford*, 19 How., 82.

[2] DISTINGUISHED AND EXPLAINED. *Landes* v. *Brant*, 10 How., 370. CITED. *Dent* v. *Emmeger*, 14 Wall., 313. See *Doe* v. *Eslava*, 9 How., 447.

[3] EXPLAINED. *Bissell* v. *Penrose*, 8 How., 339. CITED. *Guitard* v. *Stoddard*, 16 How., 507.

[4] CITED. *Bryan* v. *Forsyth*, 19 How., 337.

These will be taken up in order.

1. A petition, concession, and survey.

The petition was as follows:—

"To Don Charles Dehault Delassus, lieutenant-colonel attached to the stationary regiment of Louisiana, and lieutenant-governor of the upper part of the same province.

"Marie Nicolle Les Bois has the honor of representing to you, that, having lost her father and mother since her most tender years, in consequence of a well known disaster, which alone would be sufficient to render her situation interesting to all men of feelings, and having had for support since that moment an uncle and aunt, both respectable, who have taken care of her infancy, considering that time in his flight deprives her every day of some one of her protectors; that her brothers and sisters are all married, and loaded with family, and without fortune; that she remains as an isolated being, who cannot expect any assistance of any one whomsoever; and who, without fortune, finds herself under several points of view in a calamitous situation, which appears to her to be worthy to attract the attention of the good heart everybody knows you possess. Full of this idea, and convinced of the generosity of the government, which has never ceased to grant favors to the unfortunate, and to be particularly the protector of orphans, she hopes you will be pleased to grant to her the concession of a tract of land situated to the south of this town, and being vacant lands of his Majesty's domain, and which may contain two hundred and thirteen arpents in superficie, more or less; which land shall be bounded as follows: to the north, south, and west, by the vacant lands of the domain, and to the east by a concession of some width belonging to Mr. Antonio Soulard.

"Such is the statement of my misfortune and pretensions, and I presume to hope this favor of the generosity of a benevolent and generous government, and of a chief as worthy as you are to fulfil its benevolent intentions.

MARIE NICOLLE LES BOIS.

"*St. Louis, May* 10, 1803."

The concession was as follows:—

"*St. Louis of Illinois, May* 11*th*, 1803.

"Having seen the foregoing statement, I do grant to Marie Nicolle Les Bois, for her and her heirs, the land which she
*451] solicits, in case it is not prejudicial to any person; and the surveyor of this *Upper Louisiana, Don Antonio

Soulard, shall put the petitioner in possession of the quantity of land she solicits in the place designated; which, when executed, he shall draw out a plat of survey, delivering the same to the party, with his certificate, in order to serve to her to obtain the concession and title in form from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting of all classes of lands of the royal domain.

"CARLOS DEHAULT DELASSUS."

Of Survey.—Upper Louisiana, District of Sn. Luis de Illinois.

The survey was as follows:—

Note. The bounds set to all corners are shown on the plat. All the line-trees were marked with one blaze above two notches. The trees on both sides of the lines were blazed only.

Registered in book B, of the surveys for said district, folio 17, No. 20.

Of Certificate of Survey.

"Don Antonio Soulard, surveyor-general of Upper Louisiana,—I do certify that I have measured, run the lines, and bounded, in favor of Marie Nicolle Les Bois, a piece of land of two hundred and forty-four arpents and fifty perches in superficie, measured with the perch of the city of Paris, of eighteen French feet in length, lineal measure of the said city, according to the agrarian measure of this province; which land is situated at about the distance of twenty-five arpents to the southwest of this town of Saint Louis, and is bounded to the north-northwest by lands of Don Santiago Mackay; to the east-southeast by lands belonging to me; to the south-southwest in part by lands of Don Jh. Brazeau, and by vacant lands of the royal domain; and by the west-southwest by vacant lands; which measurement and survey I took without regarding the variation of the needle, which is 70° 30′ east, as is evident by the foregoing figurative plat, on which are noted the dimensions, directions of the lines and limits, and other boundaries, &c.

"Said survey was executed by virtue of the memorial and decree of the lieutenant-governor and sub-delegate of the royal fisc, Don Carlos Dehault Delassus, dated 11th May, 1803.

"In testimony whereof, I do give the present, with the preceding figurative plat, executed by my exertions on the 27th of May of the current year, in St. Louis, August 20, 1803.

"ANTONIO SOULARD, *Surveyor-General.*

"Truly translated, St. Louis, December 15, 1832.

"JULIUS DE MUN."

*2. Proceedings of the board of commissioners established by the act of Congress passed on the 2d of March, 1805.

Proceedings of Commissioners.

"*Friday, October 7th*, 1808.

"Board met. Present: The Honorable Clement B. Penrose and Frederick Bates.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and one half arpents of land, situated in the commons of St. Louis, produces to the board a concession from Don Charles Dehault Delassus, lieutenant-governor for the same, dated May 11th, 1803; a plat and certificate of survey, dated 27th May, 1803, and certified 20th August, same year.

"Laid over for decision; board adjourned.

"CLEMENT B. PENROSE.
"FREDERICK BATES."

"*Wednesday, August 21st*, 1811.

"Board met. Present: Clement B. Penrose and Frederick Bates, commissioners.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and one half arpents of land, see book No. 3, p. 282. It is the opinion of this board that this claim ought not to be confirmed.

"Board adjourned until to-morrow, eight o'clock, A. M.

"CLEMENT B. PENROSE.
"FREDERICK BATES."

3. Proceedings of the board of commissioners, established by the acts of July 9, 1832, and March 2, 1833.

"*Thursday, November* 29, 1832.

"Board met pursuant to adjournment. Present Lewis F. Linn [and] F. R. Conway, commissioners.

"Marie Nicolle Les Bois, by her legal representatives, claiming two hundred and forty-four and a half arpents of land, see book C, pp. 73, 74, and 75, No. 3, p. 282, No. 5, p. 328, produces a paper, purporting to be an original concession for two hundred and thirteen arpents of land, more or less, from Charles Dehault Delassus, dated 11th of May, 1803; also a paper, purporting to be a plat and certificate of survey for two hundred and forty-four arpents and fifty perches, taken 27th of May, and certified 20th of August, 1803, by Antonio Soulard.

"M. P. Leduc, duly sworn, saith, that the signature to said

concession is in the proper handwriting of the said Charles D. Delassus, and the signature to said certificate of survey is in the proper handwriting of said Soulard.

"The board adjourned until to-morrow at ten o'clock, A. M.

"L. F. LINN.

"F. R. CONWAY."

*No. 39. [*453

"*Tuesday, November 5th*, 1833.

"The board met pursuant to adjournment. Present: L. F. Linn, A. G. Harrison, F. R. Conway, commissioners.

"Marie Nicolle Les Bois, claiming two hundred and forty-four and a half arpents of land, see pp. 64 and 65 of this book (No. 6). The board are unanimously of opinion that this claim ought to be confirmed to the said Marie Nicolle Les Bois, or her legal representatives, according to the concession.

"The board adjourned until to-morrow at nine o'clock, A. M.

"L. F. LINN.

"F. R. CONWAY.

"A. G. HARRISON."

4. The act of Congress, passed on the 4th of July, 1836.

The purport of this act is set forth, under the eighth head of the plaintiff's title, in the case of *Mackay* v. *Dillon*.

5. A certificate of the surveyor of the public lands, dated September 6, 1838.

This certificate is as follows:—

Plat and Certificate of Survey, by Authority of the United States.

"Survey No. 3,184.

"Plat and description of the survey of a tract of two hundred and four arpents and fifty perches, equal to two hundred and eight acres of land, situated in township forty-five, north of the base line, range seven, east of the fifth principal meridian, in the state of Missouri, executed on the twenty-fifth day of September, eighteen hundred and thirty-eight, by Charles De Ward, deputy surveyor, under instructions from the surveyor of the public lands in the states of Illinois and Missouri, dated the sixth day of September, eighteen hundred and thirty-eight.

"This being the tract of land granted, on the eleventh day of May, eighteen hundred and three, to Marie Nicolle Les Bois, by Charles Dehault Delassus, then lieutenant-governor, for the government of Spain, of the province of Upper

Louisiana, surveyed on the twenty-seventh day of May eighteen hundred and three, by Antoine Soulard, Spanish surveyor of the same province, and confirmed to the said Marie Nicolle Les Bois, or her legal representatives, by the act of Congress of the United States, approved the 4th of July, eighteen hundred and thirty-six, entitled 'An act confirming claims to land in the state of Missouri, and for other purposes,' according to the decision, numbered thirty-nine, of the report of the board of commissioners appointed by the act of Congress, approved the ninth of July, eighteen hundred and thirty-two, *454] entitled 'An act for the final adjustment of private *land claims in Missouri'; and the act of Congress, approved the second of March, eighteen hundred and thirty-three, supplemental thereto."

Then follows a minute description of the land by metes and bounds.

Defendant's Title.

The evidence offered by the defendant consisted of the first six heads of the title offered by the defendant, in the case of *Mackay* v. *Dillon*.

He further offered a plat and survey of the common, made in November, 1832, under instructions from the surveyor of public lands in the states of Illinois and Missouri, and the following certificate:—

"SURVEYOR'S OFFICE, *St. Louis, 7th of April*, 1841.

"The foregoing plat and description of the survey of the commons of St. Louis are correctly copied from pp. 74, 75, and 76 of record-book C, in this office. The plat of the survey, No. 3,184, subsequently made of the claim of Marie Nicolle Les Bois, within the survey of said commons, is this day laid down on the said foregoing plat of the common, according to the survey of the said claim of Marie Nicolle Les Bois.

"WILLIAM MILBURN,
Surveyor of the Public Lands in the States of Illinois and Missouri."

The evidence being closed on both sides, the counsel filed the following agreement:

Agreement by Parties.

It was agreed by the parties, that, at the time of the commencement of this suit, the defendant was in the actual

possession and occupation of twenty acres of land, parcel of the tract of land in the declaration mentioned, as tenant of the city of St. Louis, claiming the same as common belonging to the inhabitants of St. Louis, and further, that the matter of dispute in this action exceeds the value of two thousand dollars, exclusive of costs.

It was also admitted by the parties, that, from a short time after the settlement of the village of St. Louis, there was a fence, commencing above the town of St. Louis, running westwardly, a little west of the village, until it came to the hill near the court-house, and then ran in a direction south of west, until it reached the line of the Barriere des Noyer fields, and then running southwardly along the front of those fields, until it reached the Carondelet fields, and from that point extended to the river. The land on the eastern side of that fence was used by the inhabitants of the town for the pasturage of cattle, and for the supply of wood, and was always *called the common of the town, while the land [*455 on the western side was used for cultivation. The land in question lies on the eastern side of this fence, and within what was called the common. The fence above mentioned was destroyed in the year 1797, at which time the cultivation of the common fields west of said fence was discontinued.

The counsel for the plaintiff then moved the court to instruct the jury, that the survey offered by the inhabitants of St. Louis, in support of their claim, upon which survey was laid down, at the request of the claimants, the concession and survey of Marie Nicolle Les Bois, excludes and protects from the confirmatory operation of the acts of Congress of 13th June, 1812, and act of Congress of 27th June, 1831, the title of said Marie Nicolle Les Bois to the tract granted to her.

Which instruction the court refused to give; to which decision the plaintiff, by her counsel, excepted.

Instructions given.

The court then instructed the jury as follows:—

1. That the inhabitants of the town of St. Louis were confirmed in their claim to commons by the acts of Congress of 1812 and 1831.

2. That the notice of claim of said inhabitants, as filed with the recorder of land titles, and exhibited before the board of commissioners, read here to the jury, is evidence of the extent of the said claim to said commons.

3. If the claim of the plaintiff is included within the

boundary of the lands confirmed to the town of St. Louis by the acts of 1812 and 1831, then the jury must find for the defendant; because those acts passed the title to the land in controversy to the inhabitants of said town.

To which opinion of the court, in giving the said instructions, the plaintiff, by her counsel, excepted. And the plaintiff prays the court to sign and seal this bill of exceptions, which is done accordingly, this 14th day of April, 1841.

J. CATRON. [SEAL.]
R. W. WELLS. [SEAL.]

Under these instructions, the jury found for the defendant, and to review them the present writ of error was brought.

The cause was argued by *Mr. Magenis*, who made the following points:—

1. That the grant and order of survey by the lieutenant-governor, in May, 1803, and the survey made in conformity thereto, raise a legal presumption, that at that date the land so granted and surveyed was royal domain.

*456] *2. That the evidence given on the part of the defendant was not sufficient to rebut that presumption.

3. That by virtue of said grant and survey the plaintiff was, in contemplation of law, in possession of the land in dispute on May, 1803, and could not be divested thereof under the act of 1812, except by actual exclusive adverse possession of the same as commons by the inhabitants of St. Louis up to the 20th of December, 1803.

4. That the grant and survey to the plaintiff gave her such a right to the premises as came within the term "property," under the treaty of Louisiana, and that notice of her claim having been duly filed by the recorder, she could not be divested thereof by the act of 1812 or 1831.

5. That by the act of 1812, legal proof before the recorder of continued inhabitation, cultivation, or possession prior to and up to the 20th of December, 1803, was made a condition precedent to the confirmation of claims to lots or land under that act, and that unless the recorder, upon the proof made, confirmed the claims submitted to him for investigation, or reported them to Congress for confirmation, the same are not confirmed by the act of 1812 or that of 1831.

6. That the plat and survey of Mackay, if received as evidence of the extent and boundaries of the land claimed as commons, are evidence also to show that the tract granted to the plaintiff was not claimed as commons, or confirmed to the inhabitants of St. Louis as such, by the act of 1812 or 1831.

Mr. Justice CATRON delivered the opinion of the court.

This case comes up by a writ of error to the Circuit Court of the District of Missouri. It is an action of ejectment for two hundred and eight acres of land, lying within the commons of St. Louis, and confirmed to the plaintiff by the act of Congress of July 4, 1836; and was surveyed by the authority of the United States, in September, 1838. The act of 1836, and the survey, make out a good *primâ facie* title for the plaintiff.

The defendant claims title under the city of St. Louis; and the title of the city depends on its grant of the commons by the acts of 1812 and 1831. The evidence of identity and boundary of neither claim being disputed, the plaintiff moved the court to instruct the jury, that the survey offered by the inhabitants of St. Louis in support of their claim, upon which survey was laid down, at the request of the claimants, the concession and survey of Marie Nicolle Les Bois, excludes and protects from the confirmatory operation of the acts of Congress of 13th June, 1812, and act of Congress of 27th June, 1831, the title of said Marie Nicolle Les Bois to the tract granted to her; which instruction was refused. The survey referred to was one made of the commons *in [*457 1806, by James Mackay; and on a plat of the survey, filed with a notice of claim before the board of commissioners organized by virtue of the act of 1805, to examine and report on French and Spanish claims, this of Les Bois was laid down, with six others. Mackay's survey was a private one, made at the instance of the inhabitants of St. Louis, and was not binding on the rights of any one; nor did it profess to exclude the pretensions laid down on the plat, as not being part of the town common, but the reverse. For our further views on the question presented by the instruction, we refer to what is said on it in the case of *Mackay's heirs* v. *Dillon*, submitted to us at the same time with the present.

The court then instructed the jury as follows:—

1. That the inhabitants of the town of St. Louis were confirmed in their claim to commons by the acts of Congress of 1812 and 1831.

2. That the notice of claim of said inhabitants, as filed with the recorder of land titles, and exhibited before the board of commissioners, read here to the jury, is evidence of the extent of the said claim to said commons.

3. If the claim of the plaintiff is included within the boundary of the lands confirmed to the town of St. Louis by the acts of 1812 and 1831, then the jury must find for the

defendant; because those acts passed the title to the land in controversy to the inhabitants of said town.

These were excepted to.

As to the first instruction given, it may be remarked, that by the act of June 13, 1812, Congress provided, that the rights, titles, and claims to town or village lots, out lots, common field lots, "and commons," in, adjoining, and belonging to St. Louis (and other towns) should be, and the same were, thereby confirmed to the inhabitants, &c.

That this was a general confirmation of the common to the town as a community no one has ever doubted, so far as the confirmation operated on the lands of the United States; to which no individual claim or pretension was set up; and the question arising on the instruction is, whether the plaintiff's claim was excepted directly, or by reason of a prior right vested in the plaintiff. The only direct exception in the act is the proviso,—"That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the 'board of commissioners' for adjusting and settling claims to land in the said territory."

The board referred to was organized according to the act of March 2, 1805, with powers to examine such claims as that of the plaintiff, and to decide on their validity; and although, by the act, no power was given to make a conclusive adjudication without the sanction of Congress, yet if any claim was
*458] declared good and *valid, and recommended for confirmation, it was of the class mentioned in the foregoing proviso, as we suppose, even when acted on under the act of 1805; but by the act of March 3, 1807, § 41, the powers of the commissioners were extended, and confirmations of various classes of claims were authorized to be made by the board conclusively, without the intervention of Congress; and for which patents were to issue, on surveys made by officers of the United States.

The foregoing were the only description of titles excepted from the act of 1812; and as the plaintiff's was not one of them, the act did not apply to it in the saving clause.

The next inquiry on the first instruction given is, as to the operation of the act of 1831 on the plaintiff's claim.

The act of May 26, 1824, gave jurisdiction to the District Court of the United States for the Missouri District, to hear and adjudge, in a mode of proceeding according to the rules governing courts of equity, on all claims of the description, and that were in the situation, of the plaintiff's,—the United States being defendants; and either party having the right of appeal to the Supreme Court.

The fifth section of the act declares,—"That any claim not brought before the District Court within two years from the passing thereof shall be forever barred, both in law and equity; and that no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claim."

An act for the relief of Phineas Underwood, and for other purposes, passed the 22d May, 1836, § 2 (1 United States Land Laws, 924), declares, that the time for filing petitions under the act of 1824, shall be and is hereby extended to the 26th day of May, 1828.

The act of May 24th, 1828 (4 Lit. & Brown's ed., ch. 90, 298), declares, that the District Courts shall be open for the receiving petitions of claimants, under the act of 1834, until the 26th day of May, 1829, and that the act shall continue in force for the purpose of enabling claimants to obtain a final decision on their claims until the 26th day of May, 1830, and no longer.

The plaintiff instituted no proceedings before the District Court under the act of 1824; and on the 26th day of May, 1829, her claim stood and was barred. For further views of this court on the character of the bar, we refer to the cases of *Barry* v. *Gamble*, 3 How., 55, and *Chouteau* v. *Eckhart*, 2 Id., 352.

In January, 1831, the city of St. Louis, and other towns, applied to have their rights of common further confirmed and regulated; and an act of Congress was passed, declaring,—"That the United States do hereby relinquish to the inhabitants of the several towns of St. Louis, &c., all the right, title, and interest in and to *the town or village lots, out lots, common field lots, and commons,—to be held [*459 by the inhabitants of the said towns in 'full property,' and to be regulated, or disposed of, for the use of the inhabitants, according to the laws of the state of Missouri." This law vested in the city corporation the town common, in fee simple, and gave full power to the legislature of Missouri to incorporate it into the city, by extending the city charter over it. The importance of the act will be understood, when we examine the plats and other evidences in the record; from which it will be seen, that the city is spreading over the eastern lines of the common, and that it is in part sold out in lots by the corporation already, and fast becoming part of the city.

Les Bois standing barred when the act of 1831 was passed, in November, 1832, the city caused the common to be officially surveyed, under instructions from the surveyor-general of Illinois and Missouri, according to the act of 26th May, 1834,

§ 2 (1 United States Land Laws, ch. 311). This survey was a public one, binding on the United States and the city corporation; and was duly recorded by the surveyor-general in his office. A copy of the plat is in the record, with a detailed description of landmarks, courses and distances; and these were given in evidence to the jury in the Circuit Court. Thus stood the defendant's title. On July 9th, 1832, a law was passed by Congress, authorizing commissioners to be appointed to act on claims not confirmed previously; and on the 5th of November, 1833, the board organized under the act declared Les Bois's claim valid; and Congress confirmed it, July 4th, 1826.

To avoid the bar, under these circumstances, and to show that neither the act of 1812, nor that of 1831, could deprive the plaintiff of her right, it is insisted, she had a vested interest to the land confirmed, when the United States acquired Louisiana, which is protected by treaty stipulation, and that such right no act of Congress could defeat; that by the third article of the treaty of 1803, with France, the inhabitants of the ceded territory were to be incorporated into the Union, to be admitted to the rights, advantages and immunities of citizens of the United States, and in the mean time they were to be maintained and protected in the free enjoyment of their liberty, property, and religion. And this implied, that after their admission they should be equally protected, and that such would have been the measure of justice applicable to their rights of property by the laws of nations, had the treaty been silent on the subject. On this assumption the plaintiff mainly relies; that it is true in the abstract is not doubted, but it involves several opposing considerations applicable to her title:—1. Whether such a vested property in the soil existed in Les Bois before the date of the treaty, as bound the government of Spain to perfect, by the execution of a complete
*460] title, the first incipient step. 2. Whether *the judicial power has any jurisdiction to interfere and enforce such right, supposing it to exist.

That this government had imposed on it the same duty to perfect the title that rested on Spain before the country was ceded is not open to question; but this was all the United States were bound to perform. How, then, did the plaintiff's claim stand previous to the cession? Her first decree and order of survey bear date in May, 1802, and the survey was made in August, 1803; but there is no evidence that any part of the land was either occupied or cultivated. The lieutenant-governor's decree is in the usual style, and concludes, "that it is given to serve the interested party to obtain the conces-

sion and title in form, from the intendant-general, to whom alone corresponds, by royal order, the distributing and granting of all classes of the royal domain."

On the 22d of October, 1798, the king of Spain appointed Morales intendant-general and sub-delegate; he kept his office at New Orleans, and was charged with the superintendence and granting of the public domain in the provinces of Upper and Lower Louisiana, "to the conclusion of all other authority." On July 17th, 1799, Morales published his regulations to the inferior officers and the people of the provinces, so that (in his own language) "all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted and sold; that those who are in possession without the necessary titles may know the steps they ought to take to come to an adjustment; that the commandants and sub-delegates of the intendancy may be informed of what they ought to observe," &c. 2 White's Recopilacion, 234.

By article eighteen, it is declared,—"Experience proves, that a great number of those who have asked for land think themselves the legal owners of it; those who have obtained the first decree, by which the surveyor is ordered to measure and put them in possession, others after a survey has been made, have neglected to ask the title for the property, and as like abuses continuing for a longer time will augment the confusion and disorder which will necessarily result,—We declare that no one of those who have obtained said decrees, notwithstanding in virtue of them the survey has taken place, and that they have been put in possession, can be regarded as owners of land until their real titles are delivered completed, with all the formalities before recited."

The formalities recited are found in the three preceding sections, which give precise instructions how the title is to be made out, and where it is to be recorded, by the officers of the general intendancy. The nineteenth article declares,—"All those who 'possess' lands in virtue of formal titles made by the governors [such as Delassus was] shall be protected and maintained in their possessions." And by article twenty,—"Those who, without the title or possession *mentioned in the nineteenth article, are found occupying lands, [*461 shall be driven therefrom, as from property belonging to the crown," unless they have occupied the same more than ten years.

The board of commissioners who confirmed Les Bois's claim acted on the principle, that the regulations of Morales were not in force in Upper Louisiana, more than those of the

royal governors, O'Reilly and Gayoso. But as the Lieutenant-Governor, Delassus, referred the claimant in this case, and in all others so far as we know, to the general intendant for a title, and the instructions point out the terms on which a complete title can be had, and the formalities with which it must be clothed, it is difficult to say on what grounds the commissioners come to the conclusion that Morales's regulations were not in force. The rules of proceeding of the board will be found in 5 D. Green's State papers, 707, and the instructions to which they refer in 2 White's Recopilacion, 228–244.

In an affidavit found in the public documents, and furnished by the same board (5 D. Green's State Papers, 708), Delassus states his practice to have been, that, when a petition was presented for land, if he considered the petitioner possessed merits to entitle him to the concession it was granted, subject to the confirmation of the intendant-general, and that he made an order of survey; these he delivered to the petitioner; but that he kept no books, nor did he make any registry of the decree or order of survey; and that whether the surveyor did so or not was no concern of his, the lieutenant-governor's, nor did he deem it material when the survey was made; as to this, there was no time limited.

From this loose mode of proceeding, it is manifest the whole matter of perfecting the title was referred to the intendant-general; and he, and those acting subordinate to him in this respect, were undoubtedly governed by the intendant's regulations. As the king's representative and deputy, he was to judge whether the considerations moving the lieutenant-governor were such as warranted the grant; next, whether conditions had been performed, &c. The granting power was in a great degree political, and altogether the exercise of royal authority, and of course subject to no supervision but by the same high authority itself. By the treaty, the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity, nor could the courts of justice be permitted to interfere; if they could, and by their decrees complete the title, all power over the subject might have been defeated, not by the courts of the Union only, but by the state courts also. And therefore the contemporary construction and practical understanding of the treaty for forty years has been, that claims like the plaintiff's had no standing in a court of justice until confirmed by Congress, or by its authority.[1]

[1] FOLLOWED, *Kennedy* v. *Hunt*, 7 How., 590.

Next, it is insisted that the confirmation of 1836 established the *original validity of Les Bois's title; that this stands as an adjudged and concluded fact, which a court of justice cannot controvert; and the confirmation having operated on the concession of 1802, therefore, by relation, it overreaches the confirmations of the town common of 1812 and 1831.

The doctrine of relation in an action of ejectment, by which the legal title by patent is made to take date from the entry or inception of title, is familiar in some of the states, and has been acted on in this court. It applies where both the litigant parties have a grant; the case of *Ross* v. *Barland*, 1 Pet., 655, was of this description. There the younger patent was founded on the best right in equity, standing in advance of either patent, and the equities were tried at law. But if the elder or better entry had not been carried into a grant, a court of equity might have administered the same measure of justice, and decreed the land from the patentee, whose legal title was founded on the inferior equity. This is the constant practice in the state courts in similar cases. But when courts of law go behind conflicting patents, and contest the equities on which they are founded, it has never been held that the patent aided the equitable title; it must come in support of the grant, and stand on its own merits. So in this case; the plaintiff admits her grant, of itself, is insufficient to authorize a recovery, and that she must go behind it;—and there she is met by the objection, that her claim had no standing in a court of equity or of law, up to the date of its confirmation, and depended on the political power. The plaintiff's assumption comes only to this, that the United States erred in granting the common first, in prejudice of her better right to have the first grant. To this assumption, the answer is, that if the sovereign power wronged her, she is without remedy in a municipal court.

The second instruction given by the Circuit Court was, that the notice of claim filed with the recorder and exhibited to the board was evidence of the extent of said claim to commons. The competency of the evidence was not objected to on part of the plaintiff; it was such as she herself resorted to, for the establishment of the extent and boundary of her own claim, and, aside from the legal and official survey of the commons made in 1832, is the only evidence of boundary that is likely to exist at no distant future day, and was the usual evidence introduced to prove the fact before the survey of 1832 was made. The court gave no opinion on its effect, but properly left it to the jury.

The third instruction is, that if the jury believed the land in dispute to lie within the bounds of the common confirmed by the acts of 1812 and 1831, then they should find for the defendant.

The first consideration on this instruction arises on the act of July 4th, 1836, by which the plaintiff's claim was confirmed. *463] The fact, that claims embraced by the act interfered with lands *previously granted or sold by the United States, was well known to the commissioners, and in their report of 27th November, 1833 (5 D. Green's State Papers, 702), they state for the information of Congress, that "there are numerous cases of lands lying within these French and Spanish claims belonging to individuals whose right or claim originated under the government of the United States; some depend on purchases; some on the law allowing preëmptions; some others on New Madrid locations; and some again upon settlement rights which have been confirmed;—that most of these persons have been for a long time settled on their lands; their claims being of a *bonâ fide* character, derived from the government of the United States, they went on to improve their lands, making for themselves and families comfortable homes, without any belief that they would ever be interrupted in their possessions; that should the claims reported by the board be confirmed by Congress, in whole or in part, Congress will, in their wisdom, no doubt notice the suggestions here made, and carve out such a course as will quiet the uneasiness and anxiety which are felt, by doing every thing which even the most scrupulous demands of justice could require."

In view of this report, Congress passed the aforesaid confirmatory act, which declares,—"That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands in opposition to the rights acquired by such location or purchase; but the individual or individuals whose claims are hereby confirmed shall be permitted to locate so much thereof as interferes with such location or purchase on other lands of the United States," &c.

The officers of the government administering the land department had to construe this law with its exceptions; the matter was referred to the Attorney-General, and in September, 1842, he gave it as his opinion, that the confirmations must yield to prior confirmations; school sections, ordinary sales prior to the act of July 4th, 1836, &c.

A confirmation of a Spanish or French claim, either by a board of commissioners under the act of 1807, or by Congress directly, or by the District Courts by force of the act of 1824, is a location of land by a law of the United States; surveys have been made and patents issued for such land in the great majority of instances, and it cannot be questioned, as we think, that a title thus protected by patent was intended to be carved out of the act of 1836; nor is it perceived how the St. Louis common can be in a worse condition, as the acts of 1812 and 1831 did not contemplate any further grant than the acts themselves import, and this conclusion is greatly strengthened by the following considerations:

The plaintiff's claim, and all others of a similar character within *the St. Louis common, that is, such as the [*464 board of commissioners from 1806 to 1812 had examined and rejected, were well known to Congress when the act of that year, confirming the common, was passed; the report of the board had just then been returned to Congress, and Mr. Penrose, one of its members, and Mr. Reddick, the clerk, were at Washington, as appears by their letters. The two of Mr. Penrose were communicated to the House of Representatives, and that of Mr. Reddick to the chairman of the committee of public lands (2 American State Papers, 447–451); they gave the information on which Congress proceeded in acting on the report, as the letters plainly show. The same information was part of the public and printed documents of Congress when the second confirming act of 1831 was passed; and when it was known, Spanish and French pretensions to claim conflicting with the common stood barred. In 1832, the common was officially and legally surveyed, pursuant to the act of May 26th, 1824, and the survey stood recorded in due form in 1836, when the plaintiff got her title. These laws, and the acts done by the United States in pursuance of them, we suppose, made and located the common's title as effectually as a patent could have done, and brought it within the exception of the act of 1836; and that the plaintiff Les Bois's confirmation was intended to give her land elsewhere, without disturbing the opposing title.

For another reason, we think the instruction was proper. When the country was acquired, the title to the land in dispute passed from France to the United States; on this government was imposed the duty by the treaty to satisfy individual and unperfected claims. This was to be done in a due exercise of the political power, to whose justice alone the claimant could appeal, and to whose decision she was compelled to submit; and there being two adverse claims to the

same land, equally inchoate, and the government, being unable to confirm both, was under the necessity of determining between them; and, having granted the land to one, necessarily rejected the pretension of the other to the same land; and therefore the first grantee took the legal and exclusive title. But where there is a second confirmation, as in the instance before us, then the justice of the government must be relied on by the second grantee for compensation; and this compensation the act of 1836 has provided. The last ground is the one on which the decision in the case of *Chouteau* v. *Eckhart* proceeded, in regard to the St. Charles common; and which doctrine, we think, applies equally to the present controversy.

For the several reasons above stated, it is ordered that the judgment of the Circuit Court be affirmed.

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*465] *THOMAS BROWN, PLAINTIFF IN ERROR, *v.* THE UNION BANK OF FLORIDA, DEFENDANT IN ERROR.

Where there has been no service of a citation, or no final judgment in the court below, the case must be dismissed on motion.[1]

THIS case was brought up, by writ of error, from the Court of Appeals for the Territory of Florida.

A motion was made by *Mr. L. A. Thompson* to dismiss it, upon two grounds:—

1. Because there was no service of the citation upon the defendant in error.

2. Because the judgment of the Court of Appeals of Florida, remanding the cause for a new trial below, was not a final judgment.

The case was this.

On the 5th of April, 1842, the Union Bank of Florida brought a suit against Thomas Brown, upon the following single bill:—

"TALLAHASSEE, *March 14th*, 1841.

"Dolls. $22,266$\frac{34}{100}$

"One month after date I promise to pay to the Union Bank of Florida, at their banking-house, in the city of Tallahassee, twenty-two thousand two hundred sixty-six $\frac{34}{100}$ dollars, for value received; for securing payment whereof, I do hereby

[1] FOLLOWED. *Moore* v. *Robbins*, 20 Id., 654; *Bostwick* v. *Brinkerhoff* 18 Wall., 588; *Parcels* v. *Johnson*, 16 Otto, 4.

pledge my shares in the capital stock of said bank. Witness my hand and seal.

"THOMAS BROWN. [L. S.]"

The defendant pleaded the general issue, four special pleas, and payment. To the pleas of the general issue and payment, the plaintiff filed a general replication; a general demurrer to the second, third, and fourth, and a special demurrer to the fifth plea. These demurrers were all sustained, and the cause came on for trial upon the general replication to the first and sixth pleas. The plaintiff made fourteen prayers to the court, ten of which were granted, and four refused. The defendant made two prayers, both of which were granted. The court then gave eight instructions to the jury. Under all these directions, the jury found a verdict for the defendant. The plaintiff excepted to the refusal of the court to grant his four prayers, to the granting of the two asked by the defendant, and to five out of the eight instructions given by the court.

The case went up to the Court of Appeals of Florida, which, on the 20th of February, 1844, gave the following judgment:—

"It seems to the court here, that there is error in said judgment. Therefore, it is considered by the court, that the said judgment be reversed and annulled; and it is further ordered, that the verdict *rendered in this cause be set [*466 aside, and that this cause be remanded to the court below, with instructions to said court to award a *venire facias de novo*, for a new trial of the issues to be had therein, and that the plaintiff in error recover against the defendant in error $ his costs by him about his said writ of error herein expended; which is ordered to be certified to the court below."

From this judgment, a writ of error brought the case up to this court.

The motion to dismiss was made and sustained by *Mr. Thompson* and *Mr. C. Cox*, on behalf of the defendant in error, and opposed by *Mr. Brockenborough* and *Mr. Eaton*, on behalf of the plaintiff in error.

Mr. Thompson, to sustain the first ground of dismissal, namely, that no citation had been served, cited Conk. Pr., 446, and 1 Cranch, 365.

And in support of the second ground, namely, that the judgment was not final, cited 3 Story's Laws, 2224; 8 Laws United States, 707; Bingh. on Judgments, 3; 4 Dallas, 22;

3 Wheat., 433; 12 Id., 135; 3 Dallas, 48; 4 Wheat., 73; 6 Id., 448.

Mr. Brockenborough, in opposition to the motion, contended that the writ of error was sued out in open court, in which case no citation was necessary; that the act of 1832 placed writs of error and appeals on the same footing, and cited and commented on the acts of 1832 (4 Story, 2330), 1803, 2 Cranch, 349; 7 Pet., 220; act of 1826, 3 Story, 2024.

Mr. Justice McLEAN delivered the opinion of the court.

A motion is made to dismiss this writ of error, because the judgment of the court below was not final, and there has been no service of the citation.

The motion is granted. The judgment below reversed the judgment of an inferior court, and remanded the cause to that court, with instructions to award a *venire facias de novo;* it was, therefore, not a final judgment, on which only a writ of error can issue.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Territory of Florida, and it appearing on the motion of *Mr. Thompson*, of counsel for the defendant in error, that there has been no service of the citation in this cause, it is therefore now here ordered and adjudged by this court, that this cause be, and the same is, hereby dismissed, with costs.

January 12*th.*

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*467] *ASPDEN AND OTHERS, COMPLAINANTS, *v.* NIXON AND OTHERS, DEFENDANTS.

Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended.[1]

The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction.

So, the administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of these English letters, and could not be known as a representative in Pennsylvania.

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[1] IN POINT. *Hill* v. *Tucker*, 13 How., 467. CITED. *Taylor* v. *Benham*, 5 How., 262.

Two suits, therefore, one in England, between the executor and the administrator of a deceased claimant, acting under English letters, and the other in Pennsylvania, between the executor and another administrator of the claimant, acting under Pennsylvania letters, are suits between different parties. And neither the decree nor proceedings in the English suit are competent evidence in the American suit. The property in controversy is different in the two suits.[2]

A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made,—

1. By a court of competent jurisdiction, upon the same subject-matter.
2. Between the same parties.
3. For the same purpose.[3]

On either ground, the evidence in the English suit is incompetent to prove any thing with regard to the Pennsylvania assets.

Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England where a suit is pending in this country for the American assets. A decree of the High Court of Chancery in England, purporting to distribute assets so situated, would be treated as void for want of jurisdiction.

The Circuit Court of the United States, sitting in Pennsylvania, is bound by the same rules which govern the local tribunals of that State, and would require a devisee to give security to refund in case a debt should afterwards be proved against the testator. Other provisions of the laws of that State would also embarrass a court in exercising the comity referred to.

Under the influence of similar laws, the courts of the several States have been so much restrained as to render the exercise of comity among each other little more than a barren theory. More could not be required between the courts of this country and England.[4]

There having been no evidence introduced in the English suit to establish the heirship of the claimant, the decision of the court there, dismissing the bill, is not conclusive as to the title. What effect those proceedings ought to have in this country, this court will not now decide. It only decides, that the evidence in support of the title is not barred in the Circuit Court of Pennsylvania.

The judgment of a foreign court upon a question of title cannot preclude a claimant from introducing evidence in a second suit, in another country, for other property. Such a proposition is not recognized either by the jurisprudence of the United States or of Great Britain; nor is the opinion of this court in conflict with the established comity of nations.

THIS case came up, by appeal, from the Circuit Court of the United States for the District of East Pennsylvania, sitting as a court of equity.

The circumstances of the case are set forth in the following statement, which the reporter finds prefixed to the opinion of the court, and which supersedes the necessity of any statement of his own.

In 1791, Matthias Aspden, a subject of the king of Great *Britain, and domiciled there, being in the [*468
State of Pennsylvania, where he had formerly resided, made

[2] RELIED ON. *Stacy* v. *Thrasher*, 6 How., 58.

[3] APPLIED. *Washington &c. S. P. Co.* v. *Sickles*, 24 How., 342; *Aurora City* v. *West*, 7 Wall., 102. CITED: *Wilkes* v. *Dinsman*, 7 How., 123; *Keefe* v. *Malone*, 3 McArth., 243 *Beckwith* v. *Thompson*, 18 W. Va., 120, 122. See note to *Bank of United States* v. *Beverly*, 1 How., 134.

[4] CITED. *Hay* v. *Railroad Co.*, 4 Hughes, 361.

his will, whereby he devised his property to his heir at law, with the exception of some trifling specific bequests. He died in England, in 1824 (which country continued to be his place of domicile), leaving much property there, and also much in Pennsylvania. The only surviving executor named in Matthias Aspden's will was Henry Nixon, of Philadelphia, who proved the will, and took out letters testamentary in the Orphan's Court of Philadelphia county, in November, 1824; and he did the same in the proper court in England, in 1825.

The testator left no children, and different persons claimed to be the true devisee, within the description of "heir at law."

In 1828, Samuel Packer filed his bill against the executor Nixon, in the Circuit Court of the United States for the Eastern District of Pennsylvania, alleging that he, Packer, was the devisee, and praying the estate might be distributed to him.

Under this bill, numerous complainants came in by petition, representing themselves to be the next of kin and the true devisees in Pennsylvania, and claiming parts of the estate; and in December, 1831, John Aspden, of the county of Lancashire, England, was admitted to come in as co-complainant, he claiming to be the rightful heir at law and devisee of Matthias Aspden.

In favor of this latter claimant a decree was made in 1833, and the bill ordered to be dismissed as to all other claimants. A portion of the latter appealed to this court.

In 1834, Janet Jones, Thomas Poole, and Mary, his wife, moved to file a supplemental bill and bill of review in the Circuit Court; the said Janet and Mary claiming to be heirs at law of John Aspden, of London, who was the heir of Matthias Aspden, at the time of Matthias's death, as they alleged. This motion was overruled, as coming too late. Thus stood the proceeding in the Supreme Court on the appeal taken in 1833.

At the January term, 1835, when the cause came on for argument upon the merits, a question was presented by the counsel for the appellants, whether the bill taken by itself, or in connection with the answer, contained sufficient matter upon which the court could proceed, and finally dispose of the cause. It was submitted, that the bill contains no averment of the actual domicile of the testator, at the time he made his will, or at any intermediate period before or at his death. The court directed this question to be argued before the argument should proceed on the merits.

The court, in their decision of this preliminary question,

say, that an averment of the testator's domicile is indispensable in the bill, and that the case ought to be remanded to the Circuit Court, for the purpose of having suitable amendments made in this particular. And the court, on the question of the motion to permit the *petitioners for a [*469 review, to be heard before the Supreme Court, make the following remarks:—

"It appears from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs at law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings, and must be again opened there for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion, that they ought to be let into the cause for this purpose. In drawing up the decree, remanding the cause, leave will be given to them accordingly. The decree of the Circuit Court is therefore reversed; and the cause is remanded to the Circuit Court for further proceedings, in conformity to this opinion." 9 Pet., 505.

On the mandate going down, in June, 1835, John Aspden of Lancashire filed his amended bill, stating the domicile, &c., and John A. Brown, administrator of John Aspden of London, together with Janet Jones and Mary Poole (then widows), the daughters of John of London, were let in to file their petition, claiming the estate of Matthias Aspden on the ground that John of London was the heir.

To this petition Nixon pleaded, that John of London, in 1825, had filed his bill against him, Nixon, as executor, &c., in the High Court of Chancery in England, for an account and distribution of the estate; which bill had been answered, and the answer replied to. That John of London died in 1828, intestate, his domicile being in England at the time; and that Thomas Poole, in right of his wife Mary, and Janet Jones, administered on said John's estate in England; that they, as such administrator and administratrix, proceeded to revive the suit in chancery against the defendant, Nixon; which was brought to a hearing in the High Court of Chancery, in 1830, and was heard, and the bill dismissed.

And that, afterwards, another bill was brought by said Thomas Poole and Janet Jones, as administrator and administratrix of John Aspden, against said Nixon, as executor of Matthias Aspden, for the same precise subject-matter, in the

Court of Exchequer in England; to which the decree in the High Court of Chancery was pleaded in bar; and which plea in bar was sustained, and the latter suit dismissed by the Court of Exchequer; and on these proceedings the defendant Nixon relied as a bar to any further proceedings on the part of the personal representatives of John Aspden of London. The court permitted the latter to reply to the plea of Nixon. The replication alleges, that the bill in the High Court of Chancery in England was dismissed "for want of prosecu-
*470] tion," because the claimants were too poor to prosecute the same, or to *procure their evidence of title; and that the bill in the Exchequer was dismissed as stated in the plea.

A commission was awarded by order of the court, and evidence taken in England to establish the facts alleged by the replication. From this, it appears that the bills were filed, and the proceedings had, which are set forth by Nixon's plea; and also that the representatives of John Aspden of London failed to produce any evidence of their title by reason of their poverty. And on the "effect" of this evidence to support the plea in bar, the judges were divided in opinion.

The cause was argued by *Mr. J. Hoffman*, and *Mr. David Hoffman*, with whom was *Mr. Charles J. Ingersoll*, for John Aspden of Lancashire, in support of the plea in bar, and by *Mr. Reed* and *Mr. Williams*, for Mrs. Poole and Mrs. Jones, and for John A. Brown, administrator of John Aspden of London, against the validity of the plea.

The question upon which the judges of the Circuit Court were divided in opinion, as certified by the record, was this:—"Is the evidence, touching the plea in bar, sufficient to support it?"

But after the argument was opened, the counsel were directed by the court to extend their inquiry, and examine the validity of the plea itself. As the decision of the court was, that the plea was insufficient, all the arguments of the counsel either for or against the competency of the evidence to support the plea are omitted.

Mr. J. Hoffman, in support of the plea.

There is no principle better settled, than that the decree, sentence, or judgment of any court, having jurisdiction of the subject-matter, whether foreign or domestic, is conclusive upon the rights of the parties in a subsequent proceeding between the same parties or their representatives. *Bowles* v. *Orr*, 1 Younge & C., 464; *Martin* v. *Nicolls*, 3 Sim., 485; 5 Cond.

Eng. Ch., 198; 8 Pet., 308; 4 Conn., 85; 2 Kames Eq. (3d edit. 1778), 365; 1 Gill & J. (Md.), 492; 4 Mau. & Sel., 20; *Phillips* v. *Hunter*, 2 H. Bl., 410; 2 Kent Com. (3d edit.), Lect. 37, pp. 119, 120. "A decree," says Judge Story, "by a foreign court, dismissing a claim, is conclusive against the plaintiff, and he cannot again renew the controversy in a foreign court or country." Story Confl. L., 499.

In the *Bank of the United States* v. *Beverly et al.*, 1 How., 134, this court ruled, "that an answer in chancery, setting up as a defence the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited." Here, the same matter is set up, by the defendants' plea, as a bar to the plaintiffs' bill or petition, and sustained by the exhibition of the record, and therefore is sufficient.

*In *Wright* v. *Diklyne*, 1 Pet., C. C., 199–202, it is held, "that the dismission of a bill in chancery is not conclusive against the complainant in a court of law; although the bill may have been brought for the same matter. But in a court of equity such dismission would be a bar to a new bill." [*471

But it is contended that the decree by the Court of Chancery was not upon the merits, but simply a dismissal of the complainants' bill for want of proof, and therefore not conclusive. The record, however, shows that there was an answer to each of the several bills of the complainants, and the case regularly brought on for a hearing on the pleadings, and after argument by counsel for both parties, the court dismissed the bills, and decreed that the funds be paid to the defendant, and that the complainants pay the defendant his bill of costs. This being a final and absolute decision in the cause, may be pleaded in bar to a new bill. "A decree of dismission of the complainant's bill, signed and enrolled, may be pleaded in bar to a new bill." 1 Vern., 310; 3 Atk., 809; *Rattenbury* v. *Fenton*, Coop. Sel. Cas., 60; *Price* v. *Boyd*, 1 Dana, (Ky.), 436; 4 Johns. (N. Y.) Ch., 142; 7 Id., 1; The same, 286; 5 Litt. (Ky.), 514.

Judge Story, in his treatise on equity (vol. 2, p. 739, § 1523, edit. of 1839), says,—"A former decree in a suit in equity between the same parties, and for the same subject-matter, is also a good defence in equity, even although it be a decree merely dismissing the bill, if the dismissal is not expressed to be without prejudice." Coop. Eq. Pl. ch. 5, pp. 269–271; Mitf. Eq. Pl. by Jeremy, 237–239. This principle of equity was applied by the Court of Exchequer to the present plaintiffs' bill, referred to and incorporated in the plea in bar. *Jones and Poole* v. *Nixon, Executor of Aspden*, 1

Younge, 359. The syllabus of that case reads thus:—"A plea of a former suit and decree signed and enrolled in the Court of Chancery, in respect to the same matters, allowed, though the bill in that court was dismissed, not on the merits, but for want of evidence."

The same principle was recognized in *Pickett* v. *Loggon*, 14 Ves., 232, 233. The chancellor remarks, in the course of his opinion, that if a party thinks proper to bring his cause to a hearing, &c., and the cause capable of being opened, and then makes default, it is very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law. "If," says the chancellor, "the judgment in the former suit, such as it was, would have barred the proceedings in this suit, it was upon the defendant to set up that bar in some shape, either by a plea in bar, or by an answer insisting upon the same benefit as if it had been pleaded in bar. Whether, in either shape, that judgment or decree would have been an absolute answer to this proceeding, I profess to entertain some doubt. But I cannot see why, if a second suit is *472] permitted, there *may not be a third, and so on. But the defendant may waive the benefit arising from pleading the former decree, or insisting upon it by answer, and proceed to answer the merits of the plaintiff's bill without reference to the former decree as a bar."

The case of *Holliday* and *Coleman*, reported in 2 Munf. (Va.), 162, is in some respects much like the present. No evidence in that case was given by either party. The defendants in the first suit demurred to the complainants' bill, and also answered at length. On the hearing, the chancellor sustained the demurrer, and dismissed the bill. The complainants filed another original bill, and the defendants pleaded the decree dismissing the former bill in bar; and the court sustained the plea. "A decree," says the chancellor, "by a court of competent jurisdiction, dismissing a bill upon the ground that the deed upon which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill."

The complainants, Mrs. Jones and Mrs. Poole, should have appealed from the decree of the vice-chancellor dismissing their bill, or petitioned for a review. Such was the course pursued by the parties in the case of Kosciuszko's will. *Armstrong* v. *Lear*, 12 Wheat., 169.

"Equity will not entertain jurisdiction of a matter which the party has had an opportunity of litigating in another

court, and which had there been decided against him, unless it appears that there existed circumstances, &c., which prevented his making his defence, or trying the question." *M'Clure* v. *Miller*, 1 Bail. (S. C.), Eq., 170; *Henderson* v. *Mitchell*, Id., 113.

"When the party seeking relief, by a petition for a rehearing, had knowledge of the evidence before the decree, or by reasonable diligence or inquiry might have obtained it, he is not entitled to relief." *Baker* v. *Whiting*, 1 Story, 218.

"A direct final judgment or decree of a court of competent jurisdiction is forever conclusive and binding, as to the subject-matter, between the same parties, and all who are privies in law or estate, although a contrary decree upon the same subject-matter be subsequently made as to the other persons who were neither parties nor privies to the first decree, and who are not therefore bound by it." *Marigarth* v. *Deas*, 1 Bail. (S. C.), Eq., 284.

"When a matter has once been adjudicated by a competent jurisdiction, it shall not again be drawn in question; nor will parties be permitted again to litigate what they had once had an opportunity of litigating in the course of a judicial proceeding; but whatever might properly have been put in issue in that proceeding shall be concluded to have been put in issue and determined." *McDowell* v. *McDowell*, 1 Bail. (S. C.), Eq., 324.

*"When a party has had it in his power to ascertain [*473 the importance of testimony before the hearing of his case, and has neglected to do so, and to obtain the testimony, a court of equity will not grant a rehearing of the case, on the ground that the importance of the evidence had been ascertained after the decision, although the justice of the case might be promoted by it. *Prevost* v. *Gratz*, 1 Pet. C. C., 365–379; 1 Paige (N. Y.), 574; 1 McCord (S. C.) Ch., 241; 1 Lit. (Ky.), 325 and 137.

And the rule at law is the same as in equity. "Whatever was, or might have been, decided in a court of law or equity is conclusive in a second proceeding between the same parties or their representatives." *Heller* v. *Jones*, 4 Binn. (Pa.), 60; *Heimes* v. *Jacobs*, 1 Pa., 152; *Fishle* v. *Fishle*, 1 Blacks., 360.

"A former suit for the same cause of action, in which the defendant obtained a verdict, is a bar to a second suit, although such verdict was rendered on the erroneous ground that the plaintiff's cause of action had not then accrued, when in fact the plaintiff had at the time a good and perfect cause of action." *Morgan* v. *Plumb*, 9 Wend. (N. Y.), 287.

"It is a principle universally acknowledged, that the judgment or decree of a court having jurisdiction is not only final

as to the matter determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided."

Per Kent, Justice, on page 502. "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded."

"The general rule is intended to prevent litigation, and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice, and judgments solemnly and deliberately given might cease to be revered, as being no longer the end of controversy and the evidence of right."

"The principle prevails both in courts of law and equity. In bills of review which are brought before the same tribunal to review a former decree, it is a settled maxim of equity, that no evidence of a matter in the knowledge of the party, and which he might have used in the former suit, shall be the ground of a bill of review." *Le Guen* v. *Governeur & Kemble*, 1 Johns. (N. Y.) Cas., 492 and 502.

The application on the part of the petitioners for admission as parties, in this case, to claim the estate of the testator, in opposition to the representatives of John Aspden of Lancashire, whose title *to the same, as the heir at law of the testator, was declared by the Circuit Court, in their decree, on the 26th of December, 1833, is made under circumstances little calculated to obtain the favorable consideration of a court of equity. From August, 1825, to July, 1830, the complainants' bill was pending, and no attempt on their part was made to prove their relationship to the testator, and establish their right to the estate, as his heirs at law. They had the most ample opportunity to establish their claim to the estate; and having neglected to do so, they are concluded by the decree of the court, dismissing their bill."

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In April, 1830, John Aspden of Lancashire appeared in the Circuit Court, and obtained leave to issue a commission, in the case of *Packer* v. *Nixon*, executor of Matthias Aspden, of April session, 1828, No. 1, to England, to prove his relationship to the testator. Numerous witnesses were examined, both in England and America, proving his relationship to the testator. And a report by the master, upon the evidence, declaring him to be the heir at common law, on the paternal side of the testator; and on the 26th of December, 1833, a

decree in his favor of the personal estate of the testator, as his heir at law. During a period of many years, these claimants watched the progress of a tedious and most expensive litigation, between the heir at law and next of kin to the testator; the former claiming the estate under the will, and the latter under the intestate laws of Pennsylvania. And immediately after the decision of the Circuit Court giving a construction to the will, by which the heir at law became entitled to the personal estate of the testator, they appeared in court, ready and willing to deprive the said John Aspden of Lancashire of the character of heir at law, and to substitute themselves as such, by an attempt to revive a claim which had been twice decided against them, and that, too, after neglecting, from 1825 to 1834, to offer a particle of evidence in support of it. It would be most iniquitous to suffer them to do so. *Vigilantibus non dormientibus servit lex.*

Upon general principles, and upon a review of the equitable circumstances in favor of John Aspden of Lancashire, who stands in the place of the defendant, the plea in bar by the defendant to the plaintiff's petition ought to be sustained, and judgment rendered for the defendant.

The counsel for Mrs. Poole and Mrs. Jones, and for John A. Brown, administrator of John Aspden of London, made the following points:

I. The plea in bar is not sufficient in law:—

1. Because the bills in this case, and the decrees in chancery and in the Exchequer in England, pleaded in bar to them, are not between the same parties.

2. Because they are not in relation to the same subject-matter.

*3. Because they are not of the same quality, or in the same right. [*475

4. Because the decree of dismission was not made by a court having competent jurisdiction, under the circumstances of the case, to conclude the appellees.

II. These pleas are not proved:—

1. Because there is no evidence to support them.

2. Because the evidence does not show them to be *ad idem* with the bills filed in this case.

3. Because there is no proof that the letters taken out by John A. Brown are ancillary to those obtained by Mrs. Jones and Mrs. Poole, in London.

4. Because the decrees are neither signed nor enrolled.

III. The dismission, if proved, is no bar to the appellees:—

1. Because there was no decision on the merits.

2. Because no proofs were taken.

3. Because there has been no construction given to the will of M. Aspden, either by the Court of Chancery or the Exchequer.

4. Because the various objections made to the sufficiency of the plea show it to be invalid as a bar.

IV. The plea is to the whole of the bills or petitions of the appellees; and as part of the defence is bad, the whole must be overruled.

Mr. Reed, after examining the second of the above points, relating to the sufficiency of the evidence, proceeded.

The question of evidence need not be further referred to. The question now is, is the plea in bar sufficient, assuming its averments to be proved. We do not come here to dispute any general principle as to the conclusiveness of competent foreign judgments. It is a doctrine, in its general application, of "repose," and hence of high morality. It is not technical, as distinguished from reasonable. On the other hand, its application is sometimes exquisitely technical. A decree in chancery, dismissing a bill "for want of evidence," is a bar. A decree dismissing a bill "for want of prosecution," is no bar. In *Rosse* v. *Rust*, 4 Johns. (N. Y.), Ch., 300, no party appeared, and the bill was dismissed for want of prosecution, and held to be no bar, "because the merits were never discussed." Yet, substantially, there is no difference between that case and this, but as much discussion of merits in one as in the other. In the case now before the court, it is in evidence that Sir Edward Sugden advised the solicitor of petitioners to stay out of court and have his bill dismissed ("struck out of the paper") for technical want of prosecution. He refused, went into court to make an effort to have it referred to a master, and it was dismissed for want of evidence. No discussion of merits. The decrees of dismissal here pleaded were not on hearing, not on evidence, not *on merits, but on default of peculiar nature, from extreme poverty of parties. This poverty is clearly proved.

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The rule of conclusiveness of a foreign decree becomes technical in the extreme when thus applied, and courts are bound, before they apply it to the exclusion of meritorious claimants from a hearing, to see that every technical requisite exists.

These decrees, then, it is contended, have none of the technical requisites.

They are not,—1. Between the same parties. 2. Not on

the same subject-matter. 3. Not, in one sense, by competent tribunals. These points, in one aspect, must be considered together. In another, they are distinct.

There are two parties, petitioners, before this court. 1. Janet Jones and Mary Poole, as heirs of John Aspden of London. 2. John A. Brown, administrator of John Aspden of London. To each there is a separate plea in bar.

1. The first petition is of two co-heiresses of a decedent, widows. The decree pleaded is a decree of dismissal of the bill, Janet Jones, and Thomas Poole, and Mary, his wife, administrators of J. Aspden. Putting out of view, for the present, this character as administrators, can a decree against husband and wife be pleaded in bar to a bill by the wife surviving the husband? *Reeve* v. *Dolly*, 2 Sim. & S., 464; Calv. Part., 272 (17 Law Library). This was a bill by wife, by her next friend, against husband and trustees of wife's separate property. Plea, a bill pending by husband and wife against the trustees. Held to be no bar, because dismissal of husband and wife's bill is no bar to wife's separate bill. The bill of husband and wife is the husband's bill, which he may bar by release. *Duvall* v. *Covenhoven*, 5 Paige (N. Y.), 581. If Thomas Poole had released this claim, it would have been a defence to bill by him and his wife in England. Yet a decree against them in England on such a defence would surely be no bar to suit here by his widow. This suit is against a different fund. Joint decree and order of payment vests property in husband. Calvert, 271; Ward Leg., 64, (18 Law Library. In this view these proceedings not between same parties.

2. A far more serious and interesting question arises on application of this plea to Mr. Brown's petition. He sues here as the American administrator, under letters granted in Pennsylvania, of John Aspden of London. The parties to the English bills were the British administrators of J. Aspden, under a different commission, and with different responsibilities, and the question then is distinctly and for the first time presented, whether a judgment of any sort, by confession, default, or on hearing, against an administrator in one country bars the suit of an administrator in another and foreign jurisdiction. The law of Pennsylvania on the subject of foreign administrations is clear. From 1705 to 1832, a suit by an administrator in a sister *state could be [*477 maintained. *McCullough* v. *Young*, 1 Binn. (Pa.), 63. But never by a British or foreign administrator. *Grœme* v. *Harris*, 1 Dall., 456. In 1826, estates of decedents were made the subject of taxation, and in 1832 (Purdon, 911), all extra

territorial letters of administration were invalidated. At no time in Pennsylvania has there been any privity between a British and a domestic administration. If John Aspden or his English administrators had obtained a decree in England, it would be inoperative here. No privity between them and Mr. Brown, no privity between Nixon in England and Nixon in the United States. *Brodie* v. *Bickley*, 2 Rawle, (Pa.), 431. The administrator with will annexed of one domiciled in England, proves the will in Massachusetts; he is not to account for English assets. *Boston* v. *Boylston*, 2 Mass., 384. The Pennsylvania act of assembly in terms is the same. Purdon, 913. If J. Aspden's British administrators had suffered a judgment against them in Pennsylvania, it would have no effect, the foreign administration being a nullity. *Borden* v. *Borden*, 5 Mass., 67. Administration confers rights and creates liabilities coëxtensive with jurisdiction that confers it. *Mothland* v. *Wireman*, 3 Pa., 185. An Irish administrator releases a bond of intestate, no bar to suit by English administrator. 3 Dyer, 305. Same principle here. *Vaughan* v. *Barrett*, 5 Vt., 333. If J. Aspden's English administrators had sued in Pennsylvania, and had judgment and execution, it would be no bar to suit by Pennsylvania administrator. *Pond* v. *Makepeace*, 2 Metc. (Mass.), 114. To a suit by Pennsylvania administrator, foreign executors come and make defence, the plaintiff entitled to recover by virtue of his distinct domestic office. *Willing* v. *Perot*, 5 Rawle (Pa.), 264. So *Vaughan* v. *Northup*, 15 Pet., 1; *Morrel* v. *Dickey*, 1 Johns. (N. Y.), Ch., 153; *Doolittle* v. *Lewis*, 7 Id., 47; *Woodin* v. *Bagley*, 13 Wend. (N. Y.), 455. Creditors must be protected. *Jenkins* v. *Freyer*, 4 Paige (N. Y.), 51. In Pennsylvania, commonwealth always a creditor.

From these authorities, it clearly results that there is no privity between English administrator whose bill was dismissed, and Pennsylvania administrator who now sues. A decree of dismissal of their bill cannot bar ours in so different a right. It is no answer to say the English decree was a decision of John Aspden's right. It was the decision of no right. It was a dismissal through neglect of English administrators,—a default from poverty. Suppose American administrator to be a creditor, such a dismissal could be no bar. This court will not inquire whether he is or not. Pennsylvania administrator represents the commonwealth, which always is a creditor.

But again, Matthias Aspden, at his death, had property in England, France, and the United States. Of the French funds we know nothing. They never were in England. On

his death, and Nixon's probate of will in England, the English funds vested in him *as English executor. As [*478
American executor, Nixon had American funds. His rights were wholly distinct. 2 Mass., 384; 3 Pa., 185. The funds were distinct. The British courts had no jurisdiction over the American funds. Their jurisdiction tested by power to enforce their decrees. That confined to England. Mr. Nixon never was in England, and not, therefore, liable to attachment. The British proceeding, therefore, strictly *in rem*, and the furthest extent of its conclusiveness is as to English funds. Hence not decree of competent tribunal, and no bar. *White* v. *White*, 7 Gill & J. (Md.), 289.

No requisite of a conclusive decree pleaded in bar exists here, and this without questioning any general principle. No case has, however, been cited, except one (*Phillips* v. *Hunter*, 2 H. Bl., 410) in bankruptcy, nor can one be found, where British courts have gone to the extent now contended for, or held an American judgment absolutely conclusive. All are cases of British colonial decrees, and in that case doubt is expressed whether a different rule ought not to prevail. *Henderson* v. *Henderson*, 3 Hare, 117.

Mr. Williams, on the same side with *Mr. Reed*, and against the plea.

I. The pleas filed by Nixon, executor of Aspden, as defensive bars to the petitions of the appellees, are not sufficient in law.

1. Because the bills filed in the courts of Chancery and of the Exchequer and the present suit are not between the same parties.

The bill in the English Court of Chancery was originally filed by John Aspden of London, became abated by his death, and was revived by Janet Jones and Thomas Poole, and Mary, his wife; the said Janet, Thomas, and Mary having taken out letters of administration to the estate of said John Aspden, from the Prerogative Court of Canterbury. Record, 790.

The bill subsequently filed in the Court of Exchequer was also brought by Janet Jones and Thomas Poole, and Mary, his wife, administratrix of said John Aspden. Record, 79, 80.

By the death of John Aspden, the bill in chancery ceased to be his bill. It became the bill of the parties for whose benefit it was revived (Com. Dig., vol. 2, pp. 410, 411, title Chancery, F, Bill of Revivor; Story Eq. Pl., § 367, p. 298, and cases there cited); and the whole interest existing in Mrs. Poole, both by virtue of letters of administration and as next of kin of the intestate, being, by operation of law and his

marital privilege, vested in her husband, Thomas Poole, the bill in fact became the bill of Janet Jones and Thomas Poole. 2 Wms. Ex., 633, 634, and cases there cited.

The bill in the Exchequer, for the same reasons, was also the bill of Janet Jones and Thomas Poole.

*479] Both these bills were thus bills filed under the authority conferred *by the English ecclesiastical courts upon the English administrators.

As the right of the parties at the time of the decree regulates that decree (2 How., 466), the dismissions in both those courts were dismissions of the bills of Janet Jones and Thomas Poole, administrator and administratrix of John Aspden.

The parties to the present suit are, 1. Janet Jones and Mary Poole, both widows, and next of kin of John Aspden; 2. John A. Brown, administrator of John Aspden, in Pennsylvania.

The parties to the English bills are thus English administrators. Those in the present suit are the next of kin of the intestate and the Pennsylvania administrator.

Are these English administrators and the Pennsylvania administrator the same parties, either in fact or in law? They are in fact different persons. Are they in law the same parties?

In Pennsylvania the law is settled, that foreign letters of administration give no rights whatever within that State. *Græme* v. *Harris*, 1 Dall., 456; *McCullough* v. *Young*, 4 Id., 292; same case, 1 Binn. (Pa.), 64.

An old act of 1705 was supposed to have given some rights to foreign administrators, but the cases cited rule that it only applied to the then English provinces, and, after the declaration of independence, to the United States. See Justice Nelson's opinion, in *Schulz* v. *Pulver*, 11 Wend. (N. Y.), 361.

In 1832, the law now in force was passed (Purdon, 911, act of 1832, § 6), declaring that no letters granted out of this commonwealth shall confer upon any person any of the powers or authorities of an executor or administrator under letters granted in Pennsylvania. This act was merely declaratory, and made no change in the law of Pennsylvania except as regards letters of administration granted within the United States. The same rule prevails in England. 1 Wms. Ex., 204, 205.

India, Scotch, or Irish letters, are of no avail in England. *Allison* v. *Murphy*, Hard. (Ky.), 216; administration in Canterbury void in York. See *Lowe* v. *Farlie*, 2 Madd. Ch., 101; *Tourton* v. *Flower*, 3 P. Wms., 369; *Vanthuysen* v. *Vanthuysen*, Fitzg., 204; Toll., 70; *Beirn* v. *Cole*, Amb., 416; *Pipon*

v. *Pipon*, Id., 25; 1 Com. Dig. Administrator, B 3, p. 494; *Jenkins* v. *Freyer*, 4 Paige (N. Y.), 50; *Woodin* v. *Bagley*, 13 Wend. (N. Y.), 453.

The principles of all these decisions will be found stated in 1 Wms. Ex., 236, 237.

The powers of these different administrators extend only to the limits of the sovereignties creating them, and neither allows the other to intermeddle with any assets within their respective jurisdictions. See bond required of an executor of non-resident testator in Pennsylvania, which applies only to assets within the Commonwealth, act of 1832, § 15. Purd., 913.

*They are not, then, in law, the same parties. [*480

Nor are they privies. *Adams* v. *Savage*, Salk., 40.

Administrator in Devonshire cannot have *sci fa.* on a judgment in Westminster. *Higgins* v. *York Buildings Company*, 2 Atk., 44.

Beames's Pleas, 300, administrator *de bonis non* cannot revive a bill filed by a former administrator, because there is no privity between them. Story Confl., § 522, p. 436; *Tallmage* v. *Chappel*, 16 Mass., 71 (see p. 73); *Grout* v. *Chamberlain*, 4 Id., 611, 613.

There is no privity between an executor and an administrator *de bonis non cum test. ann.*, and the latter cannot sue out a writ of error on a judgment recovered by the former.

The administrator *de bonis non* may have a new action. C. J. Parsons rests this decision upon the English authorities. Yelv., 33, 83; Latch, 140.

It required a statute, 17 Car. II., c. 8, to enable such succeeding administrator to obtain the fruits of a judgment obtained by his predecessor; and therefore, even in this case, where letters are granted by the same ecclesiastical court, there is only a privity by statute, not by the common law.

So, in Pennsylvania; the succeeding administrator completes the administration of the former by virtue of an express authority conferred by act of 1834. Purd., 440. (See *Allen* v. *Irwin*, 1 Serg. & R. (Pa.), 554.)

But this statute in England and the act of Pennsylvania applies only to administration granted by these respective countries; neither relates to foreign letters. Bohun, Cur. Can., 186; *Tourton* v. *Flower*, 3 P. Wms., 369.

Lee v. *Bank of England*, 8 Ves., 44. In this case Sir William Grant says, that the persons (executors) in America are not the personal representatives of the testator, within the meaning of the laws of this country. And this was where the executor refused to prove the will in England, the M. R.

saying, if he refuses and is absent, you may have administration here. *Arnold* v. *Arnold*, 2 Myl. & C., 271. Acc.

The American cases are equally strong. *Goodwin* v. *Jones*, 3 Mass., 514; 2 Id., 384; 9 Id., 347; *Doolittle* v. *Lewis*, 7 Johns. (N. Y.), Ch., 46; *Morrel* v. *Dickey*, 1 Id., 153; *Chapman* v. *Fish*, 6 Hill (N. Y.), 555.

In this court, the same law has been laid down repeatedly. *Fenwick* v. *Sears*, 1 Cranch, 259; *Dixon's executors* v. *Ramsay's executors*, 3 Id., 319; *Kerr* v. *Moon*, 9 Wheat., 56; *Smith* v. *The Bank of United States*, 5 Pet., 529; *Vaughan* v. *Northup*, 15 Id., 1. (See Judge Story's opinion, pp. 5, 6.)

But as the law of the forum in which the bar is set up must regulate its effect, it is particularly with Pennsylvania law we have to do *here; and the authorities in this State are conclusive. *Brodie* v. *Birkley*, 2 Rawle (Pa.), 436; *Mothland* v. *Wireman*, 3 Pa., 186; *Willing* v. *Perot*, 5 Rawle, (Pa.), 264; Purdon, 443, act of 24th February, 1834, § 47, requiring executors to pay legacies under the direction of the Orphan's Court.

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From these authorities, it results,—

1. That administration granted by each jurisdiction is paramount.

2. That administrators are, even within the same jurisdiction, privies only by virtue of statutory enactments, and in no case by the common law.

3. That they are not the general representatives of the intestate, but only as respects his estate in the country from which they derive their authority.

4. And that therefore foreign administrators cannot be in any sense the same parties or privies with those in the State of Pennsylvania.

On this ground, the plea in bar is insufficient.

Again, the parties in these suits are different, because the English bills are bills by a husband and wife, which are always considered bills of the husband only. *Smith* v. *Myers*, 3 Madd., 474; *Reeves* v. *Dolby*, 2 Sim. & S., 464; *Hughes* v. *Evans*, 1 Id., 185; *Mole* v. *Smith*, 1 Jac. & W.; *Paulet* v. *Delaval*, 2 Ves. Sr., 666; *Griffith* v. *Hood*, 2 Ves., Id., 451.

Bill by husband and wife is the husband's bill. Where any thing is for the separate use of the wife, the bill should be brought by a *prochein amy*, otherwise it is the husband's bill. *Owden* v. *Campbell*, 8 Sim., 551.

Suit by husband and wife is suit of husband, and if bill be dismissed or decree made adverse to her interests, the wife may bring a fresh bill by her next friend. *Wake* v. *Parker*,

2 Keen, 73; *Grant* v. *Vanshoonhoven*, 9 Paige (N. Y.), 257; *Duvall* v. *Covenhoven*, 5 Id., 581.

The husband, when he sues in right of his wife, must make her a party, but he sues for his own benefit, and he may release or assign his claim for a valuable consideration; and if a decree is made for the payment of money, or if the claim is otherwise reduced into possession, it will pass to his representatives. *Wintercast* v. *Smith*, 4 Rawle (Pa.), 182; *Lodge* v. *Hamilton*, 2 Serg. & R. (Pa.), 493.

As there is no *prochein amy* a party in the English bills, they are then the husband's bills, and the dismission cannot be pleaded in bar to a fresh bill by the wife, even in England, much less in a foreign jurisdiction.

For this reason, then, the English and American bills are not between the same parties.

II. The English bills and the suit in Pennsylvania are not for the same subject-matter.

*These were *bona notabilia* both in England and Pennsylvania. Record, 116: 16. [*482

The assets in Pennsylvania are subject only to the control of the Pennsylvania administratrator, and those in England to that of the English administrator; neither can affect any portion of the estate of the decedent not within the jurisdiction from which they receive their appointment.

1. By suit; or

2. By assignment.

3. And each must account to, and are responsible only for, the assets within the state, province, or diocese which appoints them.

1. They cannot affect these assets by suit. *Borden* v. *Borden*, 5 Mass., 77; *Pond* v. *Makepeace*, 2 Metc. (Mass.), 114; judgment recovered by a Rhode Island administrator in Massachusetts, and an execution returned satisfied. Still this judgment was no plea in an action for same debt by the Massachusetts administrator, because that debt was *bona notabilia* in Massachusetts. (See cases referred to at p. 117.)

The same rule prevails in England. 1 Dowl. & Ry., 35; 16 Eng. Com. L., 15; *Attorney-General* v. *Dimond*, 1 Cromp. & J., 356, 370; 2 Wms. Ex., 1020.

2. Nor by assignment. *Cutter* v. *Davenport*, 1 Pick. (Mass.), 80 (see 83, 84); administrator in Vermont cannot assign a mortgage debt due by a citizen of Massachusetts. It is *bona notabilia* in Massachusetts, and must be administered there. So are simple contract debts, and they must be collected where the debtor lives. *Chapman* v. *Fish*, 6 Hill (N. Y.), 554.

The release of a note dated at Albany by a foreign admin-

istrator is no bar to a suit by a New York administrator, because it is *bona notabilia* in that state. The release is inoperative. *Vaughan* v. *Barret*, 5 Vt., 333; 3 Dyer, 305.

New York administrator releases a debt due from a resident of Vermont. No plea to a suit by Vermont administrator. *Thomas* v. *Wilson*, 2 N. H., 291.

Foreign administrator cannot indorse a note so as to enable the indorser to sue in New Hampshire in his own name. *Hearns* v. *Burnham*, 5 Greenl. (Me.), 261; *Lee* v. *Marans*, 1 Bravt. (Vt.), 93; *Willing* v. *Perot*, 5 Rawle (Pa.), 264.

This last case was a controversy between the Pennsylvania administrator and the assignee of a foreign administrator, and it was held that the former must always prevail.

3. Administrators are bound to account within the jurisdiction appointing them, but only for the *bona notabilia* within that jurisdiction. *Boston* v. *Boylston*, 2 Mass., 394; *Dawes* v. *Boylston*, 9 Mass., 337.

Suit on probate bond for assets in administrator's hands, he being also administrator *cum test. ann.* in England. *483] Held that he was *accountable in Massachusetts only for the goods, &c., collected there. *Stevens* v. *Gaylord*, 11 Mass., 257; *Hooker* v. *Olmsted*, 6 Pick. (Mass.), 9, 482, 483.

Plaintiff not entitled to execution against Massachusetts administrator for sums collected in Connecticut, under letters granted to same person there. Distribution of these assets must be made in that state, though the estate of decedent was insolvent in Massachusetts and solvent in Connecticut. *Fay* v. *Haven*, 3 Metc. (Mass.), 114, 115; *Peck* v. *Mead*, 2 Wend. (N. Y.), 471; *Orcut* v. *Orms*, 3 Paige (N. Y.), 465.

Administration granted in New York and Vermont to the same person. He must account in each state for the goods inventoried, as found in them, respectively, at the death of the intestate. *Harrison* v. *Sterry*, 5 Cranch, 289; *Smith* v. *Bank*, 5 Pet., 523–525; *Vaughan* v. *Northup*, 15 Id., 1, 5, 6; *Vrom* v. *Vanhorne*, 10 Paige (N. Y.), 555.

If, then, foreign administrators cannot affect the assets in Pennsylvania by suit, or by assignment, directly, how can they be affected by mere omission on his part to prosecute a claim to other assets, out of the jurisdiction of Pennsylvania, beyond the control of the Pennsylvania administrator, who could not interfere with, become a party to, or regulate in any way his proceedings abroad?

The three cases cited above, from 2 Rawle (Pa.), 436, 5 Id., 264, and 3 Pennsylvania, 188, show it to be the law of Pennsylvania that such proceedings cannot be a bar, as the assets

are to be retained by the Pennsylvania administrator, to be administered there.

The fact that Nixon appeared to the suits in England does not vary the case. He appeared only as English executor, under letters from the Prerogative Court to protect the English funds. Such appearance is co-extensive only with his authority as English executor. As American executor, he could not have been heard. *Stevens* v. *Gaylord*, 11 Mass., 257; *Vaughan* v. *Northup*, 15 Pet., 1.

In both these cases, and in several others previously cited, the administrators were actually served with process; yet the courts held that circumstance gave them no jurisdiction over foreign *bona notabilia*.

The Pennsylvania act of assembly is as strong in its terms as that of any other state and country, and excludes every possible mode of interference, either by acts or omissions; consent on his part could not prevent its operation.

III. The bills in this case, and the decrees in England, are not in the same rights.

The former are by Pennsylvania administrator, who is trustee,—1. For creditors in Pennsylvania: 2. For the commonwealth, as respects taxes, &c.; 3. For distribution, under direction of our orphan's courts. The latter are by the *administrators in England, who are trustees,—1. For [*484 the creditors in England; 2. For the government there, to pay duties, &c.; 3. For distribution under direction of the courts there.

The cases previously cited establish these positions. See Story Confl., 439, § 524.

Dodge v. *Perkins*, 4 Mason, 436. The right to sue in the United States courts depends on the citizenship of the administrator, not on that of the decedent; for administrator is the real, not merely the nominal party.

If it is said that administrator is a trustee for next of kin, and therefore the dismission of the English bills must be a bar, the answer is, that a decree against a *cestui que trust* is no bar to a suit by a trustee who was not a party to the former case. *Thomas's Trustees* v. *Brashear*, 4 Mon. (Ky.), 65, 68.

IV. This decree not made by a court of competent jurisdiction, either as respects the parties or the subject-matter.

To bind parties, they must be within their jurisdiction. To bind the property, it must be within their power.

The English courts had no jurisdiction over the administrator or the property in Pennsylvania.

The cases already cited establish this. The American administrator of Aspden was never summoned, could not

appear, could not defend or protect his own rights, or the rights of those whom he represents.

The Pennsylvania property was not within their power,—could not have been collected or disposed of by virtue of any authority from them. Their decree in favor of the complainants, then (if it had been given), could not have been enforced. The process of sequestration and attachment would have been fruitless.

The American administrator could not have set up a decree in favor of the English administrators, if such a decree had been made, as the foundation of a suit in this country, nor as a bar to the claims of others as distributees.

It would certainly have been no evidence against John Aspden of Lancashire. *Picquet* v. *Swan*, 5 Mason, 40.

General principles restrain jurisdiction of all courts within their local limits. In cases of non-residents, judgments are never *in personam*, they are *in rem*, and bind only the goods attached. *Bond* v. *Briggs*, 9 Mass.

Even under the act of Congress, judgments must appear to be rendered by courts having jurisdiction of the parties, as well as the cause, to have full faith and credit given them. Story's Confl., 458, § 547.

Douglass v. *Forest*, 4 Bing., 686, takes a distinction between cases where parties owed allegiance to the country where judgment was given; but American administrator owed none to England.

*485] 7 Gill & J. (Md.), 210. Chancery proceeds *in rem*, or *in personam*, *and the power of enforcing their decrees is the test of their jurisdiction. They had here no power over J. A. Brown.

In admiralty cases the world are parties, and the whole world is therefore bound, because notice is served upon the thing itself, and all interested have, therefore, notice. But those who have no interest which could be asserted in a court of admiralty have no notice of the seizure, and cannot be considered as parties. The decree, as respects them, can therefore be reëxamined. Case of the Mary, 9 Cranch, 126, 144; Marshall, C. J.

But if the sentence appears to be for a cause which involves no violation of the law of nations, even admiralty sentences are not conclusive on the question of neutrality. 2 Wend. (N. Y.), 64; 2 Bay (S. C.), 239; *Salucci* v. *Johnston*, 4 Doug., 224.

In this case the American administrator had no interest in the English funds, was not present there, owed no allegiance, had no notice,—in fact, became administrator only in 1834,

after the decrees were pronounced. He can be, therefore, upon no principle, considered a party; nor can the decrees be considered, as respects him, *in personam*. If they are not so, they are no defensive bar. *Bates* v. *Delavan*, 5 Paige (N. Y.), 305, is clear to this point. *Picquet* v. *Swan*, 5 Mason, 40.

V. This plea is not proved, no evidence being taken by respondent. But even our evidence shows that,—

1. It is not proved that the bills in England and the present suit are *ad idem*. See former part of this argument.

2. It is not proved that Brown's letters were ancillary to those in England; not that Brown acted as attorney for Poole and Jones.

3. It is not proved that the decrees were signed and enrolled; and without being so they are no bar. Witnesses clearly establish that they were not. Record, 96, 100.

Only two cases have been cited against this position :—

Prettyman v. *Prettyman*, 1 Vern., 310, has been overruled. See Beames's Pleas, 219, 220.

Dodson v. *Oliver*, 1 Eagle & J., is a tithe case, and in these cases the practice of the courts is peculiar, not governed by the rules of equity practice. The book cited is not in this country; a note of it is found in Seaton's Decrees.

The English cases are clear. The American are equally strong. *Bennet* v. *Winter*, 2 Johns. (N. Y.), Cas., 205; *Gill* v. *Scott*, 1 Gill & J. (Md.), 393; Halst. Dig., 176; *Minturn* v. *Tomkins*, 2 Paige (N. Y.), 102; *Thomas* v. *Harvie*, 10 Wheat., 148.

The replication denies the fact of the enrollment, and every other fact except what are specially set forth in it.

VI. The dismission under the circumstances proved is not a bar. The only discussion was in relation to a reference to the master; no pretence that any took place in relation to the merits.

Parties were poor. Record, 101. Gregson died insolvent. *Record, 98. Application made to Dugdale for a loan. Record, 101. [*486

No construction of the will was given. *Brandlyn* v. *Ord*, 1 Atk., 571; 1 Smith Ch. Pr., 246; Lord Bacon's Orders, 4; Bacon's Works, 511; *Rosse* v. *Rust*, 4 Johns. (N. Y.), Ch., 300; 15 Ves., 231.

Lord Eldon doubts whether, when cause has not been heard on its merits, and an opportunity to be heard has been given, a decree will be any bar. *Can* v. *Can*, 1 P. Wms., 723.

These decrees are no bar, because they do not bind the party for whose benefit they are pleaded.

The next of kin have no interest in this question.

John Aspden of Lancashire alone will be benefited by a decision in favor of these pleas.

He is not a party to, nor bound by, the proceeding in the English courts. *Henderson* v. *Henderson*, 3 Hare, 117; *Atkinson* v. *Turner*, Barn., 77; *Rees* v. *Lawless*, 4 Litt. (Ky.), 219; *Thompson* v. *Clay*, 3 Mon. (Ky.), 361, 362; *Davis* v. *Hunt*, 2 Bail. (S. C.), 412, 415.

VII. This plea is to the whole bill; and if part of the defence is bad, the whole must be overruled. Beames Pleas, 42, 44; *Chamberlain* v. *Agar*, 2 Ves. & B., 259; *Jones* v. *Davis*, 16 Ves., 262.

Mr. David Hoffman, in support of the pleas and in conclusion.

(All those parts of *Mr. Hoffman's* argument, which do not apply to the point decided by the court, are omitted.)

The British and American cases in support of such pleas in bar are quite too numerous to be further dwelt on, in the general view I am now taking of the *exceptio rei judicatæ;* but the opinion of Chief Justice De Grey, in the Duchess of Kingston's case, 11 State Trials, 201, and of Chief Justice Willes, in the case of *Prudham* v. *Phillips*, Ambler, 763, are leading decisions, and show that the doctrine had made its foundations deep in the British system of jurisprudence, long before the prize courts had carried it to an iniquitous extent. The whole current, also, of our own authorities go the same length; and whether the decision be a domestic or a foreign one, the matter decided is equally respected. Having dwelt sufficiently upon the general nature, grounds, and just application of the weight accorded to the *exceptio rei judicatæ*, I now proceed to inquire into,—

II. This doctrine, as practically enforced, under various sound distinctions, in British and American courts.

In the case now before the Supreme Court, the pleas in bar of former judgments in foreign courts are fortified by the following evidence.

*487] *Authenticated copies of the records, together with the evidence taken under the defendant Nixon's commission, showing,—

1. A final decree upon a regular hearing of the cause, before the counsel on both sides, in the British High Court of Chancery.

2. That this decree of dismissal was for want of any evidence on the part of the complainants, from 1st August, 1825, to 17th July, 1830.

3. No caveat was entered against the signing and enrolling of said decree.

4. No rehearing, or review, or appeal, was prayed.

5. A new original bill was filed in the Exchequer, twenty-three days after the dismissal: no evidence there produced, and no attempt to procure it; bill dismissed from the Exchequer, a year after it was filed, upon the express grounds, 1st. That this was a final decree in chancery; 2d. That the *exceptio rei judicatæ* filed by Nixon was a flat bar to any further proceeding, although the merits as to heirship had been in no way litigated in the Court of Chancery; and 3d. That a decree of dismissal, for want of evidence, after a hearing, according to the rules of court, and the practice in chancery, was conclusive upon the Court of Exchequer, and therefore the complainant's bill must be dismissed. Was that decision correct, according to the English law? and does the American conform thereto? and if so, will not the American courts deal with these records, and with all the attendant circumstances (especially as between British subjects) in the same way as British courts would deal, and have dealt, with the matter? An affirmative answer to these questions seems the unavoidable result of what has already been stated, and of all the circumstances of the case; for courts are competent to look at the entire judicial and extrajudicial *res gestas*. But, as I have undertaken to consider the subject more in detail, in this second division of my argument, I shall now proceed to refer to a number of British and American cases, and to comment upon some of them.

The correctness of the decision in the Exchequer will appear from the following cases and books, in addition to those already cited. 2 Ld. Kames Eq., 365; *Martin* v. *Nicolls*, 3 Sim., 485; *Bowles* v. *Orr*, 1 Younge & C., 464. "A decree of dismission of complainant's bill, after it is signed and enrolled, is a bar to a new bill, between the same parties, and for the same matter." Coop. Eq. Pl., ch. 5, 269, &c., and authorities there cited. "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not in direct terms 'without prejudice.'" 1 Vern., 310; 1 Bro. P. C., 281; 1 Ch. Cas., 155; Mitf. Pl. (Jeremy's edit.), 237, &c.

In *Pickett* v. *Loggon*, 14 Ves., 232, the chancellor says,—"If a party thinks proper to allow his case to come to a hearing, *&c., and the cause is capable of being opened, it is very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law." How a [*488

nonsuit necessarily differs from a dismissal of a bill, after answer and hearing, will be noted hereafter.

I will now advert to some American authorities and cases, which speak the same language; and then again return to British authorities, and apply them both to the case at bar.

1. Where a bill in equity states certain things, and not sufficient proof is offered by complainant to sustain his allegation, the bill must be dismissed; so, if neither denied nor admitted, but complainant be left to his proof, the bill must be dismissed, if there be no proof at the rule day. 2 Ohio, 22; 3 Id., 291.

2. Equity will not grant a new trial at law, where the party seeking it has been guilty of any neglect in obtaining his evidence, even though such neglect were occasioned by the ill-judged advice of his counsel, and though his bill charges positively that the demand against him has been fully discharged. 2 Ohio, 312; 6 Id., 82.

3. Where a second bill is filed to obtain a second injunction (the first being dismissed), in relation to the same transaction, and between the same parties, it will not be enough to allege in that second bill a new ground of equity not suggested in the former bill. It must also be shown that the new matter alleged did not exist at the time of the first bill; or that, if it existed, it was unknown to the complainant. *Bank of the United States* v. *Shultz*, 3 Ohio, 62.

4. No matter can be taken *ad aliud examen*, which has been finally acted on by another competent jurisdiction. The only remedy is by appeal, or error, or by a rehearing, or review; 4 Ohio, 330; or unless there has been fraud in the opposite party; or finally pure accident, without any fault or negligence of himself, or of his agents. 4 Ohio, 492; 5 Id., 183.

5. A decree which puts an end to the suit is not the less final because it is subject, within a limited time, to be reversed upon a bill of review. 5 Ohio, 460.

I have alluded several times to the admitted fact in this case, that both of the parties litigant are British subjects, claiming this property as heir at common law, both claiming descent from a common ancestor, both related to the testator in the degree of second cousins, and both claiming as eldest sons through those, respectively, whom each avers to have been the eldest son of Thomas Aspden, the common ancestor,—John Aspden of London claiming through John Aspden 1st, of Kent, whom he alleges to have been the eldest son of that Thomas; and John Aspden of Lancaster claiming through
*489] William Aspden, whom he alleges was the eldest son of that Thomas Aspden, the admitted common *ances-

tor. In respect to proof, the London Aspdens have not only utterly failed to give any, either legal or moral, but no less than three decrees have been pronounced against their claim; one in the British Chancery, as has been often stated, the second in the British Court of Exchequer, and the third in the Circuit Court of the United States, upon their first application. John of Lancaster, on the other hand, gave such evidence of his pedigree and heirship as satisfied the master in his two reports, and also the court, after the most diligent inquiry. Thus, then, the matter now stands, as between these two British subjects. But Aspden of London, after nearly ten years of merely nominal prosecution, has now planted himself in such a position in an American court of equity as to call upon that court utterly to disregard all that was done in the British tribunals, and to take no cognizance of his neglects there; and yet further, that John of Lancaster's advantageous position, after all his proofs, and the decree in his favor, should also be wholly disregarded, and that he of London should be now as favorably dealt with in the American court as if nothing had ever been done either in that court or in the tribunals of his own country!

Passing by, for the present, all that has been done in the Circuit Court in support of John Aspden of Lancaster's claim, and looking exclusively to all that John Aspden of London has not done in England during ten years, and in this country during ten years more, the inquiry naturally is (when we find these two British subjects interpleading in this court),—Shall John of London, when contending merely with John of Lancashire, be regarded by this court in precisely the same light as if he had been originally and regularly prosecuting his claim in this court, and had never been in any way concluded in the tribunals of his own country?—for to that extent does he now claim. Nixon, and now Trotter, are to be regarded, at all times, as mere stakeholders. The executor of Matthias, the testator, was called on to account for this estate to one or the other of two British subjects; John Aspden of London's claim to heirship was pronounced by chancery to be without proof; not, indeed, that he had brought some proof, and there stopped, and that the court pronounced that proof worthless, —but that, after five years, he could produce no proof at all, —and hence the court regarded that as an irresistible presumption that none existed, and so decreed. Another forum, of his own voluntary selection, also decreed that the first decree was valid, final, and conclusive; and shall not these two decrees avail here to the same extent as there? Are they not *res judicatæ*, that the fact of John Aspden's heirship

does not exist? That in England this fact is forever established is beyond all question,—every court in that island would at once decide that this fact was *res judicatæ*. This being clearly so, why shall John of London *be now permitted to cast all this to the winds, and say to his relative and co-subject, "Here are copies of my former bills in British courts; I file them now in an American court, with a few verbal alterations; we must now have another ten years of litigation here!" for such, in truth, is the alleged right of John Aspden of London! Is it not, therefore, fit, moral, and legal to accord to John of London (seeking equity here) exactly that, and no more nor less, than what the tribunals of his own country would give, and have given? Why should one British subject have a measure of justice extended to him against another British subject, which the tribunals of their common country have refused to give? And why should the court here close its eyes to all past neglects, to all the presumptions of actual want of proof involved in the fact of those neglects? *Inter ipsos*, the decrees are not foreign, but domestic; and, whether the one or the other, the decision at least of the Exchequer ought to close the controversy.

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And here I am reminded of the very sensible and pertinent language of the late excellent Judge Washington, in the case of *Green* v. *Sarmiento*, 1 Pet. C. C., 80. "But it is objected," says the judge, "that the judgment may be unjust upon the merits of the case, or erroneous in point of law; and it is asked, shall such a decision be submitted to by the courts of another state? I answer, that the contrary of all this ought to be presumed; and let me ask in return, what state (or nation) stands so pre-eminent for knowledge and virtue, as to say with confidence, that the judgments of her courts would be more just, or more consonant to law, than those that have already passed on it? I concede that the objection may sometimes be well founded, but I am far from admitting that in all cases the evil would be remedied by a re-examination before another tribunal, and the general good forbids that this should be done."

These foreign judgments, then, which stand unimpeached by fraud, or irregularity, or by any internal infirmity, should have accorded to them (especially when the matter of controversy rests between subjects of the same nation) precisely that effect, and no more, which would be given were the matter interpleaded by them in the courts of their own country; what that is, we know, and has been decided in this very case, and should be everywhere; for if a contrary doctrine be adopted, foreigners would have nothing more to do than to

litigate their rights vexatiously and dilatorily for years in the equity tribunals of their own country, and when there ousted, carry on an equally annoying procedure in our tribunals, hoping to gain at length a portion of that, a title to the whole of which they have utterly failed to establish at their home, and in the midst of that very evidence which would have served them had it in fact existed.

I shall now proceed to cite some further of the leading cases *and authorities, and to remark upon a few; [*491 all of which, as it seems to me, can leave no doubt that such decrees as are relied on in the present pleas in bar will be regarded by this court, and all other courts, as conclusive; and therefore that the pleas will be sustained.

(1.) In regard to foreign judgments, a distinction was early taken between a suit directly upon the judgment to enforce it in another tribunal, and the case where a party sets up a foreign judgment merely in bar and defensively; and, in the former case, it has been held that the foreign judgment is only *primâ facie* correct, as no nation should be bound actively to enforce the decision of a foreign tribunal; but that in the latter case, where it is used in defence only, the losing party has no right to institute a suit for the same matter elsewhere, and that if he does so, the judgment shall be regarded as *res judicata*, if exempt from fraud, and the jurisdiction were competent that pronounced it. Admitting this distinction, *argumenti gratia*, the present case belongs to this second class; the decrees are used defensively, and the *exceptio rei judicatæ* is said by the same authorities to be entitled to that full measure of respect everywhere. *Boucher* v. *Lauson*, 2 Cas. t. Hardw., 89; *Phillips* v. *Hunter*, 2 H. Bl., 410; Story Confl. of L., 500.

This distinction, however, just as it may be, has been much questioned ever since, and in favor of a less extended doctrine of conclusiveness. Mansfield, Buller, Blackstone, Eyre, and others sustain the doctrine of revision; Nottingham, Hardwicke, Kenyon, Ellenborough, and the current of more modern authorities, down to the present hour, repudiate the distinction, and are disposed to inquire into no foreign decrees or judgments further than, first, as to the competency of the court; second, the absence of all fraud; third, whether (admitting the decree to the fullest extent) it does, in point of fact, embrace the matter in controversy. To this third class of admissible inquiries belongs the ordinary case of a foreign sentence of condemnation as prize, which is no bar to proof that the property was in fact neutral, as there may be many other grounds of condemnation than that of enemy's

property. To the same class, also, belong all of those cases at law which do not regard decrees in equity, in certain cases: because equity may well reject a claim which the law would enforce, and *e converso*. But, with the exception of these three classes of inquiry, the sound doctrine would seem to be, that the decree is *res judicata*, whether used affirmatively and to be enforced by a plaintiff, or defensively as against the claim of a plaintiff. But still, without now insisting upon an extension of the doctrine, which our case does not need, we repose with great confidence on the opinion of Lord Chief Justice Eyre, who, though he takes sides with Lord Mansfield in the case of *Walker* v. *Witter*, in permitting a foreign
*492] decree to be looked into, *when directly sued on, and asked to be enforced, is equally strong in his rejecting all such right when the foreign decree is used (as in the present case) only as a defensive bar. "If we had the means," said that able judge, "we could not examine a judgment of a foreign court, that is brought before us in this manner, by the defendant as a bar. It is in one way only that the decree or judgment of a foreign court is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it as a matter *in pais*, respect it *primâ facie*, but examine as we do a promise; but in all other cases we give entire faith and credit to foreign judgments, and consider them as conclusive upon us." *Phillips* v. *Hunter*, 2 H. Bl., 410. Our case, however, needs no more than this very doctrine; and, if we produce yet stronger cases, it is only to manifest more clearly the earnestness with which courts, at this day, sustain every means of terminating vexatious litigation, and cherish that repose so essential to the security of property and the peace of society.

And here I cannot avoid citing the remarks of Lord Kames, when he is arguing in favor of a distinction between foreign decrees that sustain a claim, and those which dismiss a claim. He thinks the former more examinable than the latter; and though the distinction is in favor of the decree at this time in controversy, as he regards a dismissal as more exempt from inquiry than a decree that sustains a claim, yet, as I cannot but regard his argument as rather more specious than solid, I now cite with pleasure the remarks with which he closes his discussion of the distinction alluded to. "Public utility," says he, "affords another argument extremely cogent. There is nothing more hurtful to society than that lawsuits be perpetual. In every lawsuit there ought to be a *ne plus ultra;* some step should be ultimate; and a decree dismissing a claim

is in its nature ultimate." 2 Kames Eq., 363. To apply, in a word, these remarks to the present case, let it be borne in mind, as has been often remarked, that the dismissal was for a total want of proof, after five years of litigation,—raising, as the court justly thought, a *presumptio juris et jure* of the non-existence of the alleged fact of heirship; that decree, moreover, was confirmed as *res judicata* by a tribunal of the present claimant's own election; and lastly, all subsequent time has confirmed the wisdom of the preceding decisions, as the Aspdens of London are still proofless.

(2.) In the case of *Bowles* v. *Orr*, 1 Younge & C., 464, it was held that a foreign judgment is equally conclusive as an English judgment; but that it, like all other judgments, may be set aside here in equity, for fraud, &c., and the Lord Chief Baron, at page 468, observes, that "As the bill does not state under what circumstances the judgment was recovered, I must presume it was in respect of the same matters as are contained in the *bill. Then, if so, it will be [*493 conclusive against the account sought. According to modern decisions, a foreign judgment is as conclusive against the debtor as an English one can be; and *Martin* v. *Nicholls*, 3 Sim., 458, is an authority to show that a foreign judgment is conclusive against the plaintiff."

(3.) I will now state the case of *Martin* v. *Nicholls*, relied upon in the above case of *Bowles* v. *Orr*.

That case, in 3 Sim., 458, seems to go the whole length of abolishing the distinction taken by some judges between a proceeding to enforce a foreign decree, and where it is used only defensively, that is, in bar. The case was this. A bill was filed for discovery, and also for a commission to take proof to impeach a foreign judgment rendered in favor of the present defendant, who was then a suitor in the Common Pleas to enforce that judgment. Upon demurrer by the defendant in equity, he argued, that, unless the foreign judgment can be questioned in England, and the grounds taken be such as would be a defense to an action on that judgment, the complainant's bill cannot be sustained. The vice-chancellor stated that the present defendant had recovered a judgment in Antigua, and complainant relies upon the case of *Walker* v. *Witter*, Doug. 1, as authority for questioning that judgment, which is sought to be enforced in the Common Pleas. "Were I to allow this bill," says the chancellor, "it would be in effect saying, that the judgment in Antigua may be overruled by the Court of Common Pleas," and therefore he sustained the demurrer.

Now, here it will be seen, that the vice-chancellor, finding

the court of Antigua a competent tribunal, and that no fraud, or want of jurisdiction was alleged, deals with the foreign judgment as *res judicata*, and as conclusive even where sought to be enforced. He regarded the doctrine of *Walker* v. *Witter* as advancing a frivolous distinction; and he preferred the old opinions, and the doctrine of conclusiveness sustained by Nottingham, Hardwicke, Kenyon, Ellenborough, &c., to that of Lord Mansfield. Happily we have no occasion, in the case now before the Supreme Court, to take sides in this controversy; for, whether *Walker* v. *Witter* be the sound law, or *Martin* v. *Nicholls*, and *Bowles* v. *Orr*, &c., be the better law, is to us quite immaterial, since in our case we seek not to enforce a foreign decree; but only to rely upon it as a defensive bar; and for that purpose there seems to be a great unanimity of opinion; for Lord Chief Baron Eyre, who entirely adopted Lord Mansfield's distinction, is yet very emphatic in his expression, as we have just seen, that foreign decrees are final and conclusive when defensively relied on; and this is all we have occasion to invoke. The stronger and more thorough cases, in which the earlier judges, as well as those of the present day, have agreed with Lord Hardwicke,—and his is a lustrous name,—"that where any court, foreign or
*494] domestic, that has the proper jurisdiction of the *case makes the determination (and it be free from fraud) it is conclusive on all other courts," are nevertheless cases that need not be urged by us in the present case; and are only now referred to in earnest support of the doctrine to the medium extent of our own case, and with no tilt of legal knight-errantry in support of one class of judges against another class. Both classes entirely concur, that, relied on as a defensive bar, foreign decrees are, and of right ought to be, conclusive. The doctrine, to that extent, is surely one of repose, of judicial policy, and even necessity; it is a doctrine of justice, and of public policy also, since it inculcates vigilance, and teaches suitors, and those cited into courts, that they should not sleep over their rights, and must not deal with the tribunals of justice as mere organs of legal delay, to exhaust the patience and worry out the life and purse, in order ultimately perhaps to obtain, by compromise, a portion of that which the indolent or unjust know they can never obtain by proofs.

In the case of *Tarlton* v. *Tarlton*, 4 Mau. & Sel., 20, the court goes to the full extent, and beyond, what we have need for. In that case, which was at law, a decree in a foreign court was relied on. The defendant stated that the decree had been obtained against him *pro confesso*, for want of an

answer, whereupon sequestration had issued, and the amount levied on the property of the plaintiff, who had been his partner in trade; but that the account had been erroneously taken, &c., &c. Lord Ellenborough ruled that the decree was conclusive, and that the defendant could not be permitted to question the accuracy of the account taken; that a decree *pro confesso*, for want of answer, was *res judicata;* and that, as such, it was binding and conclusive,—his Lordship emphatically adding, that "I had not thought I was sitting at *nisi prius* to try a writ of error to correct the proceedings of a foreign court!"

Also, in the case of *Richard Raynel Keen* v. *John McDonough*, 8 Pet., 308, a decree was pronounced by a Spanish tribunal in Louisiana, after the cession of that dominion, but whilst it was, *de facto*, in possession of Spain. The court held, that, as the tribunal still had jurisdiction, the decree was valid and conclusive.

In 2 Story Eq. Jur., p. 911, § 1523, it is stated, that, "A former decree in a suit in equity, between the same parties, and for the same subject-matter, is also a good defence, even although it be a decree dismissing the bill, if the dismissal is not expressed to be without prejudice. Here, the courts of equity act in analogy to the law in some respects,—but not in all,—for the dismissal of a suit at law, or even a judgment at law, is not, in all cases, good bar to another action."

We here see, that, although equity may follow the law, and deal with a naked dismissal of a bill, "for mere want of prosecution," as a nonsuit, and hence no bar, yet that a dismissal of the other kind, such as, in the present case, the dismissal on hearing, and for *want of proof, is a decree, and conclusive; and so the Court of Exchequer pronounced this very decree in chancery to be, and accorded to it the entire weight of *res judicata;* and the same learned author, in his treatise on the Conflict of Laws, p. 515, remarking upon the doctrine of conclusiveness adopted by Holland, on the basis of reciprocity, seems to entirely approve of the doctrine upon that substantive ground, even were the authorities silent on the subject, and the matter, instead of being so often decided, were at this time, as I suppose, an open question. If, then, reciprocity be an additional reason, as it certainly is, there seems to be a very special fitness in regarding the present decrees as conclusive, seeing, 1st, the thoroughness of the present British doctrine, and how great would be the respect accorded by their courts to the decisions of our tribunals; 2d, adverting also to the fact that the present controversy is solely between British subjects; 3d, bearing also [*495

in mind that this is a question of British law, and of British chancery practice, and that the complainant, Aspden of London, after his five years' tarrying in chancery, and dismissal for want of proof, submitted to another tribunal of his own country the legal effect of that dismissal, which second tribunal pronounced it to be *res judicata*, and conclusive. On every principle then, even of reciprocity and of comity, in addition to all the other reasons that have been urged, it is not doubted but that the Supreme Court will sustain those pleas in bar, and with the greater alacrity, as it may well be asked, *Cui bono* overrule them, as there is every moral certainty that it can only tend to another series of proofless delays?

(4.) The dismissal of bills in equity in our own courts has often been held conclusive, as in the case of *Holliday* v. *Coleman*, 2 Munf. (Va.), 162. In that case no evidence was exhibited on either side; defendant demurred to complainant's bill, and also answered in detail; the demurrer was sustained, and the bill dismissed. The complainant filed another bill, and the decree of dismissal was pleaded in bar. The court sustained the plea in bar, and said,—"A decree by a court of competent jurisdiction, dismissing a bill, is a complete bar to another original bill to try the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review."

Again. In the case of the *Bank of the United States* v. *Beverly*, 1 How., 134, it was held, that, "An answer in chancery, setting up as a defence the dismission of a former bill between the same parties, and for the same matter, is not sufficient, unless the record be exhibited." The conclusion from this non-production of the record must be, that, if the record be exhibited, the dismissal is conclusive. So likewise, in the case of *Wright* v. *Diklyne*, 1 Pet., C. C., 199, the court held, that "the dismission of a bill in chancery is not conclusive against the complainant in a court of law, but that in a court of equity such *dismissal would be a bar to a new bill;" and the obvious reason is, because there are cases at law that will not be sustained in equity, and therefore the dismissal of a bill in equity could only be evidence that, as an equitable demand, it was not sustainable; but where the decree of dismissal is defensively used in a court of equity, such dismissal is final and conclusive, and for the reverse reason, unless impugned on the ground of fraud. To the same effect is the case of *McDowell* v. *McDowell*, 1 Bail. (S. C.), Eq. Rep., 324. "When a matter has once been adjudicated by a competent jurisdiction, it shall not again

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be drawn in question; nor will parties be permitted again to litigate what they had once an opportunity of litigating; and whatever might properly have been put in issue in that proceeding shall be concluded to be a thing determined." The cases of *McClure* v. *Miller*, *Henderson* v. *Mitchell*, and *Marigarth* v. *Deas*, 1 Bail. (S. C.) Eq., 170, 113, 284, are all confirmatory, and strongly in point. Even upon a petition for a rehearing, if the party had knowledge of the evidence, or, by reasonable diligence or inquiry, might have obtained it, he will not be entitled to relief. *Baker* v. *Whiting*, 1 Story, 218; *Heller* v. *Jones*, 4 Binn. (Pa.), 60; *Heimes* v. *Jacobs*, 1 Pa., 152. Many hundred cases might be shown, all evincive of the determination of courts, as a fundamental rule of judicial policy and necessity, to sustain the vigilant, and to manifest no special favor, at least, to the grossly negligent. With what pretence of claim then, can the Aspden family of London expect from this court the high and very special favor of litigating this case, which would not be retained a moment in the courts of their own country, after it could reach the chancellor's eye in judgment, and also when this court has a mountain of proof, that here, as well as there, they have played a part of most vexatious delay for nearly the fourth of a century! In the language, then, of a distinguished American lawyer, Mr. Justice Kent, I will now conclude, taking to myself no little shame for the great length and the too immethodical character of the observations I have made on this case, —a case, I confess, that has greatly interested me, because of the shameful delays that have been produced by the London Aspdens,—a case, too, in which no legal alchemy, even, could extract a scintilla of evidence of right on their part! "Every person is bound," says Judge Kent, "to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if he neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded." "The general rule is intended to prevent litigation, and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice; and judgments solemnly and deliberately given might cease to be revered, as being no longer the end *of controversy and the evidence of right." 1 Johns. (N. Y.), Cas. 492, 502. [*497

Mr. Justice CATRON (after having stated the facts of the case as they are recited in the commencement of this report) proceeded to deliver the opinion of the court.

We understand the true question submitted to this court to be, whether the decree dismissing the bill, made by the High Court of Chancery in England, bars and precludes John A. Brown, the Pennsylvania administrator of John Aspden of London, from prosecuting his claim as administrator for the Pennsylvania assets of the estate of Matthias Aspden, found in the hands of Joseph Trotter, the present administrator, with the will annexed; Nixon having died, the contest in the British court was between an executor there, and administrators also there; the complainants sued and the defendant resisted the claim alike in a representative capacity, and were restricted by the authority under which they respectively acted to the limits of the country to which their letters extended. Under his English letters testamentary, Nixon could do no act as executor beyond England; so neither could he voluntarily transfer the Pennsylvania assets to the foreign jurisdiction, there to be distributed, as this would have been in violation of his letters in this country; by these he held the assets here as trustee, and in subordination to the laws of Pennsylvania and the orders of the Orphan's Court executing those laws, as well as in subordination to the suit pending in the Circuit Court.

So, on the other hand, on the death of John Aspden of London, the bill in chancery ceased to be his bill, and became the suit of the parties for whose benefit it was revived; when this was done, they represented John Aspden of London, as administrator of his estate, and the same rules applied to them as to Matthias's executor; they only represented the intestate by virtue of, and to the extent of, their English letters, and could not be known as representatives in Pennsylvania. Again, the representative character of Nixon in England was altogether distinct from his character as executor in Pennsylvania. And so, also, the English administrators of John Aspden's estate are equally distinct from Brown, who is the administrator of his estate in Pennsylvania. It follows, the English suit was between different parties from those prosecuting and defending the American suit; and therefore neither the decree, nor the proceedings on which it is founded, are competent evidence between the parties to the present suit, for this reason; and yet more conclusively for another, which is, that the property in controversy here is distinct from that sued for in England.

As applicable to such a state of facts, the rules of evidence governing courts of justice are, that a judgment or decree set
*498] up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, *must have been made,

1. by a court of competent jurisdiction upon the same subject-matter; 2. between the same parties; 3. for the same purpose; and, on either ground, the evidence submitted to our judgment is incompetent to prove anything in regard to the Pennsylvania assets.

But these conclusions are resisted by those setting up the bar on this ground,—that the administration of the domicile is the principal administration on the estate of Matthias Aspden, and this being in England, and the assumed devisee's residence also being there, the Pennsylvania administration was auxiliary to the foreign one; that in the British suit the American assets might have been recovered from the executor Nixon, the bill having gone for the Pennsylvania assets, as well as the English.

However true it may be, in cases peculiarly circumstanced, that one jurisdiction administering assets may, as matter of comity, transmit them to a foreign jurisdiction, there to be distributed; still, the doctrine can have no application here, as no assets had been transmitted to England from Pennsylvania, and a suit was pending, and in no part decided, in this country for the American assets, before and at the time the decree in England was made; and therefore an assumption to distribute the assets in this country by the High Court of Chancery in England must necessarily have been treated by the Circuit Court as merely void for want of jurisdiction of the subject-matter in the foreign court. Even up to this date, the American court could exercise no comity, as is manifest from the state of the proceedings before us; nor will there be any occasion for its exercise hereafter, as all the parties claiming the estate are before the Circuit Court, anxiously litigating their claims, and seeking distribution at its hands.

It is proper, however, to remark, in this connection, that the courts of the United States held in Pennsylvania are administering the laws of that state, and bound by the same rules governing the local tribunals; and that by these laws a devisee, before he can take a legacy, must give security that if any debt or demand should afterwards be recovered against the estate of the testator, the devisee shall refund. Purdon's Dig., Ex. & Ad., §§ 41, 47. So, also, there are many other provisions in the laws of Pennsylvania governing the distribution of estates that would embarrass the Orphan's Courts in exercising the comity referred to. The like laws exist in other states of the Union; and, under the influence of such laws, the courts of the states have been so much restrained, as to render an exercise of comity among each other little more than a barren theory; nor could more be required in a

case like the present, where part of the assets were administered abroad, under independent letters granted there, and by
*499] a tribunal that was under no obligations to extend comity to the probate courts *of this country, whatever might be done in the exercise of a sound discretion.

The next ground, and that relied on with most confidence in support of the bar, is, that John Aspden of London, and those representing him after his death, were British subjects, residing in Great Britain, and that the contest and only matter litigated in the High Court of Chancery was, whether John Aspden of London was or was not the heir and consequent devisee of Matthias Aspden; and that this fact having been found by the decree against the complainants established and concluded all proof to the contrary of such adjudication, directly on the single fact of title; and that the representatives of John of London could not be heard in another jurisdiction to disavow the conclusiveness of the finding by a court of their own government, to which they had resorted.

That the English bill involved directly the question of heirship, and that nothing else was contested, is undoubtedly true; but it is equally true, that no evidence was introduced by the complainants there to establish their title, nor was there had any adjudication on the merits of their claim; so that no equitable considerations are violated by our present judgment, in any aspect that the evidence may be viewed.

What effect the decree has in England is a question for the courts of that country to settle; nor will we now determine whether, in our judgment, by the comity of nations, the proceedings should have a similar effect here; or what effect they should have. The question for us to dispose of is, whether the administrator and distributees of John Aspden of London shall be heard in the Circuit Court, or whether their evidence of title is barred? We have already stated that the Pennsylvania assets stand unaffected, and will only add, that the assumption that a complainant or plaintiff is estopped, by a judgment against him, from introducing evidence in a second suit, and in another country, for other property, on the ground that the fact of title had been adjudged and concluded by a former judgment or decree (thus separating the title from the property), is an abstract proposition, inconsistent with the due administration of justice, and not recognized in our system of jurisprudence, or that of Great Britain, and is aside from any question affecting the comity of nations.

Giving the British decree all the force and effect that could be accorded to it if it had been made in a state of this Union, it yet establishes no fact, as respects any title to the Pennsyl-

vania assets; nor would the rules of evidence be sufficient in separate suits, pending in the same court, for different parcels of property, even between the same parties. And therefore we certify to the Circuit Court, that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John Aspden of *London, in so far as [*500 they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphan's Court of Philadelphia county. Further than this, we do not pretend to determine on the effect of the evidence, as we are not aware that any controversy now exists in the Circuit Court in regard to any other assets.

Order.

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 Pennsylvania, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably 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, that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John Aspden of London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphan's Court of Philadelphia county; whereupon it is now here ordered and decreed by this court, that it be certified to the said Circuit Court accordingly.

Dissenting, Mr. Chief Justice TANEY and Mr. Justice McLEAN.

RICHARD CHARLES DOWNES, PLAINTIFF IN ERROR *v.* WILLIAM S. SCOTT, DEFENDANT.

The second section of the act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west line the settlement or improvement of each can be included in a half-quarter-section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres.

Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a State court for partition under the above act, the

judgment of that court cannot be reviewed by this court, when brought up by writ of error under the twenty-fifth section of the judiciary act, because the right asserted does not arise under an act of Congress.
The writ of error must be dismissed.

THIS case was brought up from the Ninth Judicial District Court of the state of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

Mr. Crittenden, for the defendant in error, moved to dismiss the writ for the following reasons. Because,—

*501] *1st. Said writ of error is directed to the "Judge of the Ninth Judicial District Court of the state of Louisiana," when in truth no writ of error lies from this to that court.

2d. Said writ is for alleged error in a judgment of the said District Court of Louisiana, when in truth this court has no jurisdiction to judge of or correct said error if it exists, and no power to reverse said judgment upon writ of error.

3d. That the record filed in this case, or what purports to be such, is not duly certified, or legally authenticated and verified,—the certificate of "John T. Mason, clerk of the Ninth District Court, Parish of Madison, La.," being no evidence of the truth or verity of any record which this court has power to judge of on writ of error.

4th. The subject-matter of said suit and judgment, and the parties thereto, were proper matters and subjects of the jurisdiction of the courts of the state of Louisiana, and there is nothing therein to give this court any cognizance or right to revise or reverse said judgment, and the same is final and conclusive.

The motion was argued by *Mr. Crittenden*, for the defendant in error, and *Mr. Mason* (Attorney-General), for the plaintiff in error.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us a judgment of the Supreme Court of Louisiana, under the twenty-fifth section of the judiciary act of 1789.

On the 15th of June, 1837, a patent was issued by the United States to Elijah Evans and Levi Blakeley for one hundred and thirty-three acres and eight hundedths of an acre, being lots numbered one and three of section six in township sixteen of range thirteen east, in the district of lands subject to sale at Ouachita, Louisiana. The patentees having settled upon the above tract, and each having made improvements thereon, claimed a preëmptive right under the act of the 29th of

May, 1830. The second section of that act provides,—"That if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west, line the settlement or improvement of each can be included in a half-quarter-section."

The plaintiff applied, by petition, to the Ninth District Court of Louisiana for a partition of the above tract, which, it seems, was submitted to a jury, and on the trial of which "the judge charged the jury that the act of Congress of May 29th, 1830, entitled 'An act to grant preëmption rights to settlers on the public lands,' was not applicable to the case before the court and jury; that the said act had no binding force as to the dividing or partitioning *lands [*502 granted to settlers on the same quarter-section or fractional quarter-section after issuing a patent therefor, but that such division and partition must be in conformity with the laws of Louisiana and the principles of equity and justice." To which charge an exception was taken, and on which an appeal was prosecuted to the Supreme Court of the state, which affirmed the judgment of the District Court.

How the parties to this suit became interested in the tract of land above patented does not appear from the record. In the petition and answer, they are represented as owners of the premises, and they are treated as such by the District and Supreme Courts of Louisiana.

The second section of the preëmption law above cited refers to a quarter of a section, which contains one hundred and sixty acres; and as the tract of which partition is demanded is less than a quarter, it does not come within the law. Had application been made for a division of the tract to the proper department of the government, before the emanation of the patent, it could not, as we suppose, have been considered as coming within the act, so as to authorize a partition and a patent to each of the claimants. A patent having been issued to the claimants for the tract jointly, as tenants in common, and they having conveyed the land, which has become vested in the parties to this record, it is now a question on what principle a division shall be made.

If the parties entitled to the preëmptive right might have applied for a partition under the act of Congress, but preferred taking the patent as issued, it is difficult to perceive how the present claimants could go behind the patent, in the assertion of a right which was waived by those with whom it originated. The patent vested in the patentees a joint interest as tenants in common, and the same interest was conveyed

through their grantees down to the present owners. It does not appear, and the court cannot presume, that any greater or different right was conveyed than that which is shown on the face of the patent.

In this view, we think the decision of the Louisiana court was correct. It directed a partition on equitable principles, under the local law, reserving to each claimant his improvements. And it appears from the facts in the case, that this could not be done by straight lines running north and south or east and west.

As the right asserted in this case by the plaintiff does not arise under an act of Congress, this court has no jurisdiction by the twenty-fifth section.

There seems to have been no allowance of the writ of error, and it was directed to the District instead of the Supreme Court of Louisiana. As this court can only revise the judgment of the highest court in the State which can *503] exercise jurisdiction in the case, the writ of error should be directed to such court; unless *the record shall have been transmitted to an inferior tribunal. But, independently of these irregularities, we think that this court have no jurisdiction under the act of Congress, and on this ground this suit is dismissed.

ANTOINE MICHOUD, JOSEPH MARIE GIROD, GABRIEL MONTAMAT, FELIX GRIMA, JEAN B. DEJAN, AINÉ, DENIS PRIEUR, CHARLES CLAIBORNE, MANDEVILLE MARIGNY, MADAM E. GRIMA, WIDOW SABATIER, A. FOURNIER, E. MAZUREAU, E. RIVOLET, CLAUDE GURLIE, THE MAYOR OF THE CITY OF NEW ORLEANS, THE TREASURER OF THE CHARITY HOSPITAL, AND THE CATHOLIC ORPHAN'S ASYLUM, APPELLANTS, *v.* PERONNE BERNARDINE GIROD, WIDOW OF J. P. H. PARGOUD, RESIDING AT ABERVILLE, IN THE DUCHY OF SAVOY, ROSALIE GIROD, WIDOW OF PHILIP ADAM, RESIDING AT FAVERGES, IN THE DUCHY OF SAVOY, ACTING FOR THEMSELVES AND IN BEHALF OF THEIR CO-HEIRS OF CLAUDE FRANCOIS GIROD, TO WIT. LOUIS JOSEPH POIDEBARD, FRANCOIS S. POIDEBARD, DENIS P. POIDEBARD, WIDOW OF P. NICOUD; JACQUELINE POIDEBARD, WIFE OF MARIE RIVOLET; CLAUDINE POIDEBARD, WIDOW OF P. F. POIDEBARD; AND M. R. POIDEBARD, WIFE OF ANTHELME VALLIER, AND ALSO OF

FRANCOIS QUETAND, JEAN M. F. QUETAND, MARIE J. QUETAND, WIFE OF J. M. AVIT; FRANCOISE QUETAND, WIFE OF J. A. ALLARD; MARIE R. QUETAND, MARIE B. QUETAND; ALSO OF J. P. GIROD, JEANNE P. GIROD, WIFE OF CLEMENT ODONINO, F. CLEMENTINE GIROD, WIFE OF P. F. PERNOISE, AND JEAN MICHEL GIROD, DEFENDANTS.

A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.[1]

A purchase, *per interpositam personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.[2]

This rule applies to a purchase by executors, at open sale, although they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were.[3]

A purchase so made by executors will be set aside.

The decisions of the courts of several states, upon this subject, examined and remarked upon.

Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.

The maxims and qualifications of the civil law, upon this point, examined.

Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it.[4]

Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.

Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the executor, and menaces and promises thrown out to prevent inquiry, are not binding.

*THIS case was brought up by appeal from the Circuit Court of the United States, for the Eastern District of Louisiana, sitting as a court of equity. [*504

The widow Pargoud and others, defendants in this court,

[1] APPLIED. *Grover* v. *Ames*, 8 Fed. Rep., 357. FOLLOWED. *Marye* v. *Strouse*, 6 Sawy., 206; *Hendee* v. *Cleaveland*, 54 Vt., 149. CITED. *Veazie* v. *Williams*, 8 How., 152; *Northern Pacific R. R. Co.* v. *Kindred*, 3 McCrary, 631; *Mercantile Mut. Ins. Co.* v. *Hope Ins. Co.*, 8 Mo. App., 411; *Northern Pacific R. R. Co.* v. *Kindred*, 14 Fed. Rep., 80. See note to *Oliver* v. *Piatt*, 3 How., 333.

[2] FOLLOWED. *Newcomb* v. *Brooks*, 16 W. Va., 59-64. CITED. *Brooks* v. *Martin*, 2 Wall., 85; *Bent* v. *Priest*, 10 Mo. App., 557; *People* v. *Stock Brokers' Building Co.*, 28 Hun (N. Y.), 277.

[3] FOLLOWED. *Latham* v. *Barney*, 14 Fed. Rep., 441.

[4] DISTINGUISHED. *Stearns* v. *Page*, 7 How., 829; *Badger* v. *Badger*, 2 Wall., 93; *Clarke* v. *Boorman*, 18 Id., 506. CITED. *Taylor* v. *Benham*, 5 How., 276; *Andreæ* v. *Redfield*, 8 Otto, 238; *Godden* v. *Kimmell*, 9 Id., 202; *Stevens* v. *Sharp*, 6 Sawy., 116; *Latham* v. *Barney*, 14 Fed. Rep., 444; *Kirby* v. *Lake Shore &c. R. R. Co.*, Id., 263.

were complainants in the court below, and obtained a decree in their favor, from which the other parties appealed. They alleged, that a series of fraudulent transactions occurred, commencing in 1813, by which they had been deprived of their fair share of the estate of Claude François Girod, whose heirs they were, and that the chief agent in this fraud was Nicolas Girod, a brother of the deceased Claude François Girod, and also a brother of some of the complainants, and relative of the rest.

Claude François Girod was a resident of the parish of Assumption, in the State of Louisiana, and died in the month of November, 1813, leaving a last will and testament, dated on the 30th of November, 1812, and a codicil, dated on the 4th of November, 1813, which will was admitted to probate, with the codicil, on the 8th of November, 1813. He never was married, and left eight brothers and sisters, and the children of a pre-deceased sister. These surviving brothers and sisters, with the exception of Jacques, otherwise called Jacques Antoine Girod (who was excluded by the terms of the will), were the legal heirs of the deceased Claude François Girod, each for the one eighth part of his estate and the succession; and the heirs and legal representatives of the said pre-deceased sister, the legal heirs by representation of their deceased mother, for the remaining eighth part of the estate.

The proceedings in the case were exceedingly complicated. There was a bill, and an amended bill, and a supplemental bill, and another amended bill, and then another amended bill. Instead of pursuing the case through all these details, the simplest course will be to state the charges in the bill, and the documents brought forward to sustain them.

The will of Claude François Girod was as follows:—

"I, Claude François Girod, the legitimate son of François Silvestre Girod, deceased, and of the late François, born Dubois, native of Thône, in Savoy, diocese of Geneva, province of France, and now a resident of the parish of Assumption, on Bayou Lafourche, in the State of Louisiana, being about sixty years of age, and desirous to die in the Roman Catholic and Apostolic religion, under which I have ever lived, with a firm belief in the mysteries of our holy religion, do ordain this my last will or testament, in case I should be overtaken by death, the hour of which I am uncertain of; and as it behooves all living beings to settle their temporal affairs, when they are in the full enjoyment of their health and reason, in order to avoid thereby the difficulties which arise when we are laboring *under a dangerous disease, which takes from us the use of our reasonable facul-

*505]

ties, and consequently deprives us of the understanding and memory necessary to the faithful and peaceable settlement of our family affairs, with a view to avert from our heirs the difficulties always prejudicial to those that are absent. Now, therefore, under these circumstances, I invoke the grace and clemency of God, to whom I recommend my soul when separated from my body; and I wish and ordain, that the latter be buried among faithful Christians, with all the usual rites of our mother church, leaving with my testamentary executors, herein after named, the performance of all pious works, such as causing three masses to be said on my behalf to my holy patron, as also funeral services, masses, &c., &c.

"1. I declare that the property I am now possessed of are the earnings of my labor and savings, and consist of the following items, to wit:—Three houses and several lots situated in suburb St. Mary, above the city of New Orleans, and one in Chartres Street, now occupied by my brother, Nicolas Girod; one main plantation, whereon I reside, situated in said Bayou Lafourche, with all the buildings, improvements, and appurtenances thereof, and being thirty-one and a half arpents front, together with the utensils, implements of husbandry, animals of all kind, and one hundred and odd slaves of different ages belonging to me; also, a quantity of lands situated in the different parishes of the bayou, the titles to which I hold in my possession; also, a certain sum of money is due to me, which I cannot ascertain at present, but which will be made to appear by the books and obligations in my power; also, I am the owner of upwards of two hundred and seventy bales of ginned cotton, now in my stores; also, I declare that I am indebted unto divers persons by obligations, and little by accounts, in a sum of about thirty thousand dollars.

"3. I give and bequeath to my parish of Thône, in Savoy, to have a solemn mass annually said on my behalf, and to contribute to the repairs of said church, a sum of two thousand dollars, such being my will.

"4. I give to the poor of my said parish, to be distributed among them so as to meet their most pressing wants, a sum of one thousand dollars, such being my will.

"5. I give and bequeath to the cousins, Dodos Gollié, of said parish, a sum of five hundred dollars, such being my will.

"6. I give and bequeath to the brothers and sisters, Joseph Suard, senior, and Antoine Suard, junior, sons of Antoine Suard, deceased, since about thirty years, residing at Cluse, in Fonsigny (Savoy), the sum of two thousand dollars, such being my will.

"7. I give and bequeath to my distant relations of said

parish a sum of five hundred dollars, to be distributed among them, such being my will.

"8. I give and bequeath to the Charity Hospital of Thône, in Savoy, a sum of one thousand dollars, such being my will.

*506] *"9. I give and bequeath to the children of my deceased sister, Françoise, wife of Poidebard, without prejudicing their rights in and to my succession, the sum of two thousand dollars, to be divided between them by equal portions, such being my will.

"10. I give and bequeath to my sister Teresa, wife of Quetand, without prejudice to her rights in my succession, a sum of one thousand dollars, such being my will.

"11. I give and bequeath to my god-daughter and sister, Rosalie, married at Taloire, her husband's name being unknown to me, a sum of one thousand dollars, without prejudice to her rights in my succession, such being my will.

"12. I give for once to my brother James Girod, a sum of four thousand dollars, without any other rights or pretensions whatever in and to my succession, such being my last will.

"13. I give and bequeath to my brother Claude, married, the sum of two thousand dollars, without prejudice to his rights in my succession, such being my last will.

"14. I give and bequeath to the parish of Assumption, for the church-wardens in Lafourche, where I now reside, a sum of five hundred dollars, for contributing to the construction of a church, such being my will.

"15. I give and bequeath to the mulatress Françoise Vils, for the faithful services she has rendered to me at my house, during a long space of time, a sum of six thousand dollars, which shall be paid to her (after my death) one, two, and three years, such being my will.

"16. I give and bequeath to my god-daughter Françoise, a free colored woman, the daughter of Rosette, a negro woman, a sum of fifteen hundred dollars, such being my last will.

"17. I give and bequeath to the mulatress Belanie, wife of Colas Meillen, a sum of two hundred dollars, such being my will.

"18. I give likewise to her younger sister Polline, a sum of two hundred dollars, such being my will.

"19. I give and bequeath to my mulatto slave Dominic, who is a blacksmith and rum-distiller, his freedom, which he shall be put in possession of six months after my death, for his good and faithful services to me.

"20. I nominate for my testamentary executors the following persons: my brother Nicolas, who is my senior, and Jean François, my junior, the former being a merchant in New

Orleans, and the second is a planter, residing at Washita, and in their default, Mr. Phillipon, senior, merchant at New Orleans, to whom I give, by the present olographic testament, full power and authority as required by law to take possession of all my property present and to come, to inventory, sell, and cause them to be sold, as to him will seem best for the heirs of all my brothers and sisters, present and absent, without intervention of justice, hereby annulling and declaring *void all other testaments, codicils, and [*507 donations, *mortis causa*, and other acts of last will which I may have made previous to and to the prejudice of the present, which is the only one I adopt as being my last will, in order that my heirs may inherit and enjoy my property with the benediction of God and mine, &c.

"Done and passed on my plantation, at Lafourche, the 30th of November, 1812.

(Signed,) C. F. GIROD.

J'H COURRIE, *witness.*
SAINT FELIX, *witness.*
"Ne varietur———"

"STATE OF LOUISIANA, PARISH OF ASSUMPTION:

"*Monday, the 8th of November, in the year* 1813.

"At the request of Mr. Nicolas Girod, I, F. Corvaisier, judge of this parish, did repair to the plantation of the late C. F. Girod, where a bundle written over having been presented to me as the testament or last will of the said C. F. Girod, signed by him under date of the thirtieth of November, eighteen hundred and twelve, as also an open codicil signed by the deceased, in the presence of Messrs. Prevot, St. Felix, and François Bernard de Deva, I proceeded to the proof of said testament by swearing to that effect Messrs. St. Felix and J'h Courrie, witnesses to said testament, in the presence of Mr. Nicolas Girod, and then proceeded to open the same.

(Signed,) N. GIROD,
J. L. COURRIE,
SAINT FELIX BECHE, *J. P.*
F. CORREJOLLES, *witness.*
F. CORVAISIER, *Judge.*

"And by the opening of said testament we saw that Messrs. N'as Girod and F'ois Girod, brothers of the deceased, were appointed testamentary executors.

(Signed,) F. CORVAISIER, *Judge.*"

There were four inventories made of the property of the deceased, namely:—

November 12th, 1813.	In the parish of Assumption.
February 3d, 1814.	In the parish of Assumption.
February 18th, 1814.	In the parish of Assumption.
February 26th, 1814.	In the city of New Orleans.

The amount of all these inventories was $124,594.45. In the fourth inventory was included the half of a house and lot at the corner of St. Louis and Chartres Streets, in the city of
*508] New Orleans, whereas the complainants alleged that the whole of it belonged *to the deceased, and ought to have been included in the inventory.

The bill then charged, that the executors plotted and contrived to obtain possession, for their own use and benefit, and to the wrong and injury of their co-heirs, of the entire succession and estate of their deceased brother, by virtue of the following proceedings, which were charged with being illegal and fraudulent, namely:—

On the 19th of January, 1814, the executors presented the following petition:—

"To the Honorable Fran's Corvaisier, Judge of the Court of Probates of the Parish of Assumption, Lafourche.

"The petition of Nicholas and Jean François Girod, both merchants, residing in the State of Louisiana, and testamentary executors of the late Claude François Girod, deceased, in the said parish, humbly showeth:—

"That their deceased brother, Claude François Girod, by his testament dated the 30th of November, 1812, has appointed them his testamentary executors and detainers of his estate, and, as such, given to them full power and authority to cause an inventory of all his property to be made, without intervention of justice, to sell or cause to be sold his property, in whole or in part, as to them will seem best for their own interests and for those of the absent heirs named in said testament.

"Wherefore petitioners pray the honorable court to order that the sale of the movables, movable effects, and of the main plantation, as also of the slaves of both sexes employed thereon, and other lands adjoining thereto, and making part thereof in the lifetime of the deceased, be made at public auction, for cash, as consisting in part of perishable objects, and for the purpose of paying the debts of the succession, after the usual delays, advertisements, and publications required by law.

"The 19th of January, 1814.

(Signed,) N. Girod, *Testamentary Executor.*
Jn. Fs. Girod, *Testamentary Executor.*"

On the 16th of February, 1814, the following bond was executed:—

"Whereas the honorable judge, François Corvaisier, thinks that he is not authorized to sell the several properties situated in the parish of Lafourche, interior, as being without the jurisdiction of his said parish; and whereas we are desirous to remove all the liabilities which the said honorable judge might subject himself to, by selling said lands in the same manner, and at the same time, as those situated within his jurisdiction. Now, therefore, as testamentary *executors [*509 of the late C. F. Girod, we do bind ourselves, by these presents, to protect and warrant said honorable judge against all the troubles and difficulties which might be the consequence of his thus selling the lands of the succession situated out of this parish.

"In faith whereof, we have signed these presents, to be by him used as of right. Parish of Assumption, the 16th of February, 1814.

(Signed,) JN. FS. GIROD.
JN. FS. GIROD, *Executor.*"

On the 18th of February, 1814, a sale took place, as evidenced by the following paper:—

"State of Louisiana, Parish of Assumption, the eighteenth day of February, in the year 1814.

"On the day and year aforewritten, upon the request of the testamentary executors of the late C. F. Girod, I, François Corvaisier, judge of the said parish, did repair to the sugar-plantation of the deceased, and we there proceeded to the sale and adjudication (as requested), of the property, both movable and immovable, belonging to the succession, to wit:—

(Then follows an enumeration of plantations, tracts of land, and personal property.)

"N. B. A certain lot of ground situated at Donaldsonville, which, through error, was included in the original inventory, has not been sold, because it does not belong to the succession, but to one F'se Wiltz, a free woman of color. And the present sale being concluded on the day and year aforewritten, we have closed these presents, amounting to the total sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, omissions and errors of calculations excepted. And the witnesses, the last appraisers, and the

parties interested, have signed, before the judge of the aforesaid parish of Assumption, on the 18th of February, 1814.

(Signed,) JN. FS. GIROD, *Testamentary Executor, for self, and by procuration of his brother, Na's Girod.*
ETIENNE BOUDREAUY, *witness.*
JACQUES TERIOT, *do.*
L. RICHE, *do.*
P. L. LAURET, *do.*
FS. CORREJOLLES, *do.*
Ordinary mark of PIERRE CANCIEL, *do.*
JUAN VIVES, *do.*
J. BERN'DO DE DEVA, *do.*
"Before me, F. CORVAISIER, *Judge.*"

*510] *On the same day, namely, the 18th of February, 1814, the following judicial adjudication of the property was made, being in the nature of a deed:—

"State of Louisiana, Parish of Assumption, the 18th of February, 1814.

"At the request of the testamentary executors of the late C. F. Girod, J. F. Corvaisier, judge of the aforesaid parish and of the Court of Probates, did repair to the sugar-plantation of said deceased, where, the customary formalities being complied with, and the sale having been announced by the public crier, I proceeded, as requested, to sell at auction, and for cash, to the highest and last bidder, on account of said succession, or those interested therein, all the lands, slaves, and other property situated in this parish and county of Bayou Lafourche, to wit:—Thirteen tracts of land or plantations, cultivated or otherwise, including thereon the sugar-plantation [and] three small islands lying at the mouth of said bayou; also one hundred and seventeen slaves, employed on said sugar-plantation, said slaves being of different ages and sexes, in good health, sick, infirm, crippled, and such as they are or may be, and no warranty being given to the purchaser against the redhibitory vices and maladies prescribed by law; said warranty being on the contrary absolutely and totally refused; also a cotton-gin adjoining said sugar-plantation; also a distillery in operation, with its implements and appurtenances; also all the horned cattle, mules, horses, carts, and wagons; also all the implements of husbandry of said sugar-plantation; as also all the furniture [and] old silver plate; also twenty-two hundred gallons of Tafrá, in the distillery aforesaid; also fifty-five thousand pounds of brown sugar lying on cisterns;

also sixty-three bales of cotton (nine of which are damaged), weighing together twenty-three thousand one hundred and thirty pounds. All the above articles were sold separately, and cried by the public crier, with the exception of the sugar-plantation, which was sold, with the furniture thereof, as appears by the judicial sale, detailed and deposited in the clerk's office of the said parish of Assumption; and the whole, amounting together to the sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, was adjudicated for cash to Mr. Charles Saint Felix, who is satisfied therewith, for having seen, visited, received, and taken possession of same. And the aforesaid Nas. Girod and Jn. F. Girod, here present, declare, by the present act, that they have received from the said Charles Saint Felix the aforesaid sum of $84,755.40, for which acquittance is hereby given, and that they quitclaim and release him, and his heirs and assigns, of and from all claims and demands whatsoever.

"In testimony whereof, the aforesaid parties have signed the *present judicial sale, the day and year first [*511 above written, in presence of the undersigned witnesses, and of the parish judge.

"Signed, per procuration of Nas. Girod, JN. F. GIROD.
JN. F. GIROD.
SAINT FELIX.
T. COURRIE.

"Witnesses,—F. CORREJOLLES.
"Before me, J. CORVAISIER, *Judge*."

On the 23d of February, 1814, by a similar deed to the above, Saint Felix conveyed the whole of the property to Nicholas Girod and Jean F. Girod, describing it in the language above quoted, and for the same consideration. The deed concludes in the following language:—

"All which articles, the said Saint Felix does, by these presents, retrocede to the said purchasers, Nas. Girod and Jean François Girod, for themselves, their heirs and assigns, without any reservation or reclamation whatever, for the price and sum of eighty-four thousand seven hundred and fifty-five dollars and forty cents, which the said vendor acknowledges by these presents, to have received in ready money, from the said purchasers, Nas. Girod and Jean Frs. Girod, and for which the present sale will operate as an acquittal and release against all and every person or persons whatever; the said St. Felix herein declaring, that he is not bound to furnish the said purchasers with any other titles for

the said lands and slaves, than those which have been given and delivered to him at the judicial sale aforesaid, and which he now delivers to said purchasers, who acknowledge to have received them, and to be satisfied therewith. Wherefore, the contracting parties agreeing both to these presents, have set their names to the same, the day and year afore written, in the presence of the undersigned witnesses, and of the parish judge aforesaid.

(Signed,) NAS. GIROD, *per procuration.*
SAINT FELIX.
JN. F. GIROD.
JN. F. GIROD.

"Witness,—(Signed,) J. COURRIE.
FS. CORREJOLLES."

On the 4th of March, 1814, the following petition was presented, and order given for the sale of the property in New Orleans:

"To the Honorable James Pitot, Judge of the Court of Probates, the petition of Nicolas and Jean François Girod, testamentary executors of the late Claude François Girod, humbly showeth:

"That, in conformity with the order rendered by this hon-
*512] orable *court, they have caused an inventory to be made by the register of said court of all the property left by the deceased in this parish, and amounting, according to the appraisement made thereof, to the sum of twenty thousand seven hundred dollars, being the amount of eight lots, and a piece of ground, situated in this city, at the corner of St. Louis and Chartres streets, as the whole appears from said inventory deposited in the clerk's office of said court. Petitioners further show, that the succession of their late brother Claude François Girod is indebted in a sum of sixty thousand dollars, or thereabouts, being the amount of the legacies and debts left by the deceased, which it is necessary to pay without delay. Wherefore petitioners pray this honorable court to order that the said piece of ground and eight lots be sold for cash, as also the said house, which, belonging in common to the succession and one of the petitioners, cannot be conveniently divided without loss or inconvenience to the owners; and petitioners further pray that the present petition be served upon the attorney appointed to represent the absent heirs, so that the law be complied with, and justice will be done. (Signed,) N. GIROD, *Mayor.*"

Copied from the original in English.

Order.

"Let Mr. C. R. Caune, attorney appointed by the court to represent the absent heirs of said Claude François Girod, be notified to show cause why the prayer of this petition should not be granted.

(Signed,) Js. PITOT.

New Orleans, March 3d, 1814."

"As attorney representing the absent heirs of the said late Claude François Girod, I have no objections to the petitioners' demand.

(Signed,) R. CAUNE, *Attorney for absent heirs.*

"*New Orleans, March 4th*, 1814."

Order.

"Let the sale be made as prayed for.

"*New Orleans, March 5th*, 1814.

(Signed,) Js. PITOT, *Judge.*"

On the 9th of April, 1814, a sale was made of the property in the city of New Orleans, in conformity with the above order, which was inventoried on the 26th of February, as appeared by the following paper:

"And on this ninth day of the month of April, in the year of our Lord one thousand eight hundred and fourteen, and of the *independence of the United States of America the thirty-eighth, at the hour of ten A. M., I, Jean [*513 Baptiste Marc Brierre, deputy register of wills for the city and parish of New Orleans, did repair to suburb St. Mary, for the purpose of selling to the highest and last bidder the houses and lots belonging to the succession of the late Claude François Girod, and there being, we did find and meet with Mr. Nicolas Girod, one of the testamentary executors of the deceased, and Charles Robert Caune, attorney at law, appointed by the court to represent the absent heirs. Whereupon, in their presence, and in that of Prosper Prieur and Sebastian Blondeau, witnesses hereto required, I did proclaim the said sale in a loud and audible voice, and on the following terms and conditions, to wit:—

"*Cash.*"

(The paper then enumerated the lots of ground, and concluded as follows:)

"And there remaining nothing else to be sold belonging to said succession, I, deputy register, aforesaid, closed and terminated the present process verbal. And after reading thereof, we ascertained the amount of said sale to be twenty-seven thousand seven hundred dollars, which sum was left by us in the hands of the said Nicolas Girod, testamentary executor aforesaid, who acknowledges the same, takes charge thereof, and has signed with the parties, the witnesses, and me, deputy register, the day, month, and year aforewritten.

(Signed,) BLONDEAU.
PROSPER PRIEUR.
R. CAUNE, *Attorney.*
N. GIROD, *Testamentary Executor.*
BRIERRE, *Deputy Register.*"

On the 28th of April, 1814, Laignel conveyed to Nicolas Girod, as follows:

Sale of House and Lots from Simon Laignel to Nicolas Girod.

"Before me, Michel de Armas, a notary public, residing in New Orleans, state of Louisiana, United States of America, and in the presence of the witnesses hereinafter named and undersigned, personally apppeared Mr. Simon Laignel, merchant, residing in suburb St. Mary, who has, by these presents, sold, transferred, and conveyed, from this day and forever, with no other warranty than that of his own acts and deeds, unto Mr. Nicolas Girod, of this city, merchant, here present and accepting purchaser for himself, his heirs and assigns.

"1st. Six lots of ground," &c., &c., enumerating the lots, and concluding as follows:—"To have and to hold said prop-
*514] erty *unto the said purchaser, who may use, enjoy, and dispose of the same, in full and complete ownership, by virtue hereof. The property herein sold and described belong to the vendor, for having acquired the same at the public sale which the said Nicolas Girod, as testamentary executor of the late Claude François Girod, caused to be made on the 9th of April, instant, by the register of wills, of the property belonging to said Claude François Girod's succession, as the whole appears by the act of sale confirmatory of the adjudication aforesaid, passed before the notary undersigned on the 25th instant. By the certificate of the recorder of mortgages in this city, bearing even date herewith, it appears that there is no mortgage in the name of the vendor on the property herein bargained and sold.

"The present sale is made for and in consideration of the

total sum of thirty-five thousand eight hundred dollars, which the said vendor acknowledges to have received cash, before the signing hereof, and out of the presence of the notary and witnesses undersigned, from the purchaser, to whom he grants full and ample acquittance and release of the same, renouncing the benefit of the exception, *non numerata pecunia*, and the two years' delay which the law accords to enforce said exception Thus it was, &c., promising, obliging, renouncing, &c.

"Done and passed at New Orleans, in my office, in the presence of Messrs. Michel J. B. L. Fourcesy and Charles Robert Caune, both witnesses hereto required and domiciled in this city on the twenty-eighth of April, in the year eighteen hundred and fourteen, and of the independence of America the thirty-eighth; and the said appearers, notary, and witnesses, have signed these presents, after reading thereof.

(Signed,) N. Girod.
Simon Laignel.
Fourcesy.
R. Caune.
Mich'l De Armas, *Not. Pub.*

The bill of the complainants in the court below also charged, that the executors, in order to appropriate, wickedly and fraudulently, to their own use and benefit, the funds of the succession, did, in their account of the 23d of May, 1817, place themselves as creditors of said succession for a sum of nearly forty-nine thousand dollars, to wit, said Nicolas Girod for forty thousand four hundred and eighteen dollars and nine cents, and said Jean François Girod for eight thousand two hundred and fifty-three dollars and twenty cents, although no sum was due to them.

The proceedings upon which this charge was founded are as follows:—

* "State of Louisiana: [*515

"Nicholas Girod
v.
J. F. Girod, Executor of C. F. Girod, and R. C. Caune, &c. } No. 604.—Parish court.

"*Petition, filed November 26th*, 1814.

"To the Honorable James Pitot, Judge of the Parish Court for the Parish and City of New Orleans.

"The petition of Nicolas Girod, of the said city and parish,

merchant, showeth, that Claude Francis Girod, of Lafourche, was indebted to your petitioner in a large sum of money, previous to his decease; that hereto annexed is a detailed account of the money due by his estate, at this time, to your petitioner; which account, amounting to the sum of forty thousand five hundred and seventy-seven dollars and twenty cents, principal [and] interest, the executors of the said Claude F. Girod has refused to pay, though thereto frequently required. Wherefore your petitioner prays, that John Francis Girod, now residing in the city of New Orleans aforesaid, one of the executors of the said Claude F. Girod, and R. C. Caune, the attorney appointed to represent the interest of the absent heirs, may be cited to appear and answer this petition.

"And your petitioner further prays, that they may be condemned to pay your petitioner the above sum of $40,577.20, with interest and costs.

"And your petitioner further prays all such other relief as the case may require, and to justice and equity may appertain.

"Received the annexed document, New Orleans, September 9th, 1816.

(Signed,) N. GIROD.

"A copy thereof being annexed to the award of the arbitrators in the premises.

"*Citation.*

"Mr. J. F. Girod, Executor of C. F. Girod, and C. R. Caune:

"You are hereby summoned to comply with the prayer of the annexed petition, or to file your answer thereto in writing with the clerk of the parish of Orleans, at his office at New Orleans, in ten days after the service hereof; and if you fail herein, judgment will be given against you by default.

"Witness the Honorable James Pitot, judge of the said court, this 26th of November, in the year of our Lord 181 .

(Signed,) SAM. P. MOORE, *Deputy Clerk.*

"*Sheriff's Return.*

*516] "Served a copy of petition and citation on each [of] the *defendants, November 28th, 1814; returned November 28th, 1814. J. H. HOLLAND, *Deputy Sheriff.*

"*Answer of J. F. Girod, filed November 29th*, 1814.

"To the Honorable James Pitot, Judge of the Court for the Parish and City of New Orleans, the answer of Jean F. Girod, one of the testamentary executors of the late C. F. Girod, to the petition of Nicolas Girod, humbly showeth:

"That all and singular the items in the accounts presented by said Nicolas Girod, in his said petition, must be proved, to justify his claim against the succession of C. F. Girod, and for that purpose this respondent prays this honorable court to order what shall seem the best for the common interest of parties, and moreover to be hence dismissed with costs. And, &c.

(Signed,) J. F. GIROD, *Ex., Jr.*

"*Answer of R. Caune, filed November 29th*, 1814.

"To the Honorable James Pitot, Judge of the Parish Court, the answer of C. R. Caune, in his capacity of attorney representing the absent heirs of the late C. F. Girod, to the petition presented by Nicolas Girod, against the estate of the late aforesaid C. F. Girod:

"Your respondent denies all facts mentioned in the plaintiff's petition, and he says that the plaintiff must be proven his claim before court, and prays the court to dismiss him, with costs of the suit; in duty bound, your petitioner shall ever pray.

(Signed,) R. CAUNE, *Attorney.*

"*Order appointing Arbitrators, Parish Court for the Parish and City of New Orleans, November 27th*, 1814.

"Present: the Honorable James Pitot.

"NICOLAS GIROD *v.* J. F. GIROD, Ex. of C. F. Girod, and C. R. Caune, attorney for the absent heirs.

"Upon motion of Alfred Hennen, esquire, of counsel for the plaintiff, it is ordered that F. Percy and F. M. Rouzan be appointed arbitrators in this case, to decide on the claim of the plaintiff, and in case of their not agreeing, that the court appoint a third person as umpire. I do hereby certify the above.

"In testimony whereof I have hereunto set my hand and affixed the seal of the said court at the city of New Orleans, the day and year first above written, and of the independence of the United States the thirty-ninth.

(Signed,) SAM. P. MOORE, *Deputy Clerk* (swearing).

"Personally appeared before me, one of the justices of the peace in and for the city and parish of New Orleans, Ferdinand *Percy et F. M. Rouzan, of this city, who [*517 were duly sworn according to law as arbitrators as above

named, that they will examine the accounts between the parties with impartiality, and give the report according to law.

(Signed,) F. Meffer Rouzan.
F. Percy, Jun.

"Subscribed and sworn to before me, at New Orleans, the 10th day of December, 1814.

(Signed,) J. L. Lapanse, *Justice of the Peace.*

"The undersigned arbitrators, appointed by a decree of the honorable the court of the city of New Orleans, under date of the 25th of November last, to verify and examine the accounts and demands of Nicolas Girod, a merchant residing in New Orleans, against the succession of the late Claude François Girod, his brother, who was a resident of the parish of Lafourche, in this State, said succession being represented by Jean François Girod, one of the testamentary executors thereof, and C. R. Caune, attorney for the absent heirs, and to make a report thereon to said honorable court, do declare, under the sanctity of the oath they have taken, on the tenth of December instant, and which is hereto annexed, that after hearing the parties interested in this affair, and the witnesses by them introduced, after being sworn by John L. Laparge, a justice of the peace in this city, they have proceeded to the examination and verification of the documents, titles, accounts, and books exhibited to them by the parties interested in the manner following, to wit:—First, they have examined the sworn account produced by Nicolas Girod, on the 25th of November last, which consists of thirteen items, which the arbitrators have verified in the manner following:

The first item, amounting in capital to $1,602 for 801 hides, which the said Nicolas had left in the stores of Claude François Girod, is established by the declaration of Jean François Girod, who affirms positively that the said 801 hides had been left in the stores of said Claude Françoise Girod, who disposed of the same for his private account; the said Jean François Girod declares likewise, that two dollars was the price for hides in 1794, and that he himself had purchased some at that price for his own account, ... $1,602 00

The second item, amounting in capital to $1,500, is the produce of an account which Mr. Pierre Bousignes, then clerk of the house of Claude F. Girod, had collected and paid in the hands of

said Claude F. Girod, as making part of the funds belonging to Nicolas Girod. *Mr. Bousignes declared under oath, that he does [*518 not remember the precise amount of that sum, but that it must have been something like fifteen hundred dollars; he recollects that that account was paid in before the fire of 1794, and that several cash payments for the private account of C. F. Girod were made out of the funds belonging to said Nicolas Girod, . . $1,500 00

The third item, amounting in capital to $6,222.18, proceeds from the following remittances and effects, to wit: Jean François Girod paid in specie to Claude François Girod, Nicolas Girod's interest, say two thirds in a shipment of furs made in March, 1795, on board the brig Jane, bound to Philadelphia, and amounting to $3,593.37, as appears from a copy-book or register, marked A, No. 40, written by Guilhempan, and signed by the said Claude François Girod, which book or register has been produced by the said Jean François Girod, who further declared, that the said Claude François Girod was at that time authorized to settle the accounts of Nicolas Girod with this deponent, and that the said C. F. Girod has never rendered to Nicolas Girod an account of this transaction, . . 2,395 63

For so much paid by Jean François Girod to said Claude François Girod, for Nicolas's interest, say two thirds in another shipment of furs made in April, 1795, on board the brig L'Archedimoi, bound to Philadelphia, as appears from the aforementioned copy-book or register, marked A, No. 40, ... 432 75

For the amount of a barrel of wine, with which the private account of said C. F. Girod was debited on the 17th of October, 1795, but never since credited with, as appears from the aforementioned copy-book or register, . . . 50 00

Amount of a bill of exchange drawn by Claude François Girod, on the 7th of April, 1796, payable eight days after sight, at New York, to his brother, Nicolas Girod, for $2,000, which he had received from Jean François Girod; *for* $2,000, *which he had received from Jean François Girod;* said bill has never been accepted or paid, as

appears from the bill itself, which has been exhibited to us by said Nicolas Girod. . . 2,000 00

For the half of the amount of twenty-six barrels of gunpowder, shipped in the month of April, *519] 1796, on board the ship The Two Friends, bound to New *York, and consigned to Th. Thebane, by Jean François Girod, on joint account with Nicolas Girod. The proceeds whereof, amounting to $1,193.75, as appears from the copy-book aforesaid, were received, as also the profits of said Th. Thebane by the said Claude François Girod, who never accounted for them to the parties interested. This being established by the declaration of said Jn. F. Girod, 596 87

Amount of sundry merchandises belonging to Nicolas Girod, and by Jean François Girod intrusted to Claude François Girod, as appears from the copy-book aforesaid, which was exhibited to us by said Jean François Girod, who declared that Claude François Girod had never accounted for the merchandise to said Nicolas Girod, . . 210 06

Amount of sundry debts which Claude François Girod had undertaken to collect for account of Nicolas Girod, as appears from the statement produced by Jean François Girod, and corroborated by the aforesaid copy-book or register A, 476 87

Amount of a barrel of wine, sold to Mr. de Vangine, by the said Jn. François Girod, which was paid to said Claude François Girod, as is proven by a written declaration of said Jn. F. Girod in said copy-book or register, ... 60 00

The 4th item, amounting in capital to $186, is established by the declaration of Jean François Girod, who affirms that it is within his knowledge that the articles composing said item were delivered to Claude François Girod, who shipped them for Havana on his private account, . . 186 00

The 5th item, amounting in capital to $651.50, consists of the net proceeds of the sale made by Claude Frs. Girod of 2 bales of blue drilling, shipped for New York in 1801, on board of the ship South Carolina, Stick, master, by Thibaut, for account of Nicolas Girod, and consigned to Claude F'ois Girod, as appears from book No. 1, which was exhibited to the arbitrators, who ascertained that it was in the handwriting of

Guilhempan, then the clerk and agent of C. F. Girod, ... 651 50

The 6th item, amounting in capital to $229.06, consists likewise of the net proceeds of the sale of a cask of manna, shipped by Nicolas Girod when in New York, in 1797, on board of schooner Despatch, Clark, master, to the consignment of said Claude *François [*520 Girod, as the whole was made to appear by copy-book No. 1, mentioned in the foregoing article, ... 229 06

The 7th item, amounting in capital to $379.12, consists of a lot of merchandise, consigned by Jean François Girod to Claude François Girod, at the time of said J'n F. Girod's departure for the United States in 1797, which said merchandises belonged to said Nicolas Girod, and were sold by said Claude François Girod, as appears from a waste or copy-book, in the handwriting of said Guilhempan, marked B, No. 42, and produced by said Jean François Girod, . . . 379 12

The 8th item, amounting in capital to $813.82, consists of the proceeds of the sale made by Claude Frs. of divers merchandises belonging to Nicolas Girod, which the latter had left in the hands of Jean François Girod, who delivered them in kind to Claude François Girod at the time of said J. F. Girod's departure for the United States, in 1797; said merchandises are enumerated in a copy or wastebook in the handwriting of the late Guilhempan, marked B, No. 41, and likewise produced by the parties interested, ... 813 82

The 9th item, amounting in capital to $899, consists of the net proceeds of twelve barrels of wine shipped by Nicolas Girod when in New York, 1797, on board the brig Success, Dinsmore, master, to the consignment of Claude François Girod, who sold the same, as was shown by the sales-book No. 1, aforesaid, . . 899 00

The 10th item, amounting in capital to $489.63, consists also of the net proceeds of sale made by Claude F'ois Girod, of 498 sextains of cards shipped by N'as Girod when in New York, in 1797, on board of the brig Success, Rathbone, master, to the consignment of said Claude F'ois

Girod, as was shown by the sales-book No. 1 aforesaid, ... 489 63

The 11th item, amounting in capital to $991.38, consists also of the net proceeds of the sale made by C. F. Girod of 762 sextains of cards, shipped in 1795 by Nicolas Girod, then in New York, for his account and risks, on board the schooner Active, Wilcox, master, and consigned to said Claude Frs. Girod, as appears from the sales-book No. 1, aforesaid, ... 991 38

*521] The 12th item, amounting in capital to the sum of *$13,901.94, consists of divers lots of merchandises and jewelry belonging to N. Girod, which the said Claude François Girod sent into the provinces of the interior, and there sold, or caused to be sold. The accounts of those sales were never settled between Claude François and Nicolas Girod, which fact is attested by the declaration of Jean François Girod, and several other witnesses, who testify that Claude Frs. Girod has constantly avoided to render said account. The several articles composing the present item are enumerated and detailed in the aforementioned sales-book, No. 1, which the arbitrators have ascertained to be in the handwriting of Guilhempan, . . . $13,901 94

The 13th item, amounting in capital to $6,574.30, consists of the balance of an account between Nicolas and Claude F. Girod, adjusted on 1st August, 1813, by Mr. Phillippon, jr., who was authorized for that purpose by the said Claude F. Girod. The arbitrators, after examining that account and the one preceding it, are satisfied that the articles mentioned in said accounts are foreign to the affairs which existed between the said Nicolas and Claude Frs. Girod, . . . 6,574 30

$34,439 93

Secondly. The arbitrators have examined and verified the account of interests also making part of the claims of said Nicolas Girod, as follows, viz.:—

Interests on $1,602, amount of the first item of the account produced by Nicolas Girod, from November, 1794, to the date hereof, making, in all, 20 years, at 6 per cent. per annum, . . . $1,922 40

Interests on $1,500, amount of the 2d item, from the year 1794 to the date hereof, that is, 20 years, at 6 per cent. per annum, . . .	1,800 00
Ditto, on $6,222.18, amount of the 3d item; the arbitrators have examined the eight parts whereof this item is composed, and found that the interests calculated on each part amounted to $7,087.92, wherefore they have been of opinion to leave the item as it was presented, . .	6,657 61
Ditto, on the $186, amount of the 4th item, from January, 1797, to this day, making 17 years, 10 months, at 6 per cent. per annum, . . .	199 02
Ditto, on $651.50, amount of the 5th item. The arbitrators have reduced the amount claimed, to wit, *$664.02, to $504.91, because the interests ought to have been calculated only from the 1st of January, 1802, when the 2 bales of drilling shipped by Thibaut were sold; —this gives 12 years and 11 months, at 6 per cent. per annum, ...	[*522 $504 91
Ditto, on $229.06, amount of the 6th item. The arbitrators have verified the calculation, which they have found correct, ...	233 58
Ditto, on $379.12, amount of the 7th item. The calculation was verified, and found correct, .	382 78
Ditto, on $813.82, amount of the 8th item. The calculation was verified, and found correct, .	817 90
Ditto, on $899, amount of the 9th item. The calculation was examined, and found correct, .	876 52
Ditto, on $489.63, amount of the 10th item; after examination, found correct, ...	477 75
Interest on $991.38, amount of the 11th item; examined, and found correct, ...	966 22
Ditto, on $13,901.94, amount of the 12th item; examined, and found correct, ...	12,998 30
Ditto, on $6,574.30, amount of the 13th and last item of the account presented by Nicolas Girod. The arbitrators, after examining the calculation, found that it fell short of what it ought to have been, but as the difference is trifling, and in favor of the heirs, they left the item as it was presented, ...	493 06
Capital and interest due, after examination .	$62,769 98

The arbitrators next proceeded to verify and examine the sums with which the said Nicolas Gi-

rod has credited the account he has produced, which sums amount, in capital and interests, to $22,351.89, and were found correct, . . . 22,351 89

Balance in favor of Nicolas Girod, . . $40,418 09

"So that the balance in favor of Nicolas Girod is reduced to $40,418.09 instead of $40, 579.20, as claimed in his account, this difference being produced by the reduction made on the interests of the 5th item of said account. The arbitrators, after having examined and heard the declarations of Messrs. Pre. Bousignes, M. Pacaud, Joseph Guillot, and Jean François Girod, witnesses introduced by the parties, and sworn by John S. Lapauze, a justice of the peace, who positively assert that Claude François Girod has always refused to settle his accounts with his brother, Nicolas Girod, and after a scrupu-
*523] lous examination of the books, accounts, titles, and other documents which were produced in this *affair, are of opinion that the sum of forty thousand four hundred and eighteen dollars and nine cents, claimed by said Nicolas Girod, is lawfully due to him. In faith whereof, we have signed the present award, that it may have its legal effect given to it.

"New Orleans, this fourteenth day of the month of December, eighteen hundred and fourteen.

(Signed,) F. Meffre Rouzan,
F. Percy, Jun'r."

"On this, the twelfth day of the month of December, 1814, in the thirty-ninth year of the independence of the United States of America, before me, one of the justices of the peace for the city and parish of New Orleans, personally appeared, as requested by the parties, Mr. Joseph Guillot, a witness in the case of *Nicolas Girod* v. *Jean François Girod*, one of the testamentary executors of the late Claude François Girod, and Charles Robert Caune, attorney for the absent heirs, who, being duly sworn according to law, declared and said, that he has always been a friend of the Girods, and that some time in the month of July, 1813, the late Claude François Girod, being in town, came to deponent's house, and requested him to call upon him in his room, saying that he had something to confide to him; and that having repaired thither, said Claude François Girod communicated his intentions of preventing all difficulties after his death, saying that he was desirous to settle with his brother Nicolas, that he had been to church, where he had knelt before the Holy Virgin, beseeching her to

assist him in terminating his affairs with his said brother Nicolas; deponent, knowing nearly all their affairs, asked him in what manner he intended to settle them; then the said Claude François Girod told him,—Here are my propositions; I will sell my house in St. Louis Street for cash to my said brother Nicolas, with a view to settle with him, reserving, for the term of my natural life, the use of one of the back rooms of said house; and if there be any balance remaining due to him, he will grant me a delay to pay the same;—and he requested deponent to submit those propositions to Nicolas Girod's consideration, which deponent did; but the said Nicolas Girod answered him surely, No; and added, that he requested deponent not to interfere in that affair, saying that he himself had made proposals to Claude François Girod, his brother.

"Deponent further says, that he knows well that said affairs between Nicolas and Claude François Girod were never settled; and he has signed with us.

(Signed,) JN. FRS. GIROD, *Test'y Executor.*
JOSH. GUILLOT.
N. GIROD.
R. CAUNE, *Attorney for absent heirs.*

* "Sworn to and subscribed before me, at New Orleans, this 12th day of December, 1814. [*524
(Signed,) JH. L. LAPANGE, *Justice of the Peace.*"

Order, 15th December, 1814.

"NICOLAS GIROD,
v.
JEAN FRANCOIS GIROD, Ex. of C. F. Girod, and C. R. CAUNE, Att'y, &c. } 604.

"Upon motion of Alfred Hennen, Esq., counsel for the plaintiff, and upon reading and filing the report of the arbitrators appointed in this case, it is ordered, that the defendants do show cause on Saturday next, the 17th instant, if any they have or can, why the said report should not be homologated, and made the judgment of this court in the premises."

Sheriff's Return on Copy of the above Order.

"Served copy of the within order on each of the defendants, December 15th, 1814.

(Signed,) J. H. HOLLAND, *Deputy Sheriff.*"

Order and Judgment.

"It is ordered, that the report of the arbitrators be homologated, and made the judgment of the court in this case, and that the said defendants do pay to plaintiff, in conformity to the said award, the sum of forty thousand four hundred and eighteen dollars and nine cents, with costs of suit to be taxed.

"*New Orleans, May 6th*, 1815.

(Signed,) J. PITOT, *Judge*."

"I do hereby certify this to be a true copy of all the records, documents, and proceedings had in this case. Clerk's [SEAL.] office of the Parish Court, New Orleans, January 10th, 1844.

(Signed,) ALFRED BODIN, *Deputy Clerk*."

In the preceding March, Jean François Girod had brought in an account against the succession, and passed it through a similar process, which resulted in a judgment in his favor for the sum of $8,253.20.

The bill of the complainants in the court below then charged, that nearly all the co-heirs, having full faith and confidence in the honesty and integrity of Nicolas and Jean François Girod, did intrust them with their powers of attorney, authorizing them to represent the interests of such co-heirs in the settlement of the succession; in virtue of which the executors approved the account rendered by themselves. And that afterwards, by concealment of facts which they *525] knew to exist, and were bound, as agents, to communicate, the *said executors obtained from some of them an acquittance or transfer of all claims against the succession.

The bill then recited that Nicolas Girod had died, in possession of all the real estate of Claude François Girod except some parts which were mentioned as having been sold, all of which property thus remaining with Nicolas Girod the complainants claimed as the original co-heirs of Claude François Girod, and also an account of the rents and profits. All claim against the other executor, Jean François Girod, was released.

Amongst the matters introduced in evidence was the following letter, which is inserted because it is referred to in the opinion of the court; and was sent by Girod at the same time that he obtained from his two sisters the receipts which are mentioned in another part of this statement.

"*New Orleans, 27th May*, 1817.

"My sister Quetend:—To-morrow, our brother Jean Fran-

çois embarks for Havre; from thence he will proceed home, for the purpose of delivering to each one of you what is coming to him from the succession of our late brother, Claude François. I assure you, that if I had not been anxious to protect the honor of this brother, every thing would have been absorbed in settlement of accounts with me, and by other debts; besides, whether you have it now or later, the greater part cannot escape you; this is to be understood of those who shall not cease to merit our friendship and esteem. Beware not to imitate the example of Jacques, who has for ever lost our regard by his iniquities toward our whole family. Hereafter, when I shall have, in some measure, recovered from my losses by different bankrupts, I will send you some assistance from time to time. At present J. F. has orders to regulate his conduct towards you all by your conduct towards him. Farewell.

"I cordially embrace you all.

"Your brother and friend,

(Signed,) "N. GIROD.

"I have not time to write to you more at length, having much to attend to before the departure of my brother."

The original is indorsed:—

"Recorded in consular book G, page 94.

"*Paris*, 22*d January*, 1844.

(Signed,) LORENZO DRAPEZ, [SEAL.]

Consul United States."

Proved and admitted in evidence, April 29th, 1844.

On the 19th of January, 1830, Jean François Girod executed to his brother and co-executor, Nicolas, the following deed.

"On this nineteenth day of the month of January, [*526 of the year *eighteen hundred and thirty, and of the independence of the United States of America the fifty-fourth, before me, Louis T. Caire, a notary public in and for the parish and city of New Orleans, duly commissioned and sworn, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Mr. Jean François Girod, junior, residing at Paris, in the kingdom of France, and now in this city, herein acting for himself and in his own right, of the one part, and Mr. Nicolas Girod, his brother, residing in this city, and herein acting for himself, and in his own right, of the other part, who declared that they own, in

common, for a moiety each, several landed properties, and, among others, a sugar-plantation, situated on Bayou Lafourche, parish of Assumption, in this State, which they have for several years cultivated as partners, the said Nicolas Girod having the exclusive administration of the same, and being clothed with the necessary powers to that effect; but that from the date hereof the partnership between them is amicably dissolved, by consent of both parties.

"And the said Jean François Girod moreover declared that he sells, abandons, transfers, and sets over, without any other warranty than that arising of his personal acts and deeds, but with substitution and subrogation to all the warranties which have been given to them by their original vendors, unto the said Nicolas Girod, his brother, here present, and accepting purchaser, for himself, his heirs and assigns:—

"1. The undivided moiety of a sugar-plantation, seven leagues distant from the River Mississippi, situate on Bayou Lafourche, in the parish of Assumption, as it now is, or may be, together with the undivided moiety of the improvements, slaves, animals, ameliorations, implements of husbandry, and all other objects or things whatever appertaining thereto.

"2. The undivided moiety of all the lands belonging to them in common, and situated on Bayou Lafourche.

"3. The undivided moiety of three islands lying at the mouth of said Bayou, and known as Timballier, Bross, and Caillon islands.

"The whole of which had been acquired, on joint account, by the said appearers, by purchase from the late Joseph St. Felix, as per act executed before F. Corvaisier, judge of the aforesaid parish of Assumption, on the eighteenth of February, eighteen hundred and fourteen, the said St. Felix had purchased the same at the judicial sale of the property belonging to the succession of the late Claude François Girod, who in his lifetime had acquired the same by purchase from divers persons; the said purchaser acknowledging that he is fully satisfied with the said titles, and declaring that he is well acquainted with the said plantation, lands, animals, slaves, and improvements, which are the subject-matter of this act, and requires nothing further.

*527] "But it is well understood and agreed upon, by and between the *parties hereto, that the sugar and molasses now on said plantation and in the sugar-house are not included in this sal , and that the net produce thereof shall be equally divided between the parties.

"And the said Jean François Girod moreover declared, that he also transfers and abandons, unto the said Nicolas Girod,

his brother, all and singular the debts due to said plantation, as also all such sum or sums as now are, or may hereafter be, due to said partnership or community, under what title, and for what reason or reasons soever, hereby giving unto his said brother full power and authority to sue for and enforce the payment thereof, but without recourse against the transferer.

"The present sale and transfer of debts are made and accepted by the contracting parties for and in consideration of the price and sum of seventeen thousand dollars, in payment whereof the said purchaser, Nicolas Girod, has presently subscribed to the order of the said Jean François Girod, his brother, three promissory notes, each for a like sum of twenty-three thousand three hundred and thirty-three dollars thirty-three and one-third cents, the first payable on the first of March, eighteen hundred and thirty-one, the second on the first of March, eighteen hundred and thirty-two, and the third on the first of March, eighteen hundred and thirty-three, with power and faculty, however, to postpone the payment of said notes, or of parts thereof, from year to year, by paying to the said Jean François Girod, or to the holder of the notes the payment whereof shall have been postponed, a yearly interest, at the rate of eight per centum per annum, until final payment; which said notes, after being marked *ne varietur* by the notary undersigned, to identify them herewith, were handed over to the said Girod, who acknowledges the receipt thereof, and gives full and ample acquittance for the same.

"By means of the foregoing, but provided the aforesaid notes be paid, the said Jean François Girod transfers and abandons unto the said Nicolas Girod all the rights of ownership whatever which he had, has, or may have, in and to the plantation, lands, slaves, animals, implements of husbandry, in a word, in and to all the property which they owned in common, wishing that the said Nicolas Girod be seized of the same, and may enjoy, use, and dispose thereof, as of things to him well and lawfully belonging, from this day and for ever.

"And the said appearers have furthermore declared, that by act before G. R. Stringer, a notary in this city, bearing date the fifteenth of May, eighteen hundred and twenty-nine, Mr. Nicolas Girod, acting for himself, and in the name and with the consent of his brother, sold to Messrs. Abner Robinson and Benjamin Ballard a tract of land situated in the parish of Assumption, and belonging to the community aforesaid, for the price of fifteen thousand dollars, five thousand whereof were paid cash, and converted to *the use of [*528
said sugar-plantation and other property; that the ten thousand dollars payable at one, two and three years from the

date of the act aforesaid belong to them for a moiety each, but that the said Jean François Girod assigns to Nicolas Girod his share of five thousand dollars in said debt, on condition that the latter shall credit his running account with a sum of twenty-five hundred dollars, as for money had and received, and without recourse to the assignor, who moreover transfers to said Nicolas Girod, without exception or reservation any, all the rights, actions, privileges, and mortgages accessory to the aforesaid debt of five thousand dollars, being the transferer's share in the price of the sale aforesaid.

"And the notary undersigned having made known to the parties hereto article 3,328 of the new civil code of Louisiana, which reads as follows:—'Every notary who shall pass an act of sale, mortgage, or donation, of an immovable or slave, shall be bound to obtain from the office of mortgages of the place where the immovable is situated, or where the seller, debtor, or donor has his domicile, if it be of a slave, a certificate declaring the privileges or mortgages, which may be inscribed on the object of the contract, and to mention them in his act, under penalty of damages towards the party who may suffer by his neglect in that respect,' they, the said parties, declared, that, as tenants in common, they are fully aware of the state of things in relation to the immovables and slaves, object of this sale, and that they do hereby jointly and separately, relieve and free the notary undersigned from all liability on that subject.

"Done and passed in my office, at New Orleans, the day, month, and year first above written, in the presence of Messrs. Charles Darcantel and Jose Antonio Bermudez, witnesses hereto required, and domiciled in this city, who have signed with the said appearers and me, notary, after reading hereof.

(Signed,) Jn. Fs. Girod.
N. Girod.
Charles Darcantel.
J. Antonio Bermudez.
Louis T. Caire, *Notary Public.*"

About the 1st of September, 1840, Nicolas Girod died, in New Orleans, leaving the following will:—

Will of Nicolas Girod—Filed 30th January, 1841.

"*Ne varietur.* New Orleans, 30th January, 1841.
(Signed,) J. Bermudez, *Judge.*

A due bill to the Mayor of New Orleans, for the sum of $100,000.00, to be employed in the

construction of a building called by the name of 'N. Girod,' in the parish of Orleans, to receive *and come to the relief of the [*529
French orphans inhabiting the state of
Louisiana, ... $100,000 00
A due bill to the treasurer of the Charity Hospital, 30,000 00
A due bill to the president of the Catholic Asylum, 30,000 00
No. 4. A due bill to Mrs. Bouvard, born Poidebard, of Bordeaux, . 100,000 00
5. Do. Mr. Vollier Poidebard, at Chamberry, . . . 30,000 00
6. Do. Mr. Joseph Girod, . . 100,000 00
7. Do. Mr. G. Montamat, . . 50,000 00
8. Do. Mr. A. Michoud, . . 50,000 00
9. Do. Mr. F. Grima, . . . 30,000 00
10. Do. Mr. Dejan, senior, . . 20,000 00
11. Do. Mr. D. Prieur, . . . 40,000 00
12. Do. Mr. Chs. Claiborne, . . 15,000 00
13. Do. Mr. M'ville Marigny, . . 15,000 00
14. Do. Mrs. Widow Sabatier, . . 20,000 00
15. Do. Mr. A. Fournier, . . 20,000 00
16. Do. Mr. E. Rivolet, . . . 20,000 00
17. Do. Mr. E. Mazureau, . . 20,000 00
18. Do. Mr. C. Gurlie, . . . 20,000 00

$710,000 00

"I certify that the eighteen due bills, above mentioned, are, and constitute, my sole and last will.

"New Orleans, the 23d of December, 1837.

(Signed,) N. GIROD."

The following is a specimen of one of these due bills :—

"Good for the sum of fifty thousand dollars, payable to Mr. A. Michoud, at the settlement of my estate.

"$50,000. No. 8. (Signed,) N. GIROD."

All these legatees were made defendants to the bill.

In the course of the suit an injunction was issued against Antoine Michoud, the executor of Nicolas Girod, to prevent him from making any payment or distribution of the funds received or to be received.

The defendants all answered; the principal answer being that of the legatees. They denied that Claude François Girod enumerated in his will and codicil all the debts due by him, but averred that he owed other and much larger debts; insisted that the authorization granted to the executors by the

will, for the sale of the property, was legal; that no law of Louisiana, then existing, contained a provision by which a judge *ex officio* auctioneer was rendered incompetent, any more than any other auctioneer in the state, to sell any property whatsoever, situated within or without the limits of his juris-
*530] diction; averred that, as no complaint was *made of the price of the property so sold by the judge, the circumstance that a portion of the property was beyond his jurisdiction was of no consequence, and the price thereof must be regarded as fair, and the sale as having been duly made; admitted the sales of property to St. Felix and Laignel, but denied that any retrocession of the property to the executors ever took place, inasmuch as no retrocession could take place between the parties, unless the executors had been previously the sole and exclusive owners of the property; denied that any fraud or breach of trust was committed by the executors.

The respondents, in their answer, also admitted that the executors had placed themselves as creditors, in their account of the succession, but averred that they had a right lawfully and justly to do so; that Nicolas Girod was creditor by virtue of a final judgment of a competent tribunal, namely, the Parish Court of the parish and city of New Orleans, rendered on the 6th of May, 1816; they further aver, that this judgment has, for upwards of twenty-six years past, acquired the force of *res adjudicata*, and cannot be disturbed; that the account presented by the executors was duly homologated by the Court of Probates, and that judgment of homologation has also acquired the force of *res adjudicata*. The respondents also deny that the executors, in placing themselves as creditors of the succession in their account, and in ratifying that account under the power of attorney intrusted to them by their co-heirs, abused the trust and betrayed the interest confided to them for their own advantage, and to the wrong and injury of their constituents.

The respondents further denied, that Nicolas Girod, by means of false and fraudulent representations, or concealment, had induced the complainants to sign acquittances; averred that they were signed freely, after being well informed of all the circumstances; that Hyppolite Pargoud, the son of Madame Pargoud, had been in New Orleans, &c., &c.

The respondents inserted in their answer a number of family letters, from which they inferred that Nicolas Girod was a charitable man, and had constantly been the supporter of his distant relations, and concluded by pleading prescription.

To these answers there was a general replication.

In the progress of the suit the following admissions were filed by the respective parties:—

Admissions of Plaintiffs.

"PARGOUD *v.* MICHOUD.

"1. Jean François Girod, senior, died, leaving a will in favor of Jean François Girod, junior, of Paris, and the share of the complainants, M'mes Pargoud and Adam, in the estate of Claude François Girod remained as it previously was, to wit, one eighth.

*"2. The complainants will contest no portions of the account rendered by the testamentary executors of C. F. Girod to the Court of Probates in 1817, except the individual claims of the said two executors, and the judgments obtained on them. [*531

"3. The heirs of Claude François Girod, with the exception of Nicolas Girod and Jean François Girod, junior, resided in Europe.

"4. All the legatees of Claude François Girod resided in Europe, except the Parish Church of Assumption, Françoise Wiltz, Françoise, the daughter of Rosette Celan, the wife of Mellion, and Pauline and Dominick, who resided in Louisiana.

"5. The lots of which Nicolas Girod has made a donation to the Poydras Asylum were worth, at the time of said donation, $35,000, or thereabouts.

"6. Nicolas Girod always resided in Louisiana, and never went to Europe after his settlement in this city under the Spanish government.

"7. All the letters mentioned in the printed answer, from pp. 27 to 38 inclusive, are admitted to be genuine, and the translations of parts thereof, in said answer, are admitted to be correct; but the complainants will require complete translations of them to be prepared, and they reserve the right of objecting to their admissibility on other grounds, if any they have.

"8. Hyppolite Pargoud was brought to Louisiana by his uncle, Jean François Girod, junior, and has resided with him in Ouachita up to the year 1821, when said uncle went to Paris.

"9. The residence of M'me Adam, of M'me Quetand, and of Jacqueline Poidebard, the wife of Joseph Rivolet, was at Thônes, in Savoy.

"10. The age of Jean François Girod, junior, now residing at Paris, is seventy-two. He is unmarried. Has no other heirs at law except the complainants, and some relatives of the same degree, or their legal representatives. He is on good

terms with the complainants, and he and Hyppolite Pargoud, the attorney in fact of the complainants, are intimate friends, and Antoine Michoud is his attorney in fact.

"11. The two acquittances of M'mes Pargoud and Adam, mentioned in the answer, and since deposited in court, are admitted to be genuine, and the said complainants were, in executing them, authorized and assisted by their husbands.

"12. Hyppolite Pargoud is a man of good business habits, attentive and intelligent. He visited his family in 1827 and 1835, but at each visit stayed but a very short time with them. In 1837, he obtained a power of attorney from his mother, authorizing him to claim and recover her share in the estate of Claude François Girod. It was shown to Antoine Michoud, to be by him attested or legalized, as Sardinian consul, but it was not made use of. Hyppolite Pargoud demanded and obtained another, which was executed
*532] before *a notary public on the 18th of May, 1840. From the time he received the first power, he made no secret of his intention of bringing a suit against his uncle Nicolas, and after receiving the second power, when making the inventory at Lafourche, where he was present, he said, that if there had been a will or testament made by his said uncle, he would have sued his succession in the name of his mother.

"13. The letters which have been heretofore deposited by the defendants in the hands of the clerk of the court are genuine, and all signed by the parties in whose names they are written. But the complainants reserve all other objections to their admissibility, and if they are admitted in evidence, they must be translated.

"14. The will of Nicolas Girod was not known when the said inventory was made at Lafourche; it was discovered to exist some time thereafter.

"15. By the laws of the Duchy of Savoy, Hyppolite Pargoud is a forced heir of his mother, Peronne Bernardine Pargoud, one of the complainants.

"16. Nicolas Girod was the eldest of the family. He was years old when he died.

"17. In November, 1833, Nicolas Girod made a present to Philippine Poidebard, his neice (widow Nicoud), of the sum of 3,240 francs, equal to $648; and in March, 1834, he made her another present of 22,000 francs, equal to $4,400, both which presents she received.

(Signed,) J. P. Benjamin, *for complainants.*"

And on the 29th of April, 1844, the following admissions of defendants were filed.

Admissions of Defendants.

"PARGOUD *v.* MICHOUD.

"1. Denise Philippine Poidebard, the widow of Pierre Nicoud, died in August, 1841, leaving three legitimate children, viz., Benoite Colline Nicoud, Maurice Emilie Nicoud, and Jeannie Benoite Nicoud, the last of whom is a minor; Jean Berger is her tutor. All these parties, as well as Louis Joseph Poidebard, never were in the United States.

"2. The allegations in the answer of Jean Firman Pepin, as syndic of Jean François Girod, jr., concerning the transmission of the latter's interest in the subject-matter of this suit, are correct, viz.: that Pierre Nicolas Girod died at New Orleans, on the 1st of September, 1841, leaving a testament, by act, before Joseph Cuvillier, notary public, of the 6th of February, 1841, by which he bequeathed all his property to the said Jean François Girod, jr., his brother; the said Jean François Girod, jr., made a cession of property in the District Court of the First Judicial District, on the 25th of January, 1842; that thereby the interest of both Pierre *Nicolas and Jean François Girod, jr., is vested in the [*533
creditors of the said Jean François Girod, jr., and that said Jean Firman Pepin is the syndic of the said creditors.

"3. All the property described in the inventory of the estate of Nicolas Girod, as being situated in the second municipality, is derived from the estate of Claude François Girod. Nicolas Girod never improved this property, but leased it to John F. Miller, by two acts passed before L. T. Caire, notary public, on the 9th of May, 1829, and the 30th of April, 1831; each of these leases is for the space of twenty years, and for an annual rent of $3,000.

"4. The age of Jean Baptiste Dejan, ainé, is sixty-seven years, and that of Claude Gurlie, seventy-two years. The former is a native of New Orleans, the latter has resided in New Orleans forty-eight years, and was intimate with Nicolas Girod as early as 1814.

"5. Nicolas Girod never cultivated or occupied any of the lands mentioned in the bill as situated on Bayou Lafourche, except the plantation, but made levees on those lands.

"6. The Bouvard family resided, in 1813, and has ever since been residing, at or near Bordeaux, in France.

"7. The age of Etienne Rivolet, one of the legatees of N. Girod, is forty years. He is not related to the Girod family, except by his brother, who married Jaqueline Poidebard, one of the nieces of Claude François Girod, the testator, and who is therefore his sister-in-law.

(Signed,) MAZUREAU, *for defendants.*"

And on the 29th of April, the following was offered in evidence and filed.

"UNITED STATES CIRCUIT COURT.

"WIDOW PARGOUD AND OTHERS
v.
ANTOINE MICHOUD AND OTHERS. } In Chancery.

"*Admissions and Agreements between the Parties.*

"1. Admitted that one Joseph Gaubuan, and one Corrino, witnesses on the part of the defendants, would, on being examined upon their oaths, declare, that it was to the perfect previous knowledge, and with the consent and authorization of Jean François Girod, jr., one of the testamentary executors of Claude François Girod, that Simon Laignel did bid and become the purchaser, at the public sale made by the register of wills, in the city of New Orleans, of the faubourg and city property belonging to said Claude Françoise Girod, after his death; and further, that it was also to the perfect knowledge, and with the consent and authorization, of said Jean François Girod, that afterwards the said Simon Laignel sold the same property to Nicolas Girod, the co-testamentary executor of said Jean François.

*534] "2. All objections are waived, which might have been made in consequence of the answers of the defendants, to whom interrogatories have been administered and propounded, being sworn to before Justice Jackson; and it is agreed that the said answers, so sworn to, shall have the same force and effect as if they had been sworn to before the proper officer.

(Signed,) L. JANIN.

"*New Orleans, 29th April*, 1844."

On the 29th of July, 1844, the court made a decree, of which the following is a copy.

"This cause came on to be heard this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows:—That the plaintiffs are the residuary legatees of Claude François Girod, deceased, in the following proportion, viz.: Peronne Bernardine Girod, the widow of Jean Pierre Hector Pargoud, for one eighth; Rosalie Girod, the widow of Louis Adam, for one eighth; Françoise Peronne Quitand, the wife of J. A. Allard, for one forty-eighth; Marie Philippine Rose Quitand, for one forty-eighth; Marie Bernard Quitand, for one forty-eighth; Louis Joseph Poidebard, for one forty-eighth; Benoite Col-

line Nicoud, for two two-hundred-and-eighty-eighths; Maurice Emile Nicoud, and Jenny Benoite Nicoud, represented by Jean Berger, their tutor, each for two two-hundred-and-eighty-eighths; Jean François Girod, the nephew, in his own right, and as testamentary heir of Pierre Nicolas Girod, his brother, and represented by Jean Firman Pepin, the syndic of his creditors, for one twentieth; and Françoise Clementine Girod, wife of Pierre François Pernond, for one fortieth.

"That the adjudication of landed property, with the slaves thereto attached, situated on Bayou Lafourche, made on the 18th of February, 1814, to Charles St. Felix; the retrocession of said property by said Charles St. Felix to Nicolas and Jean François Girod, on the 23d of February, 1814; the adjudication of the property situated in the parish of Orleans, made to Simon Laignel on the 9th of April, 1814, and the notarial seal made to the same on the 26th of April, 1814, in pursuance of said adjudication; and the conveyance of said property to Nicolas Girod, of the 28th of April, 1814, be set aside and annulled, saving, however, the just rights of third persons, to whom two tracts of land on Bayou Lafourche, two slaves, and a piece of ground in the city of New Orleans were conveyed by the said Nicolas Girod in his lifetime, as appears from the admissions in the pleadings.

"That the dative testamentary executors of the late Nicolas Girod do execute to the plaintiffs, or to their legal representatives, good and valid notarial conveyances and assignments of such undivided portions of the aforesaid property as correspond to the proportions *in which they are [*535 residuary legatees of the late Claude François Girod, as herein before declared; which conveyances and assignments are to be settled by Duncan N. Hennen, as master in chancery of this court, in the event of a difference between the parties in relation thereto.

"And for greater certainty, it is hereby declared, that the property, of which undivided portions are to be conveyed and assigned to the plaintiffs as aforesaid, is all the property and slaves which were inventoried in the parishes of Ascension, Assumption, and Lafourche Interior, after the death of said Nicolas Girod, as belonging to his estate; and all the property which was inventoried, after the death of said Nicolas Girod, as situated in the Municipality No. 2 of the city of New Orleans, including the property which is an alluvion, and accessory to the property derived from the estates of Claude François Girod, was abandoned to Nicolas Girod by the heirs of Bertrand Gravier, by an act of compromise executed on the 29th day of March, 1823, and also the house and

lot situated at the corner of St. Louis and Chartres Streets, in Municipality No. 1 of the city of New Orleans.

"That the account filed by Nicolas Girod and Jean François Girod, in the Court of Probates of the Parish of Orleans, in May, 1817, be opened and set aside; that the sum of $40,418.09, claimed by Nicolas Girod in said account, and the sum of $8,253.20, claimed by Jean François Girod for himself in said account, be disallowed and rejected; that the two judgments which were obtained in the Parish Court of the Parish of Orleans, in the year 1815, for the aforesaid two sums of $40,418.09, and $8,253.20, be declared satisfied, and that no allowance be made to the defendants on account of said judgments.

"That the two acquittances and releases given, in 1817, by the plaintiffs, Madame Adam and Madame Pargoud, to Jean François Girod, be set aside, and be allowed no other force or effect than as acknowledgments of the receipt by Madame Pargoud for 5,242.75 francs, and by Madame Adam for the sum of 10,242 francs 75c., making respectively the sum of $975.15 and $1.905.15 in the currency of the United States, as stated in said receipt.

"And it is ordered, that a reference be made to the said master in chancery, to take an account of what is due from the estate of Nicolas Girod to the plaintiffs on account of the property belonging to the estate of Claude François Girod and alienated by said Nicolas Girod, for rents and profits, and for interest; and of what may be due by the complainants to the estate of Nicolas Girod, for payments made by the said Nicolas on account of the debts of the said Claude François Girod, and of the legacies made by him, and of permanent improvements; and in taking said account, said master shall *536] charge the said estate with the value of the crop *alleged to have been on hand when the property in Lafourche was adjudicated to Charles St. Felix, with interest thereon; with the amounts which by the aforesaid account of 1817, the said executors acknowledged to have received, or for which they consented to become responsible, from the time the same were received; with the price at which the two tracts of land on Bayou Lafourche and the two slaves were sold, and which are mentioned in the pleadings as having heretofore been sold, with interest thereon, from the time when, according to the bill of sale, said price was payable; with the sum of thirty-five thousand dollars, this being the admitted value of the price of the ground donated by Nicolas Girod to the Female Orphan Asylum, with interest thereon from the time said donation was made; with the rents and

profits of the plantation and slaves, the house at the corner of Chartres and St. Louis Streets, and the property in Faubourg St. Mary, now called the Second Municipality, from the adjudication of 1814, and at the rate which might reasonably, and with a proper administration, have been obtained for the same, it being understood that from the years 1829 and 1830, when the property in Faubourg St. Mary, or Second Municipality, still undisposed of, was leased to John F. Miller, the rents and profits thereon are to be charged at the rate at which the rent was stipulated in the lease to said Miller.

"And the said master shall credit the estate of Nicolas Girod in said account with the amount with which said executors credited themselves in their account of 1817, with interest thereon, except their aforesaid two personal claims of $40,418.09, and $8,253.20; with any payments that have been made on account of legacies left by the said Claude François Girod, with interest thereon; and also with one half of the rents and profits of the plantation and slaves of Bayou Lafourche, up to the time when Jean François Girod sold his interest in the same to Nicolas Girod, the plaintiffs having in their bill consented to abandon the half of these rents and profits supposed to have been received by the said Jean François Girod; and also with the actual cost in money to Nicolas Girod, but without interest, of the permanent improvements made by said Nicolas Girod, and still in existence, on the lot at the corner of St. Louis and Chartres Streets, and on the lands on Bayou Lafourche, deducting therefrom the value of the labor of the slaves of the said plantation, and of the materials procured from the same, and making, also, proper deductions for the diminution in value of said improvements by wear and tear; and all the interest to be charged in said account shall be so charged at the rate of five per cent.

"And the said master shall compute what amount of the balance so to be found against the estate of Nicolas Girod shall be paid to each of the plaintiffs, according to their declared proportionate interest in the estate of Claude François Girod, and said balance shall be paid to them, with interest, from the date up to which the *master's report may present a calculation of interest, unless, on application of the parties, the court shall otherwise direct; and said payment shall be made by the dative testamentary executors of Nicolas Girod, out of the funds of said estate, in preference to any legacies. And for the better discovery of matters aforesaid, the parties are to produce before the said master, upon oath, all books, papers, and writings, in their custody or power, relating thereto, as the said master shall [*537

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direct. And the said master shall, when necessary, examine said parties upon written interrogatories.

"And it is further ordered, that the said dative testamentary executors pay out of the funds of said estate the costs of this suit which have hitherto accrued. And it is further ordered, that either party, if so advised, be at liberty to apply to the court for a partition in kind, or by sale of the above-mentioned real estate of Nicolas Girod. And all further directions are reserved until the master shall bring in his report.

"Decree signed, July 30th, 1844.

(Signed,) THEO. H. McCALEB, [SEAL.]
United States Judge."

From this decree, the defendants appealed to this court.[1]

The cause was argued by *Mr. Eustis*, for the appellants, and *Mr. Janin*, for the appellees.

The following is a synopsis of the argument of *Mr. Eustis*, for the appellants:

The facts necessary to an understanding of this case are few and not complicated; most of them are admitted in the answer, and others are established by documentary evidence.

The action is founded on an alleged purchase of the effects of the succession of Claude Girod by his executors.

Claude Girod died in 1813, leaving a will made in 1812.

The sales complained of took place in 1814.

The commencement of the adverse possession, and the uninterrupted, exclusive, and notorious enjoyment of the revenues of the estates being fixed by the complainants' own bill, we proceed at once to the matters of defence which those facts present, and which are set forth formally in the answer.

1. The first ground of defence is the entire want of equity in the complainants' case, arising from the silence, acquiescence, and laches of the complainants since 1814.

The principles on which courts of equity refuse their assistance to parties under circumstances like the present are familiar to the court. The most recent cases are the following:—*McKnight* v. *Taylor*, 1 How., 168; *Bowman* v. *Walthen*, 1 Id., 193; *Smith* v. *Clay*, 3 Bro. Ch., 640, n.; *Stearns* v. *Paige*, 1 Story, 215; *Giles* v. *Baremore*, 5 Johns. (N. Y.), Ch., 550; **Piatt* v. *Vattier*, 9 Pet., 417; Story

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[1] Whether the decree is a final one from which an appeal will lie, see *Forgay* v. *Conrad*, 6 How., 204; *Patterson* v. *Gaines*, Id., 585; *West* v. *Smith*, 8 Id., 413; *Craighead* v. *Wilson*, 18 Id., 201; *Beebe* v. *Russell*, 19 Id., 287; *Thomson* v. *Dean*, 7 Wall., 346.

Eq., §§ 1519, 1520, *et seq.*; Fonblanque's Equity (last edition), notes to Book 1, c. 4, § 27.

2. The allegations and evidence adduced by the complainants are not reasonably definite as to the time, occasion, and circumstances of the alleged concealment, misrepresentation, and frauds; nor is any account given of the time of the discovery. Of the fact of the adverse possession, it is not even alleged in terms that the plaintiffs were ignorant; the allegation of ignorance of the real situation, &c., is not sufficient for a court of equity to base its action upon. *Stearns* v. *Paige*, 1 Story, 215.

The allegations of ignorance, concealment, &c., are expressly denied and put at issue by defendants.

By the testimony of J. F. Girod, J. M. Girod, Michoud, and Rivolet, receipts, &c., the fact of knowledge is put beyond a reasonable doubt.

3. The allegations of the complainants in their amended bill afford strong evidence that the relief sought by them will not be a matter of equity, but a speculation upon events.

The will of the testator, Nicolas Girod, and the large amount of legacies, was the cause of the suit, not the injustice and wrongs of 1814.

The release of the co-executor, J. F. Girod, and their conduct towards him, point to the same conclusion. He is rich and alive. The chances of inheritance offer a greater benefit than the result of litigation. They acquiesce, discharge him, and await his bounty. N. Girod is dead, and all their vials of wrath are opened upon his grave.

4. The defendants rely upon prescription as a defence.

There is a marked difference between prescriptions and statutes of limitation. The former create rights; the latter merely reach remedies, and in a very qualified and artificial manner.

Prescription is a manner of acquiring property and of discharging debts by the effect of time. It is a title as much so as that of inheritance or sale is. All are on the same footing, and a court can no more interfere with rights under the one than under the others. La. Code, 3421; Code of 1809, p. 482, art. 32.

By the civil law, prescription is a mode of extinguishing obligations, and is classed with payment, novation, &c. The obligation itself is extinguished *in foro conscientiæ*, as well as *in foro legis*. Louisiana Code, art. 2126; Code of 1809, p. 286, art. 134; Troplong on Prescription, c. 1, §§ 2, 31; Code Napoleon, 1234, 2219; Institutes of the Civil Law of Spain, p. 103, lib. 2, tit. 2, p. 108.

Under the civil law, from motives of public policy, great weight in matters of property is given to possession. The oldest legal maxims of which we have record establish the
*539] principles, which modern nations, so far from deviating from, have rather restricted. *The policy has stood the test of experience and of time. Possession is at once the object, the attribute, and the proof of property; hence it forms the basis of a title, that of prescription.

Nicolas Girod purchased and possessed the estates mentioned in the bill since 1814.

He acquired to them a complete title, by prescription, under the laws of Louisiana. His acts of conveyance were public and authentic, and duly recorded in the proper offices. There are several articles of the Code providing prescriptions, which cover this case. Article 2218, and 204, p. 302, of the Code of 1809, provide, that in all cases in which the action of nullity or of rescission of an agreement is not limited to a shorter period by a particular law, that action may be brought within ten years. In cases of error or deception, the time of the prescription dates from the day on which either was discovered. In this case, there was no secrecy or concealment, and there could be no discovery, in relation to the fact of the sales to N. Girod. The property was not kept concealed under the name of a third person, but in his own, and placed on the public records as belonging to him. The adverse possession alone was full notice to the complainants. It was sufficient to put them on the inquiry, and they had all the means of information to lead them to a knowledge of the facts, and in law are deemed consonant of them. Sugd. Vend., 542; 1 Atk., 489; 1 Johns. (N. Y.), 267; 2 Binn. (Pa.), 466; 15 Johns. (N. Y.), 555; *Willison* v. *Watkins*, 3 Pet., 52; 10 Id., 222, 223; 1 How., 196; see also the opinion of Pothier on prescription, as affecting absentees, Treatise on Obligations, No. 649; Institutes of the Civil Law of Spain, lib. 2, tit. 2, p. 108.

The only fraud in relation to the sales which can be pretended is, that the executors purchased at the public sales. This fact, if it was so, is as apparent when the titles were put in their names as it is now.

But, if the only fraud in the sales arises from the incapacity of the party to purchase, the prescription of the article 3507 applies with great force. That provides that the action of nullity, or rescission of contracts, testaments, or other acts for the rescissions of partitions, &c., is prescribed by five years against persons living in the State, and ten years against absentees.

Is not the agreement between J. F. Girod and Me. Pargoud, of November 10, 1817, a contract,—an act? Is it not, under the decisions of our courts, a partition? It is stated in the instrument, that it is for her share in the succession reduced into movable effects, *mobilise*, turned into money. "Whatever may be the form of the act, it is well settled that every first settlement between heirs or partners, by which a state of indivision is terminated, is in substance a partition," say the Supreme Court. And an action to set aside, on the ground of lesion and fraud, an agreement by which *six [*540 slaves were given in consideration of a relinquishment on the part of an heir of all her right and interest in the succession of her mother, in favor of her father-in-law, was held to be barred by the prescription of five years under this article 3507. See 3 Rob. (La.), 317; 14 La., 22; 15 Id., 517; 16 Id., 252; *Tippet and husband* v. *Jett.* Here the court hold that even fraud is prescribed against under this article, without any reference as to the time of the discovery of it.

The prescription of actions for lesion, in contracts generally, is only four years. Code, 1870. There is another prescription which protects the defendants,—that of twenty years under a just title; that is, a title by which property can be transferred. La. Code, 3442; Code of 1809, p. 488, arts. 60–72.

After the 10th of November, 1817, the date of the receipt of the funds of the succession, in which it is stated that the property is *mobilise*,—converted into money,—there was nothing to impugn the justice of the title to the property sold, which could not be affected by any misappropriation of the purchase money. This would constitute a claim, and give rise to a personal action, which would not affect the title to the property, which must rest on the state of things in 1814. The heirs in Europe must be considered as being satisfied with the price the property sold for, and constituted themselves creditors for their respective shares. The complaint that they have been wronged out of the proceeds pre-supposes that the sales were made; and though it may or not be true that they have been hardly dealt with, as the complainants allege, it by no means follows that the property was, in 1814, sold or purchased in bad faith. In matters of prescription by possession, good faith is presumed; bad faith, in a possession, must be proved. Art. 3447. On the form of the title, see Toullier, 8 vol., No. 508, 509, art. 3453, *et seq.;* Merlin, Questions de Droit, verbo *Mineur.*

There is a statute on this subject which clearly points out the policy of the law, which is decidedly against stale claims,

and reduces the prescription in previous sales to administrators, executors, &c. to two years from its passage, and recognizes their right to purchase in all cases in which they have an interest in the property sold, as heirs, legatees, or partners. This law is very important in the consideration of this case. Laws of Louisiana of 1840, p. 123, No. 112, passed on the 28th of March, 1840.

5. The answer contains an argument on the facts. The letters offered by defendants are found at pp. 200–215; the answers under oath from pp. 91–101. The most important deposition, that of the co-executor, J. F. Girod, taken in Paris, at p. 139. It was offered in evidence by the complainants.

The complainants call upon the defendants to explain all the affairs of this succession, which was opened in 1813. The defendants *are all strangers to them. They are the dative executors, appointed by the Court of Probates, and not by the will of the testator and legatees. *Vide* the will.

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Why did they not call upon him who alone could give them information,—upon N. Girod, in his lifetime?

But they called upon J. F. Girod, the co-executor of Claude Girod, and the alleged confederate in these marvellous frauds. Let his deposition speak. Does he say the sales were fraudulent, or that his co-heirs were wronged? It is decisive of the case. One sentence alone closes it:—

"Then (1817) it was that N. Girod, who had settled the estate, handed me a copy of the account rendered to the Court of Probates, and a copy of C. F. Girod's testament, and it was on the faith of these documents, presented to the heirs in Europe, that I paid to each of them and to the legatees what accrued to them."

J. F. Girod was sent to Europe by his brother to pay the heirs who resided in Savoy. The act in the bill of complaint, signed by Me. Pargoud, was made at Annecy, in Savoy. He met his brother, the priest, in Paris. He refused to examine the accounts in Paris. *Vide* his letter. The account on which the heirs were paid by J. F. Girod is found at length at pp. 125–128; the will of Claude Girod, pp. 163, 164. In the account are stated the amounts due N. Girod and J. F. Girod, namely, of $40,413.09, and of $8,253.20. These items are charged as paid, and the succession is credited with the proceeds of the property sold. The account is a settlement of the affairs of the succession, on which the payment was made in Savoy, in 1817.

A strict examination of the evidence must result in the

conviction of an entire want of evidence to establish any thing like fraud on the part of N. Girod.

There are some matters of law which it may be well to consider under this head.

a. By the will the executors were empowered to sell, without the intervention of justice, as to them should seem best for the interest of the absent.

b. The executors were bound to cause the property to be sold. Code of 1809, p. 246, arts. 173, 174; p. 174, art. 128.

c. The heirs present had a right to insist on a sale for cash. Id., p. 174, art. 129.

d. The law requires the estate to be settled within the year, where it can be done. The possession of the executor does not continue after a year and a day. Id., p. 244, arts. 166, 169, 173, *et al.*; 4 Mart. (La.), 340, 609; Norwood's case, 10 Id., 723.

e. After a considerable lapse of time, the presumption *omnia rite acta esse* applies; besides, by the law of 1834 (p. 123 of pamphlet acts), all informalities growing out [*542 of a public sale by a *parish judge, or other public officer, are prescribed by the lapse of five years. 2 Rob. (La.), 377; 16 Id., 554.

f. But the executors did not sell; the judge sold at public auction, and in the most public, fair, and formal manner.

Code of 1809, pp. 174, 127–129. The judge sells, not the executor or curator. The sale was complete without any act of the executors. 3 Mart. (La.), 592.

g. No decree of the court was necessary to authorize the sale. If there was, one must be presumed after this lapse of time; for the judge himself sold. But none was necessary. Commentary of Gregorio Lopez on Law, 62, tit. 18, part 3, which treats of sales made by executors, and only requires them to be made at auction.

6. The decisions of the Supreme Court went far beyond the law in establishing incapacities to purchase at judicial sales under the old laws; the legislative interpretation of 1840, before cited, puts this fact beyond question. In interpreting the Spanish laws, the decisions of the Supreme Court of Louisiana are very unsafe guides, as every one knows who has scrutinized them.

It is a great mistake to suppose that purchases made by an executor, at a public sale made by a judge of the property of a succession, are absolutely null and void. The inhibition is, at best, a matter of precaution, to prevent abuse, and is established in the interest of the heirs, and for their benefit exclusively. The authorities cited by the complainants prove this

beyond question. 13 La., 396. This they may renounce or enforce, after a reasonable time, according to their own peculiar views. Louisiana Code, art. 11; 7 Toullier, 562, *et seq.*, 665, *et seq.;* Sugd. Vend. (ed. of 1834), 436. In all cases where a purchase is made by a trustee, it is optional with the *cestui que trust* to set it aside. Story's Equity, §§ 322, 308. The *cestui que trust* has a right to set aside the purchase, and have the estate resold, if he choose, within any reasonable time, to dissent from the purchase. 5 Ves., 678; 13 Ves., 600.

The purchase by a curator or trustee is *malum prohibitum*, and not *malum in se*. 8 Toullier, § 517, p. 713; 2 Sugd. Vend. (ed. of 1836), 143; notes to page 125, No. 329. In *Randall* v. *Ermington* (10 Ves., 428), the fact of the purchase was not clear, the possession of Ermington was equivocal; but, in all cases where there is a continued public adverse possession, the party dissenting must apply within a reasonable time for relief; he must not lie by and speculate on events. 5 Ves., 678 and 680. Newland on Contracts.

The court cannot permit the parties in this case to speculate on the chances of war. The appraisement, the basis of the mortuary proceedings, is not impugned, nor is the ade-
*543] quacy of the price. The complainants were satisfied with it, even in 1817. They have *waited until the growth of the country has given an increased value to real property, and now ask the court, not to do justice, but to accomplish for them a speculation. Had Louisiana been reduced to colonial vassalage, and enjoyed the advantages of negrophilism, or had the father of the floods, instead of adding to the extent of the suburban estates, reduced, by its frequent abrasions, their extent and value, and burdened it with riparian works and charges, we should have been held accountable for the price,—at their option the thing or the price, as it is most advantageous to the claimants. What is this but a speculation on events, which law and good faith repudiate?

7. There has been a ratification of the sales by receiving the price, or part of it. This is what is called the voluntary execution of the contract of sales. The article 2252 of our Code, and 238 of the Code of 1809, p. 310, say it is sufficient that the obligation be voluntarily executed, to throw the proof of ignorance of the party ratifying on him who alleged it. Where there is an execution of the contract by receiving the price, the party executing it is presumed to know any defects or grounds on which it could be annulled, and ignorance of them must be proved, which can be very easily done where

there has been any misrepresentation or deceit. And if part of the price be received, the remedy of the party is by a personal action against the executor or trustee for any abuse of his functions.

8 Toullier, 508–510, 513, cit. Merlin, Questions de Droit, verbo *Mineur*.

The case of *Rivas*, relied on by complainants, contains no new doctrine. The question there was, whether the party had received part of the price of the plantation in dispute knowingly, that is, knowing that the money he received came from the sale. The court, not being satisfied of the fact, of course held that there was no ratification, but asserted the principle maintained in 8 Toullier, 519, art. 2252 of the Louisiana Code.

The law never permits a person to mislead another by his silence, where, by the relations between them, he is bound to speak. This property had been sold, the executors were the agents of complainants, the accounts were before them, the price which the property brought was laid before them, and if they thought proper to receive their portions, they certainly ratified the sales. Their claim for a further portion of the price remains to be considered. Story on Agency, § 255, and cases cited.

The application of these principles to the payment and discharge in Europe, as explained in the testimony of J. F. Girod, requires no observation.

8. An examination of the articles of the Code of 1809 cited by complainants will satisfy the court that the parish judges of the place where the property was situated were competent to make the *inventories, appraisements, [*544
and sales. Page 246, art. 174; page 174, art. 127–129.

The French text of art. 127, cited, puts the matter beyond controversy,—*le juge de la paroisse ou des paroisses*, in which the deceased had property, shall make the inventory; and art. 128 provides, that the judge making the inventory shall make the sales. The art. 137, p. 178, refers to curators appointed by a judge. The executor is appointed by the will, and not by the judge.

It is not alleged in the bill or supplementary bills, that the parish judges who made the inventories and sales acted without authority, except as to the sale of the land in the parish of Lafourche Interior by the judge of Assumption. Nor is it alleged that the Court of Probates of New Orleans was without jurisdiction as to the settlement of the executor's accounts and liquidation of the succession.

The only allegation as to the defect of jurisdiction of any of the courts is found in the amended bill, p. 102, in which it

is charged that the Parish Court of New Orleans, which rendered the two judgments alleged to be fraudulent, is incompetent. How incompetent? By reason of what? Query, for want of jurisdiction, or for want of proper parties?

Questions of jurisdiction, under the old judicial system of Louisiana, particularly of the courts of probates, have been difficult; and, after this lapse of time, every presumption must be in favor of what has been done in courts of justice. 2 Rob. (La.), 377; *Drenet's case*, 8 Mart. (La.), N. S., 705.

As to the undoubted jurisdiction of the court of the parish and city of New Orleans, which rendered the judgments attacked as fraudulent, vide *Tabor's case*, 3 Mart. (La.), N. S., 676; 6 Id., 676; 8 Id., 241 and 705; 7 Id., 378. The Code of Practice, enacted in 1825, vested the jurisdiction in the courts of probate exclusively of all claims for money against successions.

The jurisdiction of the Court of Probates of New Orleans, which homologated the executor's account, not having been questioned in the bill, this court will not disturb its decrees. The jurisdiction existed *ratione materiæ*, the creditors assented thereto; the succession was solvent and the vesting of the jurisdiction in any other court by the articles quoted is merely a matter of implication, and by no means exclusive. See *Tabor's case*, cit. 3 Mart. (La.), N. S., 680.

9. Respecting the effect given to judgments homologating proceedings, tableaus, accounts, &c., *vid.* 6 Mart. (La.), N. S., 133, 654; 11 La., 571; 7 Mart. (La.), N. S., 183, 433; 4 La., 174. The settlement established by the judge in a judgment against a curator or executor. Code of 1809, p. 180, art. 145.

As to the appointment of a defensor to represent absent heirs in suits and vacant successions, *vide* 4 Mart. (La.), 666; 10 Id., *17; 4 La., 259; 6 Mart. (La.), N. S., 17; *Seymour's case*, 9 La., 79.

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10. Homologations, like other judgments, must be annulled by a judgment of the court which rendered them. 12 La., 406.

Every judgment in Louisiana is subject to an action of nullity, but it must be brought before the court by which the judgment was rendered. 1 La., 21. Code of Practice, article 608, and notes.

If the court would not give the party relief, then, and only then, can relief be sought before the courts of the United States. The doctrine established by this court in the *Gaines case*, concerning relief against the effect of a will, is similar in all respects to that which is here invoked.

11. It appears that in the account filed by the executors in the Court of Probates of New Orleans, and exhibited, with

the will, to the heirs in Europe by J. F. Girod, on which he made the payments to the heirs, were two sums with which the executors charged the succession of Claude Girod; one was for $40,413.09, as paid to Nicolas Girod; and the other was for $8,258.20, paid to J. F. Girod. The sums are stated to be by account annexed, approved by the judge. *Vide* Code of 1809, p. 180, article 145.

The complainants, acting uniformly on the principle of one course of conduct for the living and another for the dead, have discharged J. F. Girod, and seek to make N. Girod's succession responsible for both debts.

It appears that the judge of the Court of Probates did not approve these accounts against the succession of Claude Girod until they had been litigated on, and settled judicially, in a court of law. Judgments were rendered on each claim in the court of the parish and city of New Orleans; on that of N. Girod on the 5th December, 1814, and on that of J. F. Girod on the 6th May, 1815. On these judgments the vials of wrath are poured forth by the complainants. Rec. 163–182.

Recourse is had to conjecture, when nothing would have been easier than to prove any fact in relation to these judgments by J. F. Girod himself, who, so far from being interrogated concerning these debts, is provided with a complete and full discharge.

The consequences and effect of this discharge of the plaintiff in one of the suits, and the recipient of the money and the defendant in the other, will certainly have an important bearing on the equity of the complainants' case; and the absence of this proof, which is at hand, will show that they rely more on confusion and conjecture for success than on evidence.

The court of the parish and city of New Orleans had jurisdiction of the cases, as has been shown.

An objection has been made, that there were not proper parties. What prevented an executor, who had a disputed claim on a succession, *establishing in an ordinary [*546
tribunal, as the laws stood before the Code of Practice? The art. 137 (p. 248, Code of 1809) gives the power of one executor to represent the succession, where there are more than one executor who has accepted. Code, 1674; *vide* 3 Mart. (La.), 247. The appearance and answer of the defensor of absent heirs strengthens the validity and fairness of the proceedings.

The judgments, being valid in point of form, must stand until they are annulled and declared void by a proper tribunal. 7 Mart. (La.), N. S., 257; 11 Mart. (La.), 607; 5 Mart. (La.), N. S., 664.

These judgments are attacked as fraudulent. Unfortunately

for the complainants, there is no circumstance by them even conjectured which may not have been removed by evidence.

The testimony and evidence on which these judgments were rendered is not before us; but let us take up that in favor of N. Girod, which is the only one we have any interest in maintaining, since the release of J. F. Girod.

Claude Girod was a trader, and left at his death various accounts, books, papers, &c., which were inventoried at his death.

He had transactions with his elder brother Nicolas, who was a merchant in New Orleans. The witnesses examined by the arbitrators were Boussignes, Pacaud, Guillot, and J. F. Girod.

The arbitrators, as will be seen by the reasons appended to each item, founded their opinion on the testimony of witnesses, and the examination of books, documents, and vouchers.

It is complained that the case was referred to arbitrators;—was it not a case of old and complicated accounts? 7 Pet., 625; 1 Martin's Digest, verbo *Accounts*, 405.

Arbitrators, by our code, are to decide according to the strictness of the law. La. Code, 3077. Code of 1809, p. 442, art. 12; Law of 1805, verbo *Accounts;* 1 Mart. Dig., 405.

The interest may well have been due. Suppose that C. Girod, in his books, charged interest on his accounts with his brothers; was he not bound to allow it?

The prescription may have been proved to have been interrupted by acknowledgment and promises. The interruption is proved positively by the testimony of Guillot. It was only in the case of *Goddard* and *Urquhart*, in 1834, that the prescriptions under the Spanish law were established. In *Lobdell's case* (7 Mart. (La.), N. S., 109), the Supreme Court held, that the prescription of a promissory note, under the Spanish law, was thirty years. It is a mistake that Claude Girod says in his will that he leaves no debts but to the amount of $30,000. He says, I am indebted to divers persons by obligations, and little by accounts, in a sum of about $30,000. He may have meant to persons other than his
*547] brothers,—to persons out of his family. Debts, especially old ones, between brothers, *are lightly thought of by debtors; but creditors have better memories.

The declarations, indefinite as these, in a man's will, are bad arguments against the existence of a debt, and no proof at all.

Nor did N. Girod, in his petition for the sale of the property of Claude Girod's succession in New Orleans, limit the legacies and debts to $60,000. He says, the amount of lega-

cies and debts which it is necessary to pay without delay is that sum, or thereabouts.

Several of the persons who are parties to these suits are still living; the respectable counsel for the plaintiff is still at the bar, and the gentlemen appointed arbitrators were persons whose characters were of the highest consideration.

But this court will enter into no such inquiry in a matter in which the presumption is *omnia acta rite esse.*

Supposing there were no judgments, were not the amounts exhibited to complainants, when the payments were made to them, and the will, with its contents, shown to them, and does not the claim for these amounts resolve itself into a personal action to recover money unlawfully retained, as they allege? and is not an action of this kind prescribed by ten years, according to complainants' own showing? *Goddard's case*, 6 La., 660.

It is believed that the grounds of defence to this action are so obvious, as to require little else from the court than an examination and scrutiny of the facts. To aid in this examination, this summary has been prepared, and is respectfully submitted.

Assignment of Error.

The appellants assign for error in the decree rendered against them in the court below,—

1. That there is a total want of equity throughout the complainants' bill, and in the evidence adduced in support of it.

2. That, under the evidence and allegations of the bill, the complainants have no claim in a court of equity, by reason of their long silence, laches, and acquiescence in the acts complained of since 1814.

3. That the cause of action, as set forth by the complainants, is barred and prescribed by lapse of time under the laws of Louisiana.

4. That the disallowance of the sums of $40,418 and of $8,253, and the decree concerning the judgments for said amounts, is contradictory and in violation of law.

5. That the agreements made by two of the complainants with the defendant in 1817 are valid, obligatory, and conclusive upon the parties; that the declaration of the co-executor, J. F. Girod, has the same effect.

6. That the discharge of J. F. Girod, the co-executor, destroys all claim in equity against the defendants.

*Mr. *Janin*, for the appellees, relied upon the following points and authorities: [*548

1. Although the will authorized the executors "to sell the

property, or cause it to be sold, as to them would seem best for the heirs of the testator, without the intervention of justice," the Spanish law, then in force in Louisiana, yet required that the property should be sold at public sale, by order of court, and after thirty days advertisement. *Gayoso* v. *Garcia*, 1 Mart. (La.), N. S., 324.

2. A succession sale, made by the register of wills in the parish of Orleans (or by the parish judges in the country parishes, who there perform the functions of the register of wills, Code of 1808, p. 182, art. 153), is null and void, if not preceded by an order of the Court of Probates. *Elliott* v. *Labarre*, 2 La., 326.

3. Probate sales, sheriff's sales, or judicial sales of any kind, can be set aside by the parties in interest, and treated as nullities, if the formalities prescribed by law are not complied with. *Psyche* v. *Paradol*, 6 La., 366; *McDonough* v. *Gravier's Curator*, 9 Id., and cases there cited.

4. The act of the legislature of Louisiana, of March 10, 1834, by which certain irregularities in judicial sales are cured by the lapse of five years, applies only to irregularities in the advertisements. *Morton* v. *Reynolds*, 4 La., 28; *McCluskey* v. *Webb*, Id., 206. And even so far as the statute is applicable to the facts of this case, it cannot avail the defendants, because it was not pleaded.

5. By the civil law, as well as by the law of chancery, an executor cannot purchase the property of the estate which he administers. *Harrod* v. *Norris's Heirs*, 11 Mart. (La.), 298; *Longbottom's Ex'r* v. *Babcock et al.* 9 La., 48; *Scott's Ex'rs* v. *Gorton*, 14 Id., 114, 122; *McCluskey* v. *Webb*, 4 Rob. (La.), 201; 1 Story's Eq. Jurisp., 315; *Prevost* v. *Gratz*, 1 Pet., C. C., 368; *Wormley* v. *Wormley*, 8 Wheat., 421; *Case* v. *Abeel*, 1 Paige (N. Y.), 397; *Davoue* v. *Fanning*, 2 Johns. (N. Y.), Ch., 252; *Rogers* v. *Rogers*, 1 Hopk. (N. Y.), 525.

6. The judgments obtained by Nicolas Girod for $40,418.09, and by J. F. Girod for $8,253.20, were the result of the fraudulent contrivances disclosed by the evidence. It is well settled, that chancery will relieve collaterally against frauds in judgments. 1 Story's Eq. Jurisp., § 252; 2 Id., § 1252; 1 Madd. Ch. Pr., 300; Mitf.'s Eq. Pl., 266; *Brashear* v. *West*, 7 Pet., 616; *Pratt* v. *Notham*, 5 Mason, 103; *Garnett* v. *Mason*, 2 Brock., 213; *Marine Ins. Co.* v. *Hodgson*, 2 Cond. R., 526; *Bateman* v. *Willoe*, 1 Sch. & L., 205; *Winthrop et al.* v. *Lane*, 3 Des. (S. C.), 323; *Irby* v. *M'Crae*, 4 Id., 429; *Barnsly* v. *Powell*, 1 Ves. Sr., 289.

*549] 7. Even without fraud, these judgments could not be binding upon *the heirs, for they were not parties to

them, and the executors did not represent them or the estate in these proceedings. These were indeed judgments without parties. Co-executors are bound jointly and severally. Code of 1808, p. 248, art. 177; 2 Story's Eq. Jurisp., §§ 1280, 1281. One of them may act for all. (Same article of the Code of 1808). They are considered in law as one person. 2 Wms.'s E., 620. Hence, if one confess the action, judgment shall be given against them all. Id., 621. And they cannot sue one another, if they have accepted the trust. Id., 685, 818.

8. Though the attorney of the absent heirs was made a party to these suits, the judgments are not binding on the heirs. The duties of such an attorney are merely conservatory,—he never represents the estate. In cases of mere neglect, and free from fraud, judgments obtained contradictorily with the attorney of the absent heir have been treated as nullities. *Stein* v. *Bowman*, 9 La., 282; *Collins* v. *Pease's Heirs*, 17 Id., 117. As a general rule, the courts disregard entirely judgments opposed to parties who were not cited or not properly represented. *Psyche* v. *Paradol*, 6 La., 366; *Marchaud* v. *Gracie*, 2 Id., 148.

9. The homologation of the account of 1817 is not *res judicata*. It appears, from the petition of the executors, and from the order thereon, that the heirs were not at all represented in this proceeding; the executors themselves preferring to represent them. An attorney was indeed appointed to represent the three heirs of the Poidebard family, who had not sent their powers of attorney to the executors, and who were, together, entitled to one sixteenth of the estate. But they, also, will be relieved from the effects of the homologation on account of the fraud of the executors, and the neglect, if not worse, of the attorney of the absent heirs.

10. The proof of fairness, in dealings between trustee and *cestui que trust*, lies upon the former. 8 Cond. Ch. R., 495; 1 Story Eq. Jur., § 218.

11. By the civil law, a purchase, by an executor of the property, of the estate administered by himself is radically null, and cannot be cured by prescription. His possession as executor is called, in that system of jurisprudence, a "precarious" possession; by no act of his own can he alter its character; he cannot sell to himself; notwithstanding an attempted purchase, the law considers his possession as the precarious possession of an executor, and a precarious possession cannot prescribe by any lapse of time. *Macarty* v. *Bond's Administrator*, 9 La., 355; *McCluskey* v. *Webb*, 4 Rob. (La.), 201; *Montamat* v. *Debon*, 4 Mart. (La.), N. S., 152; Troplong on Prescription, Nos. 509, 517: 1 Vazeille on Pre-

scription, Nos. 148, 149; Pothier's Treatise on Possession, Nos. 64–66.

*550] *12. If any prescription was applicable to the purchases of the executors, it would be the prescription of thirty years, which protects purchasers in bad faith. Code of 1808, p. 486, art. 66; Code of 1825, art. 3438, 3465; *Francois* v. *Delaronde*, 8 Mart. (La.), 629; Troplong on Prescription, Nos. 905–907, 915, 918; 21 Duranton, Nos. 352–354.

13. The prescription of ten and twenty years relied on by the defendants, that is, of ten years between present, and of twenty years between absent persons, can be pleaded only by those whose possession was acquired,—first, honestly; second, by virtue of a just title; third, by a title not defective in form. Code of 1808, p. 486, art 67; *Devall* v. *Choppin*, 15 La., 566; Code of 1825, art. 3442, 3445, 3449–3454.

But this prescription was not pleaded by the defendants.

14. The only prescription which the defendants plead in their answer is the prescription of the action of nullity (p. 81 of the answer). This is a prescription of ten years, established by art. 204, p. 303, of the Code of 1808, which is literally the same as article 2218 of the Code of 1825, and article 1304 of the Napoleon Code.

The answer rests this prescription on the receipts given in 1817 by Mme. Pargoud and Mme. Adam, representing two of the five branches of heirs on whose behalf this suit has been brought.

The terms of the law show that this prescription applies only to actions of nullity or rescission to set aside an "agreement." This is not an action of nullity, but an action of revendication, or petitory action, which, as has been seen, is barred only as between absent persons by the prescription of twenty or of thirty years, according as the purchaser was in good or in bad faith.

The receipts were not "agreements," but an acknowledgment of the reception of a sum of money, which the executors represented as all that was coming to those two heirs from the succession.

Even if these receipts were "agreements," in the sense of the article, the right to set them aside would be barred only by the term of ten years "from the discovery of the fraud." The evidence shows that the complainants had not the slightest knowledge of the fraudulent acts now proved, before 1837.

15. The defendants also contend, that these two receipts imply a ratification of the acts of the executors. The definition and attributes of acts of confirmation and ratification are

given in article 238, p. 310 of the Code 1808, which is a literal copy of art. 1338 of the Napoleon Code, and which was retained in the Code of 1825 as article 2252.

But no ratification or confirmation exists in this case, because,—

1st. The original sales, being absolute nullities, are not susceptible *of ratification. If it was the intention [*551 of the injured party to sanction them, nothing less than a new sale would have been required to accomplish this object. Acts infected with a radical nullity cannot be ratified; they must be made anew. Solon, Théorie sur la Nullité, vol. 2, pp. 262, 292, 294, 296, 301, 321, 327, 328, 373 *et seq.*, 406 · Troplong on Prescription, n. 905–907.

2d. If considered as an express ratification of its fraudulent sales and judgments, the receipts are inoperative, for they do not contain, in the words of the law (Code of 1808, p. 310, art. 238), "the mention of the motive of the action of rescission, and the intention of supplying the defect on which that action is founded."

3d. If considered as a tacit ratification, all the authorities concur that all the facts and circumstances must be fully and completely known, and that the act relied on as a tacit ratification can be susceptible of no other interpretation. *Rivas's Heirs* v. *Bernard*, 13 La., 175, and authorities there cited; *Copeland* v. *Mickie*, 17 Id., 293; 2 Solon, p. 370; Perrin, Traité des Nullités, p. 350.

16. The defendants also rely, in their printed argument, on the prescription of five years, established by art. 3507 of the Code of 1825. This prescription was not pleaded by them. Had it been, the answer would be, that it applies, in terms, to "contracts, testaments, and other acts," like art. 204, p. 303, of the Code of 1808; and that it does not extend to cases of fraud, which are exclusively provided for in the last-mentioned article.

17. If the case be tested by the rules of chancery, the resale would be the same.

In chancery, a purchase by a trustee can be cured by lapse of time.

The cases on this subject are nowhere better reviewed than in *Kane* v. *Bloodgood*, 7 Johns. (N. Y.), Ch., 90. But the statute of limitations begins to run only from the open disavowal of the trust.

In this case, the possession was not known to the heirs to be adverse to the trust, except from the time when they were informed that the sales to Laignel and St. Felix were simulated. Until then, they believed the executors to be, as the

executors pretended themselves to be, *bonâ fide* purchasers from Laignel and St. Felix, who, it was believed and represented, were themselves serious purchasers from the estate.

The courts of the United States, sitting as courts of equity, apply the statutes of limitations of the respective states. 6 Pet., 291; 16 Id., 455, 495; 11 Id., 369, 393, 406.

When the statute limits not at law, the same length of time is not a bar in equity. *Boone* v. *Chiles*, 10 Pet., 177; *Cook* v. *Ankam*, 6 Cond. Rep. 287; *Baker* v. *Whiting*, 3 Sumn., 486.

552] "In a case of trusts of lands, nothing short of the statute period *which would bar a legal estate or right of entry would be permitted to operate in equity as a bar of the equitable estate." Judge Story, in *Baker* v. *Whiting*, 3 Sumn., 486.

It has been seen that no other prescription but that of thirty years would, by the law of Louisiana, bar the action of revendication.

Nothing is better settled, in the law of chancery, than that, in cases of fraud, the statute of limitations does not begin to run until a full discovery of the frauds practised. *Boone* v. *Chiles*, 10 Pet., 223; *Aylward* v. *Kearney*, 2 Ball & B., 476; *Murray* v. *Palmer*, 2 Sch. & L., 486; *Hovenden* v. *Lord Annesley*, 2 Id., 632; *Bond* v. *Hopkins*, 1 Id., 413; 1 Hovenden on Frauds, 480; *Croft* v. *Adm'rs of Townsend*, 3 Desau. (S. C.), 239; *Wamburzee* v. *Kennedy*, 4 Id., 474, 485, 489; *Randall* v. *Errington*, 10 Ves. 423.

And vague rumors and reports do not constitute that kind of knowledge of the fraud which will give course to the statute of limitations. *Flagg* v. *Mann*, 2 Sumn., 491, 551, 563; *Irby* v. *M'Crae*, 4 Desau. (S. C.), 431; *Randall* v. *Errington*, 10 Ves., 423; 11 La., 139; *Conway* v. *Williams's Adm'r*, 10 Id., 568; *Tyson* v. *McGill*, 15 Id., 145.

The acquiescence and ratification of two of the complainants is attempted to be inferred from their receipts. These parties assuredly knew nothing of the frauds of the executors when they signed the receipts, and acted with blind confidence. In equity, as long as the injured party does not know the full extent of his rights, and that the transaction is impeachable, any act done by him subsequently will not amount to a ratification or confirmation. As long as the dependence of the *cestui que trust* upon the trustee and the fiduciary relation continues, an alleged ratification will always be scrutinized with the utmost jealousy; and a party possessing only imperfect information cannot be held guilty of laches. 1 Story's Equity, § 345; *Butler* v. *Haskell*, 4 Desau., (S. C.) 651, 709 (where the principal cases are reviewed);

Murray v. *Palmer*, 2 Sch. & L., 486; 1 Hovenden on Frauds, 152, 484; *Purcell* v. *McNamara*, 14 Ves., 107, 120; *Cole* v. *Gibbons*, 3 P. Wms., 293; *Brooke*, *Ex'r*, v. *Gally*, 2 Atk., 34; *Cole* v. *Gibson*, 1 Ves. Sr., 507; *Taylor* v. *Rockfort*, 2 Id., 281; *Roche* v. *O'Brien*, 1 Ball & B., 230; *Morse* v. *Royall*, 12 Ves., 364; *Wood* v. *Downes*, 18 Id. 120.

Mr. Justice WAYNE delivered the opinion of the court.

The conclusions to which we have come in this cause do not require from us any comment upon its facts.

We concur with the learned judge in the Circuit Court, in setting aside the purchases by which Nicolas Girod and Jean François Girod became the possessors of their testator's entire estate. *But the morality and policy of the law, as it is administered in courts of equity, induce us to add, that those purchases were fraudulent and void, and may be declared to be so, without any further inquiry, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying it to the executors. Such a transaction carries fraud upon the face of it. *Lord Hardwicke* v. *Vernon*, 4 Ves., 411; 14 Id., 504; 2 Bro. Ch., 410, note. It matters not, in such a case, whether the sales are made with or without the sanction of judicial authority, or with ministerial exactness. The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not,—*per interpositam personam*,—carries fraud on the face of it. In this instance, Laignel and St. Felix were the instruments of the executors. They bid off the property, paid nothing, received titles, and conveyed what they nominally bought to the executors. In this way Nicolas Girod became the purchaser of all the testator's property in New Orleans, and himself and his brother Jean François, the other executor, were joint purchasers of the lands and slaves in the parish of Assumption, and of the testator's lands elsewhere. Jean François, some years afterwards, sold out his half of their joint purchase to Nicolas, for seventy thousand dollars. Thus the latter became the possessor of the entire estate, and held it until he died, to the exclusion of all the other testamentary heirs. Some of those heirs, and the representatives of others of them, now sue the representatives of Nicolas Girod, and seek to set aside the purchases of the executors. They allege that they were fraudulently made, ask that they may have assigned to them their respective portions of the [*553

estate, with an account of rents and profits, excepting from their claim for the latter the moiety which had been received by Jean François Girod. The defendants reply, and deny fraud in fact or in intention on the part of the executors. They declare, that the sales were judicially ordered and conducted, that the purchases were rightfully made, for a fair price, at public auction, that the complainants have no standing in a court of equity by reason of their long silence, laches, and acquiescence in the acts of which they complain, and that their rights are barred by lapse of time, under the laws of Louisiana. They also say, that receipts or acquittances were given to the executors by two of the complainants, which are valid and obligatory upon them. The bill and answers, and the arguments of the learned counsel for the appellants, then, involve the question of the right of executors to purchase any part of the estate which they administer, for a fair price, at a public sale judicially ordered and conducted. Remarking, first, that an executor or administrator *is in equity *554]
a trustee for heirs, legatees, and creditors, we proceed to give our opinion of the law in respect to purchases of the estate represented by them, and of purchases made by other trustees and agents, and all persons *qui negotia aliena gerunt.* The rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity, is compendiously given by Sir Edward Sugden, in his second section of purchases by trustees, agents, &c. It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination, also, of other cases in the English courts, and of cases in the courts of chancery of several of the states in our Union, sustaining the doctrine, to the fullest extent, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another. He says,—"It may be laid down as a general proposition, that trustees,—unless they are nominally such to preserve contingent remainders,—agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired

in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" 2 Sugd. Vendors and Purchasers, 109, London ed., 1824.* The principle has been extended to a purchase by an *attorney from his client whilst [*555 the relation subsists. *Bellew* v. *Russell*, 1 Ball & B., 96; 9 Ves., 296; 13 Id., 133. As to gifts. *Lord Selsey* v. *Rhoades*, 2 Sim. & S., 41; *Williams* v. *Llewellyn*, 2 Younge & J., 68; *Champion* v. *Rigby*, 1 Russ. & M., 539. Nor can an arbitrator buy up the unascertained claims of any of the parties to the reference. *Blannerhasset* v. *Day*, 2 Ball & B., 116; *Cane* v. *Lord Allen*, 2 Dow, 289. Where a person cannot purchase the estate himself, he cannot buy it as agent for another. 9 Ves., 248; *ex parte Bennet*, 10 Id., 381.

The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-

* *Trustees.*—*Fox* v. *Mackreth*, 2 Bro., 400; 4 Bro. P. C. (Tomlins's) 258; *Hall* v. *Noyes*, 3 Bro., 483, and see 3 Ves., 748; *Kellick* v. *Flexny*, 4 Bro., 161; *Whitcote* v. *Lawrence*, 3 Ves., 740; *Campbell* v. *Walker*, 5 Id., 678, and *Whitackre* v. *Whitackre*, Sel. Ch. Cas., 13.

Remainders.—See *Parks* v. *White*, 11 Ves., 226.

Agents.—*York Buildings Company* v. *Mackenzie*, 8 Bro. P. C., 42; *Lowther* v. *Lowther*, 13 Ves., 95; see *Watt* v. *Grove*, 2 Sch. & L., 492; *Whitcomb* v. *Minchin*, 5 Madd., 91; *Woodhouse* v. *Meredith*, 1 Jac. & W., 204.

Commissioners of Bankrupts.—*Ex parte Bennet*, 10 Ves., 381; *Ex parte Dumbell*, Aug. 13, 1806, Mont., notes, 33, cited; *Ex parte Harrison*, 1 Buck, 17.

Assignees of Bankrupts.—*Ex parte Reynolds*, 5 Ves., 707; *Ex parte Lacey*, 6 Id., 625; *Ex parte Bage*, 4 Madd., 459; *Ex parte Badcock*, 1 Mont. & M., 231.

Solicitors to the Commission.—*Owen* v. *Foulkes*, 6 Ves., 630, note *b*; *Ex parte Linwood*; *Ex parte Churchill*, 8 Id., 343, cited; *Ex parte Bennet*, 10 Id., 381; *Ex parte Dumbell*, Aug. 13, 1806, Mont., notes, cited; see 12 Ves., 372; 3 Meriv., 200.

Auctioneers, creditors consulted as to mode of sale, or any persons who by their connection with, or concern in, the affairs have acquired a knowledge, &c.—See *Ex parte Hughes*, 6 Ves., 617; *Coles* v. *Trecothick*, 9 Id., 234; 1 Smith, 233; *Oliver* v. *Court*, 8 Price, 127.

interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells. 2 Burge Com., 459. Cases have been frequently decided in the courts of Louisiana, which maintain the rule in all its integrity. In Pennsylvania it is enforced, though, on looking over its reports, we find a case, but unsustained by any reference to adjudged cases, in which it is said that an executor might buy at a sale of the testator's effects, if he did so for a fair price, at public auction. In Maryland, the courts of chancery carry out the rule to the fullest extent of the principles upon which it is founded, and as they have just been stated by us. In the case of *Wormley* v. *Wormley*, 8 Wheat., 421, this court declared, that no rule is better settled, than that a trustee cannot become the purchaser of the trust estate. . He cannot be, at the same time, vendor and vendee. It had been previously ruled, in the case of *Prevost* v. *Gratz*, 6 Wheat., 481, and this court afterwards, in *Ringo et al.* v. *Binns et al.*, reaffirmed the rule, by its application to an agent who had bought land to which *his principal was in equity entitled. It said, "The proposition laid down by this court is, that if an agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, that he will be held as a trustee holding for his principal." 10 Pet., 269, 281. See also the case of *Oliver* v. *Piatt*, 3 How., 333. It is also affirmed, in *Church* v. *Marine Insurance Company*, 1 Mason, 341, that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property which is confided to his care. We scarcely need add, that a purchase by a trustee of his *cestui que trust*, *sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, "and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee," will

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be sustained in a court of equity.[1] But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. *Coles* v. *Trecothick*, 9 Ves., 246; *Fox* v. *Mackreth*, 2 Bro. Ch., 400; *Gibson* v. *Jeyes*, 6 Ves., 277; *Whichcote* v. *Lawrence*, 3 Id., 740; *Campbell* v. *Walker*, 5 Id., 678; *Ayliffe* v. *Murray*, 2 Atk., 59. And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself. 1 Story Com. on Equity (2d ed.), 317; *Fox* v. *Mackreth*, 2 Bro. Ch., 400; S. C., 2 Cox. Ch., 320, 327.

In New York there has been no relaxation of it, since the decision in the case of *Davoue* v. *Fanning*, 2 Johns. (N. Y.) Ch., 252. It is a critical and able review of the doctrine, as it had been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our State chancery courts, as altogether putting the rule upon its proper footing. Indeed, it is not too much to say, that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great chancellor, Lord Elden. *Davoue* v. *Fanning* was the case of an executor for whose wife a purchase had been made by one Hedden, at public auction, *bonâ fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was, that the purchase might be set aside, and the premises resold. The case was examined with a special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee, or person acting for others, sells the *trust [*557 estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bonâ fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust*, and who had an interest in

[1] FOLLOWED. *Beckett* v. *Tyler*, 3 McArth, 326.

the land under the will of the testator. The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executors, in respect to all persons interested in the estate, or only to such of them as are *sui juris?* And if only to those who are *sui juris*, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is *sui juris?* Shall it be relaxed in cases of those who are interested in the estate, and who are not *sui juris* or minors? Then other remedies must be devised to protect their interests than that which experience has shown to be alone efficacious. It is, that when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, *and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it. *Campbell* v. *Walker*, 5 Ves., 478; 13 Id., 601; 1 Ball & B., 418.

*558]

Such is the proceeding adopted in Louisiana, when property

in which a minor is interested is offered for sale, as may be seen by the case in 5 La., 16, *McCarty* v. *Steam Cotton Press Company et al.* The property was sold at auction, and the mother of the minor became the purchaser. It was contended that this purchase was null and void, because the property had descended to the children immediately after the death of the father, and the mother, who, by the effect of the law, was their natural tutor, could not buy it. The court said it was a general rule. But it having been shown that the mother and purchaser had petitioned the Court of Probates for a ratification of the sale, and that the court had ratified it upon the advice of a family meeting, the sale was confirmed. And the court held, that under the Spanish law (20) a tutor could purchase the property of his ward, with the permission of the judge.

We have said more upon the relaxation of the rule in the case of executors than we would have done, if the learned counsel for the appellants had not pressed, as an exemption from the rule, purchases made by executors without fraud at open sale, especially when by the will they were empowered to sell the estate of their testator for the benefit of heirs and legatees, and were heirs or legatees themselves. And if it had not been urged, that the decisions of the Supreme Court of Louisiana were unsafe guides in interpreting the Spanish laws in respect to the incapacity of persons to purchase at judicial sales particular property, on account of the official or financiering relation in which they stood to the persons who owned the property. It was supposed that the qualifications of the rule by the civil law embraced executors, or might do so by the reason upon which those qualifications were sustained. It imposes upon us the task of showing, that the relaxations of the rule by the civil law were never permitted by the Spanish law which prevailed in Louisiana, and were never extended under the civil law, to permit the executor *testamentarius* or executor *dativus* to buy the property which he was appointed to administer. It is a subject of curious and instructive examination to trace the rule or prohibition, in the course of its application under the jurisprudence of different nations. In all of them, there were limited and occasional relaxations of the rule in particular cases, in what are sometimes called hard cases, but in no one nation have purchases by executors been permitted, as a relaxation of the civil law rule. For a general historical examination of the subject, we have not time; we wish we had. A brief examination, however, of the qualifications of the rule by the civil law will not be inappropriate upon an appeal from a court held in Loui-

siana, where the civil *law exists in a modified form, and is still often the rule of decision by its enlightened jurists. The prohibition of the civil law is thus expressed:—"*Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt.*" Dig., Lib. 18, tit. 1, l. 34; Inst., Lib. 1, tit. 21, 23.

The rule as expressed embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual interest. Nor was it ever relaxed or qualified by the civil law, further than to allow the guardian to purchase the property of the ward, *palam et bonâ fide*, at public auction. "Cum ipse tutor nihil ex bonis pupilli, quæ distrahi possunt, comparare palam et bonâ fide prohibetur; multo magis uxor ejus hoc facere potest." Cod., Lib. 4, tit. 38, l. 5. But foreseeing the mischief which might grow out of the relaxation, it required that the purchase must be made by the guardian himself, *palam et bonâ fide*, and not *per interpositam personam*. "Sed si per interpositam personam rem pupilli emerit, in eâ causâ ut emptio nullius momenti sit, quia non bonâ fide videtur rem gessisse. Et ita est rescriptum a D. Severo et Antonino." Dig., Lib. 26, tit. 5, l. 5, § 3. A purchase by a guardian from his co-guardian was permitted, if it took place in public, and *bonâ fide*. "Item ipse tutor et emptoris et venditoris officio fungi non potest. Sed enim si contutorem habeat, cujus auctoritas sufficit, procul-dubio emere potest. Sed si malâ fide emptio intercesserit, nullius erit momenti, ideoque nec usucapere potest. Sane, si suæ ætatis factus comprobaverit emptionem, contractus valet." Dig., Lib. 26, tit. 8, l. 5, § 2.

The guardian might purchase at a sale made at the suit of a creditor. "Si creditor pupilli distrahat, æque emere bonâ fide poterit." Dig., Lib. 26, l. 5, § 5. Such is the extent of the qualification of the rule of the civil law. And, its limitation not being well understood, persons have often been misled to apply it to what they supposed to be analogous agencies, such as executors, when there was no authority either in the text of the civil law, or in the practice under it, for doing so. But, further, those qualifications of the rule mentioned were confined in practice to those territories in Europe in which the civil law prevailed without modification. And it is remarkable, considering what were the influences upon Christendom of the civil law, after its discovery in the twelfth century,—and when not until some time after it began to be used as a rule of law by which public and private rights were

determined,—when in the fifteenth and sixteenth centuries it was the study of the wisest men,—it is remarkable that the qualifications of the rule, as they have been stated, were considered imperfections, and were rejected by every nation in Europe whose codes are generally admitted to have been compiled from the civil law, with an intimate *knowledge of human nature, as it has always shown itself in the business of life. Here, appropriate to what has been just said, is the language of Pothier. "Nous ne pouvons acheter, ni par nousmêmes, ni par personnes interposées, les choses que font partie des biens dont nous avons l'administration; ainsi un tuteur ne peut acheter les choses qui appartiennent à son mineur; un administrateur ne peut acheter aucune chose de bien dont il a l'administration." Tr. du Contrat de Vente, part. 1, n. 13. The rule of the civil law, without qualification, is adopted in the codes of Holland. "Quæ vero de tutoribus cautâ, ea quoque in curatoribus, procuratoribus, testamentorum executoribus, aliisque similibus, qui aliena gerunt negotia, probanda sunt." Voet., Lib. 18, tit. 1, n. 9; 2 Burge Com., 463. In Spain, the rule was enforced without relaxation, and with stern uniformity. Judge McCaleb cites in his opinion, from the Novissima Recopilacion, the rule, in the following words: "No man, who is testamentary executor or guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately the act is invalid, and on proof being made of the fact, the sale must be set aside." This was the law of Louisiana when the executors in this instance made their purchases, and it is conclusive of the invalidity. [*560

We have thus shown, that those purchases are fraudulent and void, from having been made *per interpositam personam*, and if they were not so on that account, that they are void by the rule in equity in the courts of England, and as it prevails in the courts of equity in the United States. It has also been shown, that they are void by the law of Louisiana, as it was when they were made by the executors, and that such purchases never were countenanced in that state by any qualification of the civil law rule prohibiting purchases by those who stood in such fiduciary relations to others; that the act could not be generally done, without creating a conflict between self-interest and integrity. In every aspect in which we have viewed this case, we are called upon to direct that the purchases made by Nicolas and Jean François Girod of their testator's estate should be set aside. We shall order it to be done. Nor do we think that the complainants have lost

their rights by negligence, or by the lapse of time. We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scene of the transactions of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers, with whom they had been associated in a common interest by another brother who was dead. In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, pur-
*561] chased their testator's estate. In general, length of time is no *bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. *Prevost* v. *Gratz*, 6 Wheat., 481. Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle that *expedit reipublicæ ut sit finis litium;* although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. 10 Ves., 467; 1 Cox Ch., 149. Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. *Boone* v. *Chiles*, 10 Pet., 177. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it. In this case, that time has not elapsed since the executors made their purchases, and it is not pretended that they were known to any of the complainants until the year 1817, and not then, except by the exhibition of an account by the executors to some of the complainants, with declarations that every thing had been fairly done with a view to save the honor of the testator, and the interests of those who were the objects of his bounty. In this view of the case, it is not necessary for us to consider the time within which remedies are barred, or property may be acquired by prescription, under the laws of Louisiana. We would willingly otherwise do so, for the result would show the same harmony in the application of the rules of the civil law and those of Louisiana

upon prescription with the rules prevailing in courts of equity in England and the United States, as we trust has been shown to exist between them in the prohibition of an executor to buy the estate of his testator.

The receipts or acquittances given by two of the complainants to the executors do not affect their rights. They were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate. Indeed, it is plain that such information had been withheld by the executors. It is true that an account was presented to them, with official signatures to it, but without vouchers of any kind to verify its correctness, and it was accompanied by a letter from Nicolas Girod, in which menaces of displeasure are mingled with intimations of future kindness.

We shall also direct the official proceedings which were had *upon the account of Nicolas Girod, against [*562 the estate of Claude, to be set aside and annulled. But there will be allowed to the representatives of Nicolas, in the settlement of the estate, the sum of $6,574.20, with interest at five per cent. The proofs in the cause show that, a few months before the death of the testator, there had been a settlement of accounts between him and Nicolas, and we allow that amount, as it is charged in the general account, disallowing all the other items. We suppose it to be an inadvertency in drawing up the decree, that the sum just mentioned was not allowed, as the learned judge, in his opinion, states that a settlement had taken place, with that result.

We shall also direct that the actual cost of all permanent improvements which were made upon any part of the estate by Nicolas Girod shall be allowed to his representatives, with interest at five per cent. in the settlement which shall be made with the complainants and the other persons having an interest under the will of Claude. And also an allowance for taxes, and the expenses and cost paid in recovering the property gained by alluvion. A reference to a master will be directed. We regret to perceive from the record, that all the persons who are interested in the estate of Claude F. Girod are not parties to this proceeding. We shall direct, that they shall be permitted to make themselves parties, if they please to become so. But in giving the order, it is not intended to delay those from receiving their portions in whose behalf this decree is made. The fruits of their vigilance can be apportioned according to their respective rights in the estate, when one of the original testamentary heirs claims, and the Circuit Court, in the further proceedings in the cause under the man-

date of this court, will of course take care to ascertain who are the representatives of others of them who are dead.

Jean François Girod is not a party in this cause, and therefore we can give no decree against him, but should he offer to become a party for the purpose of claiming what under the will was his portion of the estate of Claude, or should it be claimed by any representative of his, we think it right to remark, for the purpose of preventing further litigation in this matter, that such claim will be subject to all the equities subsisting between Jean François and Nicolas, and especially to the allowance to the representatives of Nicolas of the purchase money which was given by Nicolas to Jean, for the one half of their joint purchase of the property of their testator, with interest at the rate according to their contract up to the times when the purchase money was paid, and afterwards at five per cent.

Order.

This cause came on to be heard on the transcript of the *563] record from the Circuit Court of the United States for the Eastern District *of Louisiana, and was argued by counsel. Whereupon it is considered by the court,—

1. That the plaintiffs are residuary legatees of Claude François Girod, deceased, in the following proportion, namely: Peronne Bernardine Girod, the widow of Jean Pierre Hector Pargoud, for one eighth; Rosalie Girod, the widow of Louis Adam, for one eighth; Françoise Peronne Quitand, the wife of J. A. Allard, for one forty-eighth; Marie Philippine Rose Quitand, for one forty-eighth; Marie Bernard Quitand, for one forty-eighth; Louis Joseph Poidebard, for one forty-eighth; Benoite Colline Nicoud, for two two-hundred-and-eighty-eighths; Maurice Emilie Nicoud, and Jenny Benoite Nicoud, represented by Jean Berger, their tutor, each for two two-hundred-and-eighty-eighths; Jean François Girod, the nephew, in his own right, and as testamentary heir of Pierre Nicolas Girod, his brother, and represented by Jean Firman Pepin, the syndic of his creditors, for one twentieth; and Françoise Clementine Girod, wife of Pierre Françoise Pernond, for one fortieth.

2. That the adjudication of landed property, with the slaves thereto attached, situated on Bayou Lafourche, made on the 18th of February, 1814, to Charles St. Felix; the retrocession of said property by said Charles St. Felix to Nicolas and Jean François Girod, on the 23d of February, 1814; the adjudication of the property situated in the parish of Orleans made to Simon Laignel on the 9th of April, 1814, and the

notarial seal made to the same on the 26th of April, 1814, in pursuance of said adjudication; and the conveyance of said property to Nicolas Girod, of the 28th of April, 1814, be set aside and annulled, saving, however, the just rights of third persons, to whom two tracts of land on Bayou Lafourche, two slaves, and a piece of ground in the city of New Orleans were conveyed by the said Nicolas Girod in his lifetime, as appears from the admissions in the pleadings.

3. That for the purpose of giving to the residuary legatees of the late Claude François Girod their proportions respectively of the estate of the testator, the said Circuit Court should direct either a sale of the said property, both real and personal, at such time and manner as said court shall see fit, or cause a partition in kind to be made of said property, as in the judgment of the said court might be deemed most advisable; and that in either case the said court should direct all the proper conveyances to be made accordingly.

4. And for greater certainty it is hereby declared, that the property, of which undivided portions are to be conveyed and assigned to the plaintiffs as aforesaid, is all the property and slaves which were inventoried in the parishes of Ascension, Assumption, and Lafourche Interior, after the death of said Nicolas Girod, as belonging to his estate; and all the property which was inventoried after the death of said Nicolas Girod, as situated in the Municipality *No. 2, of the city of New Orleans, including the property which [*564 is an alluvion, and accessory to the property derived from the estates of Claude François Girod, and which was abandoned to Nicholas Girod by the heirs of Bertrand Gravier, by an act of compromise executed on the 29th day of March, 1823, and also the house and lot situated at the corner of St. Louis and Chartres streets, in Municipality No. 1 of the city of New Orleans.

5. That the adjudication made in the Parish Court of the parish of Orleans, in the year 1815, in favor of Nicolas Girod, for $40,418.09, and claimed by the said Nicolas in the account filed in the Court of Probates by Nicolas and Jean François Girod, in May, 1817, be set aside, and instead thereof that the representatives of said Nicolas Girod be allowed, in the settlement of the accounts by the master in this cause, the sum of $6,576.20, with interest thereon at the rate of five per cent. per annum from the 1st day of August, 1813.

6. That the two acquittances and releases given, in 1817, by the plaintiffs, Madame Adam and Madame Pargoud, to Jean François Girod, be set aside, and be allowed no other force or effect than as acknowledgments of the receipt by

Madame Pargoud for 5,242 francs 75c., and by Madame Adam for the sum of 10,242 francs 75c., making respectively the sum of $975.15, and $1,905.15, in the currency of the United States, as stated in said receipt; and that the said amounts should be deducted from their portions respectively in the distribution.

7. That a reference be made to a master in chancery to take an account of what is due from the estate of Nicolas Girod to the plaintiffs, on account of the property belonging to the estate of Claude François Girod, and alienated by said Nicolas Girod, for rents and profits, and for interest; and of what may be due by the complainants to the estate of Nicolas Girod for payments made by the said Nicolas on account of the debts of the said Claude François Girod, and of the legacies paid by him, and of permanent improvements; and, in taking said account, said master shall charge the said estate with the value of the crop alleged to have been on hand, when the property in Lafourche was adjudicated to Charles St. Felix, with interest thereon; with the amounts which, by the aforesaid account of 1817, the said executors acknowledged to have received, or for which they consented to become responsible, from the time the same were received; with the price at which the two tracts of land on Bayou Lafourche and the two slaves were sold, and which are mentioned in the pleadings as having heretofore been sold, with interest thereon from the time when, according to the bill of sale, said price was payable; with the sum of thirty-five thousand dollars, this being the admitted value of the price of the ground donated by Nicholas Girod to the Female Orphan Asylum, with interest thereon from the time said donation was made; with
*565] the *rents and profits of the plantation and slaves, the house at the corner of Chartres and St. Louis streets, and the property in Faubourg St. Mary, now called the Second Municipality, from the adjudication of 1814, and at the rate which might reasonably, and with a proper administration, have been obtained for the same, it being understood that from the years 1829 and 1830, when the property in Faubourg St. Mary, or Second Municipality, still undisposed of, was leased to John F. Miller, the rents and profits thereon are to be charged at the rate at which the rent was stipulated in the lease to said Miller.

8. And the said master shall credit the estate of Nicolas Girod, on said account, with the amount which the said executors credited themselves in their account of the 23d of May, 1817, with interest thereon, except the personal claim of $40,418.09, in lieu of which this court has directed the allow-

ance of $6,576.30, being one of the items of the general account which was claimed by Nicolas Girod against Claude François Girod after the death of the said Claude, and the estate of Nicolas Girod shall be credited with any payments that have been made on account of legacies left by the said Claude, with interest thereon. And the estate of the said Nicolas Girod shall be credited with one half of the rents and profits of the plantation and slaves of Bayou Lafourche, up to the time when Jean François sold his interest in the same to Nicolas Girod. And the said master shall also credit the estate of the said Nicolas Girod with the actual cost in money expended by the said Nicolas in permanent improvements, still in existence, of or upon any part of the estate of Claude François Girod, including improvements of the property gained by alluvion, accessory to the property derived from the estate of Claude François Girod, which was abandoned to Nicolas Girod by the heirs of Bertrand Gravier, by an act of compromise, executed on the 29th of March, 1823, and the expenses and cost paid by him in recovering the alluvion before mentioned, and including also improvements on the lot at the corner of St. Louis and Chartres streets, and with improvements on the lands on Bayou Lafourche, deducting from these last the value of the labor of the slaves on the said plantation aiding and making such improvements, and of the materials procured from the same. And the actual cost in money of all improvements made by said Nicolas shall be allowed, with interest at five per cent. upon the same from the time it shall be ascertained or found by the master that the sums were expended. And allowance is also to be made to the estate of said Nicolas for all taxes paid on the property of Claude François Girod. And the said master is hereby authorized, for the discovery of the matters aforesaid, to receive from the parties, upon oath, books, and papers, and writings in their custody and power relating thereto, and also to examine witnesses orally or upon written interrogatories, in regard to the cost *of [*566 all improvements, due notice of his proceedings in this matter being given to the parties or their attorney.

9. And the said master shall compute what amount of the balance so to be found against the estate of Nicolas Girod shall be paid to each of the plaintiffs, according to their declared proportionate interest in the estate of Claude François Girod, and said balance shall be paid to them, with interest from the date up to which the master's report may present a calculation of interest; and said payment shall be made by the dative testamentary executors of Nicolas Girod, out of

the funds of said estate, in preference to any legacies under the will of said Nicolas Girod. And for the better discovery of matters aforesaid, the parties are to produce before the said master, upon oath, all books, papers, and writings in their custody or power relating thereto, as the said master shall direct. And the said master shall, when necessary, examine said parties upon written interrogatories.

10. That any other person or persons, not now parties to the proceedings, claiming title to the funds or estate in controversy, or to any part thereof, should be allowed to present their claims respectively before the said Circuit Court, to make due proofs thereof, and to become parties to the proceedings, for the due establishment and adjudication thereof. And that the costs of this suit which have hitherto accrued in the said court should be paid by the said dative testamentary executors out of the funds of said estate.

11. It is thereupon now here adjudged and decreed by this court, that so much of the decree of the said Circuit Court as conforms to the decree and opinion of this court be and the same is hereby affirmed. And that this cause be and the same is hereby remanded to the said Circuit Court, with directions to allow any person or persons not now parties and claiming title to any portion of the estate in controversy to become parties to the suit, to present their claims and make due proof thereof, and for such further proceedings to be had therein, in conformity to the decree and opinion of this court, as to law and justice shall appertain.

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*567] THE UNITED STATES, PLAINTIFFS, *v.* WILLIAM S. ROGERS.

The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parcelled out as if it had been vacant and unoccupied land.

If the propriety of exercising this power were now an open question, it would be one for the law-making and political department of the government, and not the judicial.

The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the states, Congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian.

The twenty-fifth section of the act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall

not include punishment for "crimes committed by one Indian against the person or property of another Indian."

This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law.[1]

The treaty with the Cherokees, concluded at New Echota, in 1835, allows the Indian Council to make laws for their own people or such persons as have connected themselves with them. But it also provides, that such laws shall not be inconsistent with acts of Congress. The act of 1844, therefore, controls and explains the treaty.[2]

It results from these principles, that a plea, set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid.[3]

THIS case came up, on a certificate of division, from the Circuit Court of the United States for the District of Arkansas.

At the April term, 1845, of the said Circuit Court, the grand jury indicted William S. Rogers for the murder of Jacob Nicholson. Both Rogers and Nicholson were alleged, in the indictment, to be "white men and not Indians." The offence was charged to have been committed within the jurisdiction of the court, that is to say, in that part of the Indian country west of the state of Arkansas that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the now state of Arkansas and the state of Missouri (the same being territory annexed to the said District of Arkansas, for the purposes in the act of Congress in that behalf made and provided).

The defendant filed the following plea:—

"And the defendant in his own proper person, comes into court, and, having heard the said indictment read, says, that the court ought not to take further cognizance of the said prosecution, because, he says, heretofore, to wit, on the —— day of November, 1836, he then being a free white man and a citizen of the United States, and having been born in the said United States, voluntarily and of his free will removed to the portion of the country west of the state of Arkansas, assigned and belonging to the Cherokee *tribe [*568 of Indians, and did incorporate himself with said tribe, and from that time forward became and continued to be one of them, and made the same his home, without any intention of returning to the said United States; and that afterwards, to wit, on the —— day of November, 1836, he intermarried with

[1] See s. c. below, Hempst., 450; *United States* v. *Ragsdale*, Id., 497.

[2] See *Holden* v. *Joy*, 17 Wall., 242; *Mackey* v. *Coxe*, 18 How., 100.

[3] COMPARE. *United States* v. *McBratney*, 14 Otto, 623.

a Cherokee Indian woman, according to the forms of marriage, and that he continued to live with the said Cherokee woman, as his wife, until September, 1843, when she died, and by her had several children, now living in the Cherokee nation, which is his and their home.

"And the defendant further says, that, from the time he removed, as aforesaid, he incorporated himself with the said tribe of Indians as one of them, and was and is so treated, recognized, and adopted by said tribe and the proper authorities thereof, and exercised and exercises all the rights and privileges of a Cherokee Indian in said tribe, and was and is domiciled in the country aforesaid; that, before and at the time of the commission of the supposed crime, if any such was committed, to wit, in the Indian country aforesaid, he, the defendant, by the acts aforesaid, became, and was, and still is, a citizen of the Cherokee nation, and became, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf provided. And the said defendant further says, that the said Jacob Nicholson, long before the commission of said crime, if any such was committed, although a native-born free white male citizen of the United States, had settled in the tract of country assigned to said Cherokee tribe of Indians west of the State of Arkansas, without any intention of returning to said United States; that he intermarried with an Indian Cherokee woman, according to the Cherokee form of marriage; that he was treated, recognized, and adopted by the said tribe as one of them, and entitled to exercise, and did exercise, all the rights and privileges of a Cherokee Indian, and was permanently domiciled in said Indian country as his home, up to the time of his supposed murder.

"And the said defendant further says, that, by the acts aforesaid, he, the said Jacob Nicholson, was a Cherokee Indian at the time of the commission of the said supposed crime, within the true intent and meaning of the act of Congress in that behalf made and provided. Wherefore the defendant says, that this court has no jurisdiction to cause the defendant to make a further or other answer to said bill of indictment, for said supposed crime alleged in the bill of indictment. And the defendant prays judgment, whether he shall be held bound to further answer said indictment."

To this plea the District-Attorney of the United States filed the following demurrer:

*569] "And the said United States, by Samuel H. Hempstead, District-Attorney, *come and say, that the said

first plea of the defendant to the jurisdiction of this honorable court is insufficient in law, and that, by reason of any thing therein contained, this court ought not to refuse to entertain further jurisdiction of the crime in said bill of indictment alleged.

"And the following causes of demurrer are assigned to said plea:—

"1st. That a native-born citizen of the United States cannot expatriate himself, so as to owe no allegiance to the United States, without some law authorizing him to do so.

"2d. That no white man can rightfully become a citizen of the Cherokee tribe of Indians, either by marriage, residence, adoption, or any other means, unless the proper authority of the United States shall authorize such incorporation.

"3d. That the proviso of the act of Congress, relating to crimes committed by one Indian upon the property or person of another Indian, was never intended to embrace white persons, whether married and residing in the Indian nation or not."

And, upon the argument of the said demurrer, the following questions arose, and were propounded for the decision of the court; but the judges being divided in opinion upon the same, upon motion, ordered that they be entered of record, and certified to the next term of the Supreme Court of the United States for its opinion and decision thereupon.

1st. Was it competent for the accused, being a citizen of the United States, either under the fourth clause of the eighth section of the first article of the Constitution of the United States, or under any act of Congress passed in virtue of the Constitution of the United States, upon the subject of naturalization, or in virtue of any admission, obligation, or duty incumbent upon the government of the United States, and implied by the said clause, section, and article of the Constitution, or any of the said acts of Congress in reference to citizens of the United States, or to foreign governments, their subjects or citizens, upon the authority of the will and act of the accused, and without any form, mode, or condition prescribed by the government of the United States,—to divest himself of his allegiance to that government, and of his character of citizen of the United States?

2d. Could the accused, as a citizen of the United States, or a resident within the same, possess the right or the power resulting from the nature and character of the civil and political institutions of the United States, or as appertaining to, and inherent in, him, as a free moral and political agent, or derived to him from the law of nature or from the law of

nations, founded either upon natural right or upon conven-
*570] tion, voluntarily and entirely put off his allegiance to, and his character of citizen of, the United States, *and transfer that allegiance and citizenship to any other government, state, or community?

3d. Could the tribe of Indians residing without the limits of any one of the states, but within the territory of the United States, as set forth in the pleadings in this prosecution, and designated as the Cherokee tribe, and also as the Cherokee nation (and by whom the accused alleges that he has been adopted), be held and recognized, in reference to the government, and under the laws of the United States, as a separate and distinct government or nation, possessing political rights and powers such as authorize them to receive and adopt, as members of their state, the subjects or citizens of other states or governments, with the assent of such subjects or citizens, and particularly the citizens of the United States, and thereby to sever their allegiance and citizenship from the states or governments to which they previously appertained, and to naturalize such subjects or citizens, and make them exclusively or effectually members, subjects or citizens of the said Indian tribe, with regard to civil and political rights and obligations?

4th. Could the accused, by any act or assent of his own, combined with the acts, authority, or assent of the abovementioned tribe, residing within the territory aforesaid, so change and put off his character, rights, and obligations as a citizen of the United States, as to become in his social, civil, and political relations and condition a Cherokee Indian?

5th. Does the twenty-fifth section of the act of Congress of the 30th of June, 1834, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers," and the proviso to that section, limit the operation of the said act, and give effect to the said proviso, as to instances of crimes committed by natives of the Indian tribes of full blood, against native Indians of full blood only; or do the said section and proviso have reference also to Indians (natives), or others adopted by, and permanently resident within, the Indian tribes; or have they relation to the progeny of Indians by whites or by negroes, or of whites or negroes by Indians, born or permanently resident within the Indian tribes and limits, or to whites or free negroes born and permanently resident in the tribes, or to negroes owned as slaves, and resident within the Indian tribes, whether procured by purchase, or there born the property of Indians?

6th. Does the plea interposed by the accused in this prosecution, the facts whereof are admitted by the demurrer, constitute a valid objection to the jurisdiction of this court?

The twenty-fifth section of the act of 1834, referred to in the fifth point certified, enacts as follows:—"That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction *of the United States [*571 shall be in force in the Indian country; provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The defendant moved the court for an order to discharge him from imprisonment, on the ground that the court were divided in opinion on his plea to the jurisdiction; but the court overruled the motion, and remanded him to the custody of the marshal.

The case came up to this court upon the points certified, and was argued by *Mr. Mason*, Attorney-General, on behalf of the United States.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been sent here by the Circuit Court of the United States for the District of Arkansas, under a certificate of division of opinion between the justices of that court.

It appears by the record, that William S. Rogers, a white man, was indicted in the above-mentioned court for murder, charged to have been committed upon a certain Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians.

The accused put in a special plea to the indictment, in which he avers, that, having been a citizen of the United States, he, long before the offence charged is supposed to have been committed, voluntarily removed to the Cherokee country, and made it his home, without any intention of returning to the United States, that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the Cherokee nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf made and provided; that the said Jacob Nicholson had in like manner become a Cherokee Indian, and was such

at the time of the commission of the said supposed crime, within the true intent and meaning of the act of Congress in that behalf made and provided; and that therefore the court had no jurisdiction to cause the defendant to make a further or other answer to the said indictment.

This is the substance of the plea, and to this plea the attorney for the United States demurred, setting down the causes of demurrer which appear in the foregoing statement of the case.

Several questions have been propounded by the Circuit Court, which do not arise on the plea of the accused, and some of them we think cannot be material in the decision of the case, and need not therefore be answered by this court.

The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within *the limits of any particular state. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

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It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political department of the government, and not for the judicial. It is our duty to expound and execute

the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[1] Consequently, the fact that Rogers had become a member of the tribe of Cherokees is no objection to the jurisdiction of the court, and no defence to the indictment, provided the case is embraced by the provisions of the act of Congress of the 30th of June, 1834, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers."

By the twenty-fifth section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is, that the provisions of that section "shall not extend to crimes committed by one Indian against the person or property of another Indian." And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not *intended [*573 to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

It may have been supposed, that the treaty of New Echota, made with the Cherokees in 1835, ought to have some influence upon the construction of this act of Congress, and extend the

[1] *Approved. The Cherokee Tobacco*, 11 Wall., 619.

exception to all the adopted members of the tribe. But there is nothing in the treaty in conflict with the construction we have given to the law. The fifth article of the treaty stipulates, it is true, that the United States will secure to the Cherokee nation the right, by their national counsels, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the Constitution of the United States, and such acts of Congress as had been, or might be, passed, regulating trade and intercourse with the Indians. Now the act of Congress under which the prisoner is indicted had been passed but a few months before, and this proviso in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions, or affect its construction. Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.

We are, therefore, of opinion, that the matters stated in the plea of the accused do not constitute a valid objection to the jurisdiction of the court, and that, if he is found guilty upon the indictment, he is liable to the punishment provided by the
*574] act of Congress before referred to, and is not within the exception in relation to Indians. *And we shall direct this opinion to be certified to the Circuit Court, as the answer to the several questions stated in the certificate of division. We abstain from giving a specific answer to each question, because, as we have already said, some of them do not appear to arise out of the case, and, upon questions of that description, we deem it most advisable not to express an opinion.

JOHN A. BARRY, PLAINTIFF IN ERROR, *v.* MARY MERCEIN AND ELIZA ANN BARRY, DEFENDANTS.

After a case has been called, and placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases, of great public importance, have already been assigned for what may be the remainder of the term.

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THE circumstances which led to the interlocutory opinion of the court in this case are sufficiently set forth in the memorial of Mr. Barry, and the opinion of the court.

The memorial was as follows:—

"To their Honors, the Justices of the Supreme Court of the United States of America.

"The memorial of John A. Barry respectfully represents, that he is a British subject, domiciled and resident abroad within the dominions of her Britannic Majesty; that, for some considerable time past, he has had upon the docket of this honorable court a highly important and most interesting case, on a writ of error to the Circuit Court for the Southern District of New York; that consequently, he came over to these United States in November, 1844, to attend to the said case at the last term of this honorable court; but the number of the case being 128, he was greatly disappointed in being obliged to return to his home without its having been reached; that he has now again come over to this country for the purpose of meeting the said case; but, owing to an unusual length of passage, did not arrive at Boston until after this honorable court had commenced its present session; that it was his intention, and full expectation, to have been before this honorable court whenever the said case (No. 72) on the present calendar should be called; but, owing to an attack of bodily indisposition, he was detained in New York until he became apprehensive that he might not be enabled to be present at the call of the said case in its regular order; that he thereupon wrote a letter to W. T. Carroll, Esq., the clerk of this honorable court, intimating his said apprehension, in order that, should it be realized, the cause thereof might be communicated to *your Honors, in the hope that, under [*575 the circumstances, your Honors would be pleased to permit the case to be passed over without prejudice until your memorialist's arrival in Washington; that he received an answer from the said W. T. Carroll, Esq., acknowledging his receipt of the said letter, but informing your memorialist, that unfortunately, the case had been reached only the day before, when, agreeably to the forty-third rule of court, the said case was placed at the foot of the calendar; that, in the event of its so remaining, your memorialist will, if he shall live, be necessitated to come again—a third time—to this country, at the next sitting of this honorable court, as no probability exists that the case can be reached, in its new position, during the present term.

"Your memorialist, therefore, respectfully prays, that, in

consideration of the foregoing premises, and further, that the case is one in relation to the writ of *habeas corpus*, in favor of liberty, in proceedings on which courts are accustomed to relax that stringency of technical requirements so strenously adhered to and insisted on in ordinary formal suits at law, the said forty-third rule of court may not be enforced on the present occasion; but that your memorialist may be heard in the matter at such earlier day as may comport with the convenience of your Honors, or be appointed for the purpose by this honorable court.

JOHN A. BARRY.

" *Washington, D. C., February 6th*, 1846."

Mr. Chief Justice TANEY delivered the opinion of the court.

In the case of *John A. Barry* v. *Mary Mercein* and *Eliza Ann Barry*, a motion was made on Friday last by the plaintiff in error to assign some day during the present term for the argument. A petition was filed at the last term by one of the defendants in error, praying that the writ of error might be dismissed for want of jurisdiction. The case in the regular order of business was called on the 15th day of January last, and neither party appearing, it was, according to the rules of the court, placed at the foot of the calendar; and it is now evident, from the number of cases standing before it, that it cannot be reached during the present term, unless by a special order of the court giving it priority.

There are two questions in the case, both of them grave and serious ones;—1st. Whether this court have jurisdiction upon a writ of error in a case like this; and, 2d. If it should be determined that it has jurisdiction, then, whether the Circuit Court committed an error in refusing to award the *habeas corpus*.

As this controversy, while it continues undecided, must be a painful one to the parties on both sides, the court feel every disposition to bring it to a speedy hearing, if it could be done without injustice to others; and if the motion to assign a day was liable to no other objection than that it would be a *576] departure from the order of business prescribed by the rules, there would be no difficulty *in making this case an exception, and assigning a day for the hearing.

But at the present period of the term, the assignment of a particular day for the trial of this case involves other and higher considerations than that of a mere departure from established rules. In four or five weeks, at farthest, the court will be compelled to close its session, in order to enable its

members to perform their duties at the circuits; and several important cases, some of which cannot be continued without producing much public inconvenience in three or more of the states, have already been specially assigned for argument, and the order in which they are to be taken up announced from the bench; and in obedience to this notice counsel have been for some time past, and still are, attending to argue them. It is very doubtful whether enough remains of the term to enable the court to dispose of these cases, and it is probable that one or more of them may of necessity be continued. Under such circumstances, we cannot, without injustice to others and inconvenience to the public in several of the states, make a new and unexpected arrangement in the order of business, by which another case, not entitled to priority, is interposed out of its proper order. The case in question must, therefore, stand over until the next term.

EDWARD BRADFORD, PLAINTIFF IN ERROR, *v.* ROBERT W. WILLIAMS, DEFENDANT, AND JOHN JUDGE, PLAINTIFF IN ERROR, *v.* ROBERT W. WILLIAMS, DEFENDANT.

By a statute of Florida, where suit is brought upon a bond, the plaintiff need not prove its execution unless the defendant denies it under oath. It also provides that such an instrument may be assigned; that the assignee becomes vested with all the rights of the assignor, and may bring suit in his own name.

Under this statute, where a joint and several bond was signed by three obligors and made payable to three obligees, one of whom was also one of the obligors, and the obligees assigned the bond, the fact that one of the obligors was also an obligee was no valid defence in a suit brought by the assignee against the two other obligors.

The inability of one of the obligees to sue himself did not impair the vitality of the bond, but amounted only to an objection to a recovery in a court of law. The assignment, and ability of the assignee to sue in his own name, removed this difficulty.[1]

The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a *bonâ fide* holder.

THESE were kindred cases, argued and decided together. Bradford and Judge were obligors upon the same bonds,

[1] See *Ransom* v. *Geer*, 12 Fed. Rep., 608.

although sued separately, and the same questions were common to both cases.

*577] They came up by writ of error, from the Court of Appeals for the Territory of Florida.

The case was this:

The defendant in error brought an action of debt in the Superior Court in the Middle District of Florida against the plaintiff in error, and declared upon four bonds, amounting in the aggregate to the sum of $4,854.28, made by the defendant below, William P. Craig, and Ed. Bradford, by which they bound themselves jointly and severally to pay that sum to William B. Nuttal, Hector W. Braden, and William P. Craig, or to their order, setting out the assignment of said bonds, in due and proper form, by the obligees to the plaintiff in the suit.

The defendant, by his attorney, craved oyer of the bonds, and after setting out the same, pleaded "that William P. Craig, one of the obligors mentioned, was, and is, the same identical person named William P. Craig, as one of the obligees in the said bonds, who, together with the others, had indorsed the bonds to the plaintiff, and that the same was therefore null and void at law, and not the deed of the defendant," concluding with a verification.

To which the plaintiff demurred, and the defendant joined in the demurrer.

The court gave judgment for the plaintiff on the demurrer, which judgment was affirmed by the Court of Appeals, upon which this writ of error was brought.

The record not having been filed in time, the cases had been docketed and dismissed under the forty-third rule of court, on motion of the defendant in error. Afterwards, a motion was made by *Mr. Westcott* to reinstate them, which was argued by *Mr. Westcott* and opposed by *Mr. Thompson;* upon which motion

Mr. Justice McLEAN delivered the opinion of the court.

A writ of error having been allowed in this case, and the record not having been filed by the plaintiff within the forty-third rule, a motion was made by the counsel of the defendant, on presenting a statement of the judgment below, regularly certified, to dock it and dismiss the cause, which the court ordered to be done. And now a motion is made to set aside that order, on the ground that the clerk, who certified the judgment, acted without authority.

The certificate objected to is in the proper form, is signed by R. T. Birchett, clerk of the Court of Appeals of Florida, and is authenticated by the seal of that court.

Florida was admitted into the Union as a state, on the 3d of March last, but provision was made under the seventeenth article in the constitution for the continuance of the courts and officers of the territory until superseded under the laws of the state. We think the clerk, having possession of the records of the Court of Appeals, has a legal right, under its sanction, to certify its judgments, *and therefore [*578 that the order of dismissal cannot be set aside on the above ground. But in consideration of a change of government in the territory, and the consequent embarrassments and doubts in regard to this writ of error, and also in consideration that the plaintiff in error, in seven days after the above dismissal, made this motion, and asked leave to file the record, the court will set aside the former order, and permit the record now to be filed; on the condition, that, at the option of the defendant in error, the plaintiff shall submit the case, on printed arguments, at the present term.

In conformity with the above order, the case was submitted, upon the following printed arguments, by *Mr. Westcott* and *Mr. C. J. Ingersoll*, for the plaintiff in error, and *Mr. Thompson*, for the defendant.

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Mr. Westcott and *Mr. Ingersoll*, for the plaintiff in error.

These cases are both depending on the same principles. The statement of defendant in error, in his brief of the pleadings, is correct. The notice of the court is, however, asked to the particular form of the counts on the bonds sued on. They are described as the joint and several bonds of Judge, Bradford, and Craig, and as given to Nuttall, Braden, and Craig. They are averred to have been indorsed by all the obligees (Nuttall, Braden, and Craig) to Williams. The plaintiff must recover upon the case made in his declaration, or not at all, in this action.

The fact that Craig, named as obligee in the bonds, is also one of the obligors, is distinctly averred in defendant's plea. The plaintiff's demurrer admits this fact. The first question, then, arises as to the correctness of the position assumed by the defendant, that the bonds are nullities, and cannot be sued upon at law by the obligees or their assignees.

It is a principle of the common law, that no one can be both obligor and obligee in the same bond. He cannot sue himself, and the instrument is a nullity. 1 Plowd., 367, 368; Co. Litt., 264, 265; Bac. Abr., 156, 157; Pow. Cont., 438; *Eastman* v. *Wright*, 6 Pick. (Mass.), 321; 6 Taunt., 407; 1 Tuck. Com., 277; 2 Am. Com. L., 412, 414; 1 Chitt. Pl., 45; 2 Saund., 47

note T; Rosc. Bills, 43, 44; 2 Cov. & H. Dig., 238, art. 9, § 7, art. 7, § 12; *Turton* v. *Benson*, 10 Mod., 450; *Mainwaring* v. *Newman &c.*, 2 Bos. & P., 120; *Jus* v. *Armstrong*, 3 Dev. (N. C.), 286; *Taylor's case*, Id., 288; *Bonner's case*, Id., 290; *Shamhour's case*, 2 Id., 6; *Davis* v. *Somerville*, 4 Id., 382; 13 Serg. & L., 328. The court are particularly referred to the North Carolina cases above cited.

Independent of all authority, the common sense of this principle is so obvious that it cannot be disputed. Delivery, *579] which, with sealing, is an essential part of a bond, cannot be made by a man to *himself, nor can a man sue himself. This objection, therefore, is insuperable, unless it can be evaded.

The counsel for defendant in error, in his submitted brief, does not seem disposed to contest this position, but it is attempted to be evaded by contending that the thirty-third and thirty-fourth sections of the Territorial statute of 1828 (see Duval's Comp., p. 69, correctly quoted in 2d page of defendant's brief), alters the common law on this subject.

The common law was adopted in Florida at the first session of the Territorial legislature after the cession. (See Laws of Florida of 1822, p. 53). It has continued in force in Florida ever since. In 1828, a revision of the laws was attempted by the legislature, and in the enumeration of the acts to be continued in force, the act of 1822, above referred to, was, as is notorious, by mere inadvertence, omitted. Until it was re-enacted in 1829, it was contended by some that during that interim the civil law of Spain, and not the common law of England, was to be regarded as existing in that territory; but such position never received the sanction of any judicial decision. It is submitted that the common law, once adopted as a system in 1822, continued till positively and affirmatively abrogated. A different rule would occasion great confusion and embarrassment as to contracts made in the year 1828, made according to the rules and forms of the common law, and in the belief that it controlled them. Yet defendant in error seeks to establish such doctrine.

The Territorial statute cited "vests" the indorsee with the same rights, powers, and capacities as might have been "possessed by the assignor or indorser; and the assignee or indorsee may bring suit in his own name." (See § 34 of statute cited, p. 2, defendant's brief, and Duval's Comp., p. 96.)

This Territorial statute does not give to the assignee or indorsee of a bond any more "rights, powers, or capacities," than "might have been possessed by the assignor or indorser." The restrictive words, "the same," used in the law, show such

intention by the legislature. Defendant in error cannot sue as indorsee, unless the words "the same" are construed to mean more. It would be as reasonable to argue, that the words, "might have been possessed," used in the same clause, meant that the indorsee of an invalid bond should have the "same rights, powers, and capacities" as his indorsee "might" have had, if the bond had been valid.

The concluding clause, providing that "the assignee or indorsee may bring suit in his own name," was not intended to "vest" him with such "right, power, or capacity," as an additional right to that possessed by his assignor or indorser; in other words, to sue on the bond in his own name, even if his assignor or indorser could not sue on it. The statute was intended to make valid bonds negotiable, and allow the assignee or indorsee to sue in his own name, [*580 *which was not allowed at common law; all the indorser's right to sue in his own name is founded on the statute. It was not intended to make a bond, invalid before indorsement, become valid by indorsement.

It was never contemplated that it would be used to overturn a fundamental principle of the common law, that the same person could not be both obligor and obligee in the same bond, and both plaintiff and defendant in the same suit.

In this case the counts all allege Nuttall, Braden, and Craig to be obligees; they allege Nuttall, Braden, and Craig to be indorsers, and they allege Judge, Bradford, and Craig to be the obligors. We are saved all inquiry as to what might have been properly decided, if plaintiff had not made these express allegations, and if he had counted differently, dropping Craig either as obligor or as obligee and indorser, with appropriate averments. This case must be decided on the pleadings; and they state that Williams, the plaintiff, claims, as indorsee of Nuttall, Braden, and Craig, of a bond given to them by Judge, Bradford, and Craig. Craig is expressly alleged to be one of his three joint indorsers. He has, therefore, in this suit, under the statute, cited precisely "the same," or "all" (as defendant cites the statute in p. 3 of his brief) "the rights, powers, and capacities," as his indorsers, Nuttall, Braden, and Craig, had, and no more. He cannot gainsay his own pleadings. If these bonds had not been indorsed, could Nuttall, Braden, and Craig have sued Judge, Bradford, and Craig?

The cases cited show that they could not at common law, and the statute gives Williams the same and no additional rights to those they had.

The argument of defendant in error (page 3 of brief filed)

which concedes that "Craig sealed, but could not deliver, the bond, because he was one of the obligees; the execution of the bond was therefore incomplete, until Craig, joining the other obligees in the assignment to Williams, by that single act compelled the execution," &c., it is submitted, gives up the law of this case upon these pleadings. The counts are not consistent with such case as that made by such arguments. To sustain it, the bonds must be regarded as being made and delivered directly to Williams by Judge, Bradford, and Craig, and Craig not regarded as indorser.

The pleadings are the reverse of this supposed case. So, too, all the arguments and authorities cited by defendant, with respect to "express" and "implied" delivery of a deed and "inchoate" instruments, and delivery to part, and not all, of the obligees, are inapplicable to this case upon the pleadings, and they are conclusively answered by a similar reference. The cases and rules of law contended for by defendant in error, if they were conceded, do not apply to his case, made upon his own pleadings.

*581] The assimilation of this case to those founded upon the rules of *commercial law, by which bills of exchange and notes, payable to the order of the maker, are held valid, and, when indorsed by the maker, suits sustained upon them, we think will not be sanctioned by this court. The essential difference between sealed instruments and simple contracts, and the pleadings upon them, and the distinctions of the mercantile law, are so obvious, that it is not necessary to refer to them. Nor has the law governing simple contracts by partnerships any analogy to the law relating to sealed obligations.

The case of *Smith* v. *Lusher*, 5 Cow. (N. Y.), (cited by defendant in error), was a case turning on both a partnership and a promissory note, in which, according to the law merchant, and for securing the free circulation of those negotiable instruments which have become a convenient substitute for the common currency of the country, and, in many respects, equivalent to money itself, the court could not do less than sustain the right of recovery. But no bond was in suit in that case, and the whole argument, both at the bar and on the bench, whenever the case of a bond is alluded to, shows what would have been the decision if the action had been upon a bond. The instance of an obligation payable by a man to himself is constantly mentioned as an absolute nullity.

The case cited by defendant from 7 Gill & J. (Md.), 265, is deemed to be in our favor. The principle for which we con-

tend, that the bonds declared on were void at common law, is, we conceive, conceded in that case; and the only question was, what constituted an assignment of the instrument then sued on. The court held the bequest to be such assignment, especially as it was delivered to plaintiff by the executor, who was the party owing and sued. The objection we make in this case at bar, that these bonds were void in their inception, could not be made in that. The instrument there was confessedly valid, and the objection made was, that it was extinguished by coming to the hands of the executor. Whether these bonds can be made valid by any indorsement, and whether the court would so hold in a case in which the pleadings were consistent with a case so made, as before observed, it is not necessary now to inquire.

The rule admitted by defendant in error (see page 3 of his brief), that "there is a technical objection to the jurisdiction of a court of law in cases of suit on a bond in which the same party is obligor and obligee, and such suits are properly cognizable in a court of equity, because it is in such courts only that adequate relief can be given," is, however, all-sufficient for plaintiff in error in this case. We admit, though these bonds are void at common law, the obligors can be compelled to do justice by a court of equity. The defendant in error states, on same page in his brief, that these bonds are by one "company of persons to another company or association, and one of the persons is a member of both." This is but a partial statement of the case. If it had been stated, also, that these *bonds were given for [*582 lands, for which lands bonds to make titles were given by the obligees, and that the vendors are unable to make good titles, the justice of the rule conceded by defendant in error, and the reason and object of a defence against these bonds at law would be manifest, for, in such case, a court of equity is the only tribunal proper to decide between the parties.

It can scarcely be necessary to observe, that the rule of the federal courts, to follow the decisions of the highest state court in the construction of the local statutes regulating practice in suits, has never been held to apply to the territorial courts, which are made subject to the appellate and revisory power of this court by act of Congress, which courts are created by federal legislation, and, indeed, the legislation of the territory wholly derived from federal authority; nor does the rule apply to the decision of a state court, when the question is, as in this case, not as to a mere matter of practice, but as to a fundamental rule of common law, and whether it has been abrogated by the statute. Whether three or four,

out of five, judges of the Florida court concurred in the decision now under examination, we do not deem important. If all had concurred, and if erroneous, it should be reversed; but, in answer to the statement in the brief on the other side on this subject, we would remark, that the only judge who filed a dissenting opinion speaks of the decision as being made by "a majority of the court."

Mr. Thompson, for defendant in error.

This was an action of debt, instituted in the Superior Court of the Middle District of Florida by Williams against the present plaintiff in error, as one of the obligors of four joint and several bonds, made by John Judge, Edward Bradford, and William P. Craig, payable to Hector W. Braden, William B. Nuttall, and William P. Craig, or order, and by the said obligees assigned to Robert W. Williams, the defendant in error in this court.

The declaration contains five counts,—one upon each bond, and the fifth upon an account stated.

The defendant pleaded two pleas; the first applicable to the first four counts, and the second, a plea of *nil debet* to the fifth count. The plea to the special counts craves oyer of the writings obligatory, and alleges, that William P. Craig, one of the obligors, "was and is the same identical person named William P. Craig," as one of the obligees in said bonds, and the same are therefore null and void in law, and not the deeds of the said Judge. To this plea there was a general demurrer and joinder, and the Superior Court sustained the demurrer, and gave judgment for the plaintiff (Williams) according to the agreement of counsel filed in the record.

The cause was removed to the Court of Appeals of the
*583] Florida *Territory, which court affirmed the judgment of the Superior Court.

The question which presents itself for consideration in this case is this:—Does the fact alleged in the plea, and admitted by the demurrer, of the identity of William P. Craig, one of the obligors, as one of the obligees, render the bonds null and void in law as to all the obligors, so as to defeat the right of action of Robert W. Williams, the assignee?

We maintain the negative of this proposition, and contend that the present case is clearly distinguishable from the cases cited by the plaintiff in error in argument in the court below, and which will doubtless be pressed upon the consideration of the court here. It was said that such an instrument was void, because Craig could not deliver the instrument to himself, and delivery was essential to the validity of a

bond, and because no action could be maintained upon it; the same person cannot be plaintiff and defendant.

This case, however, is not to be determined by the rules of the common law, but by the act of the legislative council of Florida, which has made some important alterations in the law as it formerly stood.

By the thirty-third section of the act of 1828, it is provided, —"That it shall not be necessary for any person who sues upon any bond, note, covenant, deed, bill of exchange, or other writing whereby money is promised or secured to be paid, to prove the execution of such bond, note, covenant, deed, bill of exchange, or other writing, unless the same shall be denied by the defendant under oath."

The thirty-fourth section provides,—"That the assignment or indorsement of any of the forementioned instruments of writing shall invest the assignee or indorsee thereof with the same rights, powers, and capacities as might have been possessed by the assignor or indorser. And the assignee or indorsee may bring suit in his own name," &c. See Duval's Comp., p. 96.

The character of the transaction, as inferrible from the instruments, seems to have been an indebtedness of several persons composing one joint company, of which Craig was one, to another company of several persons, of which he was also a member, and the bond was executed as the evidence of that indebtedness. We admit that delivery is essential to the complete execution of every deed, but we contend that where there are several co-obligees, a formal delivery to all is not necessary (*Moss* v. *Riddle*, 5 Cranch, 351), and we presume where there are several co-obligors a formal delivery by all to the obligees is equally unnecessary. In this case we see no valid objection to the delivery of these bonds by Judge, Bradford, and Craig, the obligors, or by some one of them, to Braden or Nuttall, representing the obligees.

"Delivery of a deed may be express, or implied by circumstance,—by saying something and doing nothing,—or by doing *something and saying nothing." Shep. Touch., 57; 4 Halst. (N. J.), 153; 1 Johns. (N. Y.), Cas., 253; 1 Har. & G. (Md.), 324; 1 Har. & J. (Md.), 323. [*584

But suppose the bonds were inchoate, or incomplete in the hands of the obligors for want of delivery, because Craig could not deliver to himself. The statute which we have referred to will, upon the assignment of the instrument, avoid the mere technical objection by providing a person to whom Craig could and did deliver the instruments. Judge and Bradford sealed and delivered the obligations to the obligees,

—Craig sealed, but could not deliver, because he was one of the obligees,—the execution of the bond was therefore incomplete until Craig, joining the other obligees in the assignment to Williams, by that single act completed the execution; Williams, the assignee, being invested by the statute with "all the rights, powers, and capacities" of his assignors, and the bond becoming by the mere operation of the statute payable to Williams, the assignee.

The instruments were not technically void, because inchoate; they were merely in the progress of creation, and had life and vigor when complete and perfect. In *Kent* v. *Somerville*, in the Court of Appeals of Maryland, it was held that a bequest by the obligee of a single bill was an inchoate transfer of the bill in writing, which when assented to by the executor is made perfect, and vests at law in the legatee the *bonâ fide* title or interest in the bill. 7 Gill & J. (Md.), 265, 271.

The bequest in this case was not held void because inchoate and incomplete; it was only inoperative till it received the assent of the executor, which completed the act of transfer.

Next, we contend that the bonds were not void because Craig could not sue himself. This is not precisely the case of a bond by one person to himself; it is of one company of persons to another company or association, in which one of the persons is a member of both.

We admit there is a technical objection to the jurisdiction of a court of law in such a case; that such suits are properly cognizable in a court of equity, because it is in the latter courts only that adequate relief can be given. It is quite common in the mercantile world for one person to be a member of two firms, and for one of such firms to become indebted to the other, yet we have never known such a contract to be held and deemed void, because a court of common law would not take jurisdiction. And why should this transaction be deemed void, because the parties chose to use a sealed instrument as the evidence of their contract?

As the law formerly stood in Florida, before the act of 1828 before cited, there was a technical objection to the jurisdiction of a court of law upon the bonds; but the act of 1828, making bonds and "all other instruments whereby money is promised or secured *to be paid" assignable, *585] and giving the assignee a right to sue in his own name, avoids the objection, and, instead of forcing him to use the names of the original obligees, which would drive him for his remedy to a court of equity, throws open to him the courts of law. The suit is in the name of Williams, the assignee; the

plaintiff and defendant on the record are not the same person.

In Florida, since the act of 1828, the analogy between bonds and notes, in regard to their negotiability, is complete. Prior to the Stat. 3 and 4 Anne, in England, promissory notes were regarded as mere choses in action; the transfer or assignment did not vest the transferee with a right to sue in his own name; the statute gave them this negotiability by putting them on the same footing with inland bills of exchange.

It is, and has been for many years, a common practice to draw both bills of exchange and notes payable to the order of the drawer and maker, and then, by indorsing and putting them into circulation, give them vitality and full effect. Now it must be admitted that the action on a note, at law, prior to the statute of Anne, must have been in the name of the payee, for the use of the assignee or indorsee; and if the note were payable to the maker's own order, such action would have been liable to the common law objection, that the plaintiff could not sue himself; but since the statute of Anne, giving the assignee or indorsee a right to sue in his own name, courts of law have sustained actions in the names of indorsees, or notes payable to the maker's own order, and by him indorsed to the plaintiff. This is expressly recognized in the Court of Errors in New York, in *Smith* v. *Lusher*. In this case, a note was made by a partnership composed of several persons, payable to one of the firm, and it was held, that, though no action could be maintained by the payee, because he was both payee and one of the makers, yet the plaintiff, to whom it had been transferred by indorsement, might sue at law upon the note as indorsee, and recover. It was, say the court, like a note payable to the maker's own order, and by him indorsed and put into circulation. See 5 Cow. (N. Y.), 689.

The case of *Kent* v. *Somerville*, cited before from 7 Gill & J. (Md.), 265, also bears strongly upon this case, if not directly in point. In that case, S., the holder and obligee of a bond, bequeathed the same specifically to A., and made T., the obligor, his executor; upon the demise of S., the executor, who was also obligor, assented to the legacy and delivered it to the legatee. It was objected that the bond was a chose in action of the testator, and a suit upon it could only have been brought by the executor, and that he could not sue himself. But the court held, that the bequest was an inchoate assignment, rendered perfect by the assent of the executor, and that, although, as the law in Maryland formerly stood, he could not sue upon it at law, either in the name *of the obligee, because he was dead, or in the name of the [*586

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executor, because he was the obligor and could not sue himself, yet, by the act of 1829, c. 51, giving to the assignee of a bond a right to sue in his own name, he was enabled to maintain the action.

The application to the case at bar will be seen in this: when the bond, by the demise of S., passed to the executor, it was in the same position as the bonds in the present case while in the hands of the obligees; a suit at law could not be maintained upon it; but when the executor, who was also the debtor, perfected the assignment by his assent, then the objection was removed; so in the case at bar, where the objection to the jurisdiction of a court of law, because of the identity of Craig as obligor and obligee, was removed by the assignment to Williams.

It was urged in the court below, that the language of the thirty-fourth section of the act of 1828 was restrictive in its character, and gave to the assignee no other "rights, powers, and capacities" than those possessed by the assignee; but there are no negative or restrictive words in the section, no words of limitation. It expressly gives the same rights, but does not prevent the assignee from acquiring any other rights which necessarily result from, or spring out of, the act of assignment; and one of the "rights, powers, and capacities" possessed by the assignee beyond those previously had by the assignor, and resulting from or springing out of the assignment, by the mere operation of law, is the removal of the technical objection to the jurisdiction of a court of law.

It was also urged in the court below, that the mention of notes, in the thirty-fourth section of the act of 1828, was superfluous, as they were before negotiable by the statute of Anne. We do not see any force in the argument as applied to this case, but if there should be, it is easily answered. When the act of 1828 went into operation, the statute of Anne was not of force in Florida; the act adopting the common law and the statutes of Great Britain was not passed until November, 1829. Duval's Comp., 357.

It is believed that all the cases cited by the plaintiff in error in the court below were suits brought by the obligees against the obligors, where there was no assignment, or where the assignment did not by law give the assignee a right to sue in his own name.

The view of the case here presented was fully sustained by four out of the five judges composing the Court of Appeals of Florida, and upon it we confidently rest our right to a judgment of affirmance in this court.

Mr. Justice NELSON delivered the opinion of the court.

Whether the obligees of the bonds in question could have maintained an action at law against the defendant is a question we need not determine, though it is not easy to perceive the force of the objection urged against it, namely, [*587 that Craig, *one of the co-obligors, is also an obligee. The bond is joint and several, and the suit against Judge, one of the obligors; and if it had been brought in the name of the obligees, Craig would not have been a party plaintiff and defendant, which creates the technical difficulty in maintaining the action at law. It would have been otherwise if the obligation had been joint and not several, for then the suit must have been brought jointly against all the obligors.

It has been held, that if two are bound jointly and severally, and one of them makes the obligee his executor, the obligee may, notwithstanding, maintain an action against the other obligor. *Cock* v. *Cross*, 2 Lev., 73; 5 Bac. Abr., 816, tit. Oblig., D. 4.

But conceding, for the sake of the argument, the objection to be well taken, that a suit at law would not lie in the name of the obligees, we have no difficulty in maintaining it, even in the aspect in which the case is presented, and has been argued, before us.

By an act of the legislature of Florida it is provided,—"That it shall not be necessary for any person who sues upon any bond, note, &c., to prove the execution of such bond, note, &c., unless the same shall be denied by the defendant under oath." And also,—"That the assignment or indorsement of any of the forementioned instruments of writing shall vest the assignee or indorsee thereof with the same rights, powers, and capacities as might have been possessed by the assignor or indorser. And the assignee or indorsee may bring a suit in his own name." Duval's Comp., p. 96, §§ 33, 34.

The bonds have been duly assigned in this case, and the suit is in the name of Williams, the assignee, and it being thus authorized by the laws of Florida, all difficulty as to the remedy at law, arising out of the circumstance of the same party being plaintiff and defendant, is removed.

The act just recited provides that the assignee shall be vested "with the same rights, powers, and capacities as might have been possessed by the obligees," and inasmuch as the bonds were uncollectible, at law, in the hands of the obligees, it has been argued that, upon the words of the statute providing for the assignment and suit in the name of the assignee,

they must be equally invalid and inoperative after the assignment, and in his hands.

This argument, doubtless, would be well founded and conclusive against the plaintiff, if the objection to the bonds was such as went to vitiate and destroy the legal force and effect of their obligation, such as usury, illegality, or the like, which would constitute a valid defence to a suit, in any form in which it might be brought. So, in respect to any other defence in discharge of the obligation, such as payment, release, and the like. For the assignee takes the bonds subject to every defence of the description mentioned; and can acquire no greater rights by virtue thereof than what belonged at the time to the obligees. This, we think, is what the *588] *statute intended, and is all its language fairly imports; and is, indeed, only declaratory of what would have been the legal effect, without the particular phraseology of the section.

But the only objection here made to the bonds in the hands of the obligees is, the want of legal validity in a court of law, arising out of the difficulty as to the parties, one of them being common to both sides of the obligation; not that they are altogether void and uncollectible, for it is conceded they might have been enforced in a court of equity. They are ineffectual at law, from defect of remedy.

Now, the assignment, and ability to sue in the name of the assignees, removed at once this difficulty, and left him free to pursue his remedy at law; and, as all parties concerned are to be taken as having assented to the assignment and delivery to the assignee, including Craig himself, and the suit in his name being sanctioned by the law, we are unable to perceive any well grounded objection to the judgment.

It has been suggested, that there could have been no delivery of the bonds to the obligees, and hence none by them to the plaintiff, so as to bind the defendant. But the obvious answer is, that all the parties, except Craig, were competent to make a delivery, and as he joined in the assignment, it is not for him to set up the objection for the purpose of invalidating his own act. The inchoate or imperfect delivery as to him in the first instance, arising out of his double relation to the instruments, became complete by his joining in the assignment and delivery to the plaintiff.

The common case of one partner drawing a bill upon his firm, payable to his own order, or of partners making a promissory note payable to the order of one of the firm, which becomes valid in the hands of a *bonâ fide* holder, and collectible at law, affords abundant authority for the principle of the

decision in this case. *Smith* v. *Lusher*, 5 Cow. (N. Y.), 688 *Smyth* v. *Strader et al.*, decided this term, *ante*, p. 404.

The statute of Florida has put bonds on the footing of bills of exchange and promissory notes, so far as respects negotiability and right to sue in the name of the assignee.

The above principle is therefore strictly applicable to the case in hand.

We are of opinion, the judgment of the court below should be affirmed.

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*JOHN HUNT, PLAINTIFF IN ERROR, *v.* J. & M. PALAO, DEFENDANTS. [*589

Upon the admission of Florida as a state, the records of the former Territorial Court of appeals were directed by a law of the state to be deposited for safe keeping with the clerk of the Supreme Court of the state.

No writ of error can be issued to bring up a record thus situated, the Territorial Court being defunct, and the Supreme Court of the state not holding the records as part of its own records, nor exercising judicial power over them.[1]

Nor could a law of the state have declared the records of a court of the United States to be a part of the records of its own state court, nor have authorized any proceedings upon them.[2]

If the record were to be brought up under the fourteenth section of the act of 1789, it would be of no avail, because there is no court to which the mandate of this court could be transmitted.

THIS was a motion made to bring up the record in the above case, which had been decided by the Territorial Court of Appeals of Florida previously to the admission of Florida as a state.

The motion was as follows:—

"*Mr. Westcott*, in behalf of John Hunt, submitted to the court a certified copy of the record of the opinion of said Court of Appeals, and of said judgment in said case, and suggested to the court that said Court of Appeals was defunct by the admission of the Territory of Florida as a state, on the 4th of March last, and that all the records and papers of said Court of Appeals, and the record aforesaid in said case, had been placed, by the act of the General Assembly of the said state, in the custody and keeping of the clerk of the Supreme Court of said state, and also that said case was a case of Federal jurisdiction; and he moved this court to allow a writ of error to remove said record and judgment into this court,

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[1] CHANGED BY STATUTE. *Benner* v. *Porter*, 9 How., 245. EXPLAINED. *Clinton* v. *Englebrecht*, 13 Wall., 448.

[2] CITED. *Atherton* v. *Fowler*, 1 Otto, 146. See *McNulty* v. *Batty*, 10 How., 78.

with directions to the clerk of this court to direct the same to the judges of said Supreme Court of said state, and to the clerk aforesaid having the custody of said record as aforesaid, in order that said record and judgment may be certified to this court, and a return to said writ of error made by said clerk of said Supreme Court of said state."

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made for process from this court to bring here for revision the record and proceedings of the late Territorial Court of Appeals of Florida, in the case of *Hunt* v. *The Lessee of M. & S. Palao*, in which judgment was rendered in favor of the latter, at February term, 1844.

Since Florida ceased to be a Territory and became a state, a law has been passed by the state, directing the records and papers of the above-mentioned Territorial Court to be placed in the custody of the clerk of the Supreme Court of the state; and under this law, the record in the case in question is now in his possession for safe keeping.

*590] *As Congress has made no special provision for a case of this kind, the appellate power of this court, if exercised at all, must be exercised in the manner prescribed by the general laws of Congress upon that subject. Under the act of 1832, writs of error to the Territorial Court of Appeals were to be prosecuted according to the provisions and regulations of the twenty-fifth section of the judiciary act of 1789. And assuming the case in question to be one subject to revision in this court, according to these acts of Congress, yet the appellate power must be exercised in the manner prescribed by these laws; and under the act of 1789, the writ of error must be directed to the court which holds the proceedings as a part of its own records, and exercises judicial power over them. But the court which rendered the judgment in the case before us is no longer in existence; the proceedings are not in the possession of any court authorized to exercise judicial power over them, but are in the possession of an officer of another court, merely for the purpose of safe keeping. For the law of Florida does not place these records in the custody of the state court, but in that of the clerk; nor does it subject him to the control of the court in any manner in regard to them. And indeed if it had placed them in the custody of the court, it would not have removed the difficulty; for the law of the state could not have made them records of that court, nor authorized any proceedings upon them. The Territorial Court of Appeals was a court of the

United States, and the control over its records, therefore, belongs to the general government, and not to the state authorities; and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred; and how these judgments shall be carried into execution, or reviewed upon appeal or writ of error.[1]

It has been suggested that a writ of error may issue, under the fourteenth section of the act of 1789, to the person having the actual custody of the record, upon the ground that such a writ is necessary to the exercise of the appellate powers of this court. But if the language of that section would justify such a construction, and the record and proceedings were brought here by a writ of error, either to the Supreme Court of the state or to the clerk, and the judgment of the Territorial Court found to be erroneous and reversed, still there is no tribunal to which we are authorized to send a mandate to proceed further in the case, or to carry into execution the judgment which this court may pronounce. Certainly we could not send it to the Supreme Court of the state, for it is not their judgment or record, nor have they any power to execute the judgment given by the Territorial Court. Neither, for the same reasons, could we send such a mandate to the District Court of the United States, unless authorized to do so by a law of Congress. And it would be useless and vain for this court to issue a writ of error, and bring up the record, and proceed to judgment *upon it, when, as the [*591 law now stands, no means or process is authorized by which our judgment could be executed. We think, therefore, that no judgment or decree rendered by the late Territorial Court can be reviewed here by writ of error or appeal, unless some further provision on that subject shall be made by Congress. Consequently, the motion in this case must be refused.

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*THE STATE OF RHODE ISLAND, COMPLAINANT, *v.* THE STATE OF MASSACHUSETTS, DEFENDANT. [*591

The grant of Massachusetts, confirmed in 1629, included the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof."

In 1662, the grant of Connecticut called to be bounded on the north by the line of the Massachusetts plantations.

In 1663, the grant of Rhode Island called to be bounded on the north by the southerly line of Massachusetts.

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[1] CITED. *Deans* v. *Wilcoxson*, 18 Fla., 549.

Whether the measurement of the three miles shall be from the body of the river, or from the head-waters of the streams which fall into it, is not clear. The charter may be construed either way without doing violence to its language.

The early exposition of it is not to be disregarded, although it may not be conclusive.

In 1642, Woodward and Saffrey fixed a station three miles south of the southernmost part of one of the tributaries of Charles River.

An express order of the crown was not necessary to run this line, as it was not then a case of disputed boundary.

In 1702, commissioners were appointed by Massachusetts and Rhode Island to run the boundary-line, who admitted the correctness of the former line.

In 1710, Rhode Island appointed an agent to conclude the matter on such terms as he might judge most proper, who agreed that the stake set up by Woodward and Saffrey should be considered as the commencement of the line.

In 1711, Rhode Island sanctioned this agreement.

In 1718, Rhode Island again appointed commissioners with power to settle the line, who agreed that the line should begin at the same place. This was accepted by Massachusetts and Rhode Island, the line run accordingly by commissioners, and the running approved by Rhode Island.

The allegation that the commissioners of Rhode Island were mistaken as to a fact, and believed that the stake was within three miles of the main river and not one of its tributaries, is difficult to establish, and cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge.

If the first commission was mistaken, it almost surpasses belief that the second should again be misled.

To sustain the allegation of a mistake, it must be made to appear, not only that the station was not within the charter, but that the commissioners believed it to be within three miles of the river, and that they had no knowledge of a fact as to the location of it which should have led them to make inquiry on the subject.

Even if the calls of the charter had been deviated from, which is not clear, still Rhode Island would be bound, because her commissioners were authorized to compromise the dispute.

It is doubtful whether a court of chancery could relieve against a mistake committed by so high an agency, in a recent occurrence. It is certain that it could not, except on the clearest proof of mistake.

This mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station.

Even if the mistake were proved, it would be difficult to disturb a possession of two centuries by Massachusetts under an assertion of right, with the claim admitted by Rhode Island and other colonies in the most solemn form.

For the security of rights, whether of states or individuals, long possession, under a claim of title, is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety, than in a case of disputed boundary.

THIS was a case of original jurisdiction in the Supreme Court, which now came up for final argument, having been partly discussed at a former term, and reported in 12 Peters.

A full statement of the case, with an analysis of the historical documents filed by the respective parties, would require a volume. The facts are summarily recited in the opinion of the court, which the reader is requested to peruse before reading the arguments of counsel.

The case was argued by *Mr. Randolph* and *Mr. Whipple*, on

the part of Rhode Island, and by *Mr. Choate* and *Mr. Webster*, on the part of Massachusetts.

The points of the arguments will be sufficiently understood by transcribing the briefs of the respective counsel. *Mr. Randolph* opened the case for the complainant. *Mr. Choate* and *Mr. Webster* followed, on the part of the defendant, and *Mr. Whipple* concluded the argument, on behalf of Rhode Island.

The brief on the part of the complainant was as follows:—

1st. That the words in the charter of Massachusetts of 1628, "three miles north of the Merrimack River, and the most northerly part thereof, and three miles south of Charles River, and the most southerly part thereof," according to their usual, ordinary, and long-established import, authorized lines three miles north and south of the Merrimack and Charles proper, and did not comprehend the tributary streams of either.

2d. That this was the construction given to the above words by the first settlers, and the colonial government of Massachusetts; that they not only thus limited their claim, but erected a bound-house three miles north of the Merrimack proper, near its mouth, in 1636, at a period when rival and opposing claims, as well as adversary settlements all along the line, forewarned her that she had reached the utmost limit of her chartered rights.

3d. That, notwithstanding these stimulating inducements, Massachusetts neglected to exercise any jurisdiction over a very large body of inhabitants, who had possessed the territory immediately north of her from 1621 until 1641, when, upon "the reiterated and earnest solicitation of the inhabitants," she received under her protection these inhabitants, who, according to her subsequent and very ambitious pretensions, had been all along her own people, upon her own soil, and famishing for want of sustenance and protection from their own government.

4th. That in 1638, 1639, and up to 1642, Massachusetts surveyed *both her northern and southern lines. [*593
Taking the same principle as her guide on both her borders, she found the source of the tributary streams of the Charles on the south, and the Merrimack on the north, running her south line at or near the Woodward and Saffrey station, and her north from some part of Lake Winnepiseogee, thereby embracing all the State of New Hampshire, and nearly all the State of Maine, and she extended a jurisdiction, savoring strongly of conservatism, if not of severity, over both.

5th. That Massachusetts continued to exercise her jurisdiction over these extended limits from 1641 till 1676, except

being ordered away from Maine by the king's commissioners, somewhere about 1660, which order she disobeyed, when John Mason, the proprietor of New Hampshire, presented his petition to the king. The merits of the claims were closely scrutinized by the king and council, aided by the chief justices of the King's Bench and Common Pleas. Massachusetts was unsuccessful in her new pretensions, and obliged to retire to the old bound-house, upon the Merrimack proper.

6th. That the decree of the king and council of 1677 was not a judicial decision merely, which other judicial bodies are at liberty to respect or not, according to its merits, but the decision of a grantor in relation to a grant, revocable in its very nature,—a grant of jurisdiction, and not of territory; that consequently the will of the king, thus expressed, was tantamount to a revocation of the old grant and the issuing of a new one.

7th. That the agreement of 1710 and 1718 was entered into by the Rhode Island commissioners, upon the representation of the Massachusetts commissioners that the Woodward and Saffrey station was three miles from Charles River proper, and not three miles from any of its tributary streams, as is stated in the answer of Massachusetts. That no such pretension was then made, or ever made by Massachusetts after said decision of 1677. On the contrary, the whole entire agreement of 1710–1718 was entered into by Rhode Island, under the full belief that said station was three miles, and no more, from Charles River proper.

8th. That t e only matter in dispute between said commissioners, from the first to the last, was not as to the station or starting-place, but in regard to the course of the line; that no compromise was ever proposed by either party as to the starting-point; that both parties agreed upon the Woodward and Saffrey station, because it was represented and believed to be three miles from Charles River proper, according to charter; and that this mistake was not discovered until 1750.

9th. That in 1750 Rhode Island appointed commissioners to meet those of Massachusetts, in order to complete the execution of the agreement of 1710–1718; that being unable to find the Woodward and Saffrey station (still believed to be three miles from *Charles River proper), they were obliged to measure three miles from the river, and run an east and west line from its termination; that they erected monuments upon that line (four miles north of the pretended Woodward and Saffrey station), and the State of Rhode Island has claimed to that line, indicated by said bounds, still remaining, from that day to the present.

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10th. That it was never pretended by Massachusetts that the Woodward and Saffrey station was the fruit of compromise, or that it was three miles from the tributaries of Charles River, until as late as 1790, when the commissioners of Massachusetts endeavored to defend their claims upon that basis; that, on the contrary, Massachusetts, from 1710–1718 up to 1790, through her commissioners, uniformly claimed to the Woodward and Saffrey station, as being according to charter; and the agreement of Rhode Island of 1710–1718 as her title, and her only title, according to charter.

11th. That the assertion of the answer, that Massachusetts had claimed still further south (to the angle tree), and that Rhode Island claimed to Charles River proper, and that, upon these rival and opposing claims, a medium station was adopted, is contrary to the entire body of the evidence in the case, contrary to the fact, and mainly, if not entirely, the offspring of the active imaginings of learned and anxious counsel.

12th. That the answer is no evidence, coming from a corporation, in any case; much more as to matter not responsive to the bill.

13th. That Massachusetts never granted to the town of Providence the five thousand acres of land stipulated and covenanted to be granted by said agreement of 1710–1718; and that, in a court of equity, although covenants are independent, yet one will not be enforced without a full performance of the other. Best on Presumptions.

14th. Upon these facts the plaintiffs will contend that the agreement of 1710 was void,—

1. Because made under an evident and apparent mistake.

2. That it cannot operate to transfer four miles of the acknowledged territory of Rhode Island, because Rhode Island, as a colony, had no power to transfer her jurisdiction to Massachusetts.

3. That no confirmation can be presumed, because a confirmation of a void agreement is void itself.

4. Because a confirmation must have been of record in England, and also in Massachusetts, if not in Rhode Island; and that no case has gone the length of presuming the loss of a record, without some foundations being first laid to support such presumption.

5. Because Massachusetts has always claimed under the agreement of 1710–1718, and never alleged or pretended that there was any other title.

*6. Because the subject of the bounds of Massachusetts, involving the dispute in the present case, has been at various periods before the commissioners of the king, 1664· [*595

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before the king and council, 1677, 1737; and at various other times between Connecticut and Rhode Island; and no such confirmation has ever been suggested, but the direct reverse.

Cases as to Mistake of Facts.

"A man is presumed to know the law. But no man can be presumed to be acquainted with all matters of fact, and therefore an ignorance of facts does not import culpable negligence." Story Eq. Jur., 156.

"The general rule is, that an act alone, or contract made under a mistake or ignorance of a material fact, is voidable and relievable in equity." Id., 155.

If instruments be delivered up by mistake, and owing to ignorance of a transaction which would have made it unconscientious to hold the instrument and proceed at law, equity will relieve. 1 Madd. Ch. Pr. The case cited is the *East India Company* v. *Donald*, 9 Ves., from 275. A charter-party was delivered up to the defendant after a voyage, the provisions of which he had violated, the plaintiff being ignorant of the violation. It was agreed that there was no fraud nor misrepresentation, but the court said there was a plain mistake.

Tompkins v. *Bernet*, 1 Salk., 22. One of three persons paid money on a usurious bond, and afterwards recovered it back as paid by mistake, he not knowing the fact of the usury.

Bingham v. *Bingham*, 1 Ves. Sr., 126, in 1748. "An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.

"The bill was to have the purchase money refunded, as it appeared to have been the plaintiff's estate.

"It was insisted that it was plaintiff's own fault, to whom the title was produced, and who had time to consider it.

"Decreed for the plaintiff, with costs, and interest for the money from the time of bringing the bill; for the no fraud appeared, and the defendant apprehended he had a right. Yet there was a plain mistake, such as the court was warranted to relieve against, not to suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right."

Rhode Island gave away her own territory, instead of the territory which Massachusetts was entitled to.

Gee v. *Spencer*, 1 Vern., 32. A release set aside by reason of the misapprehension of the party. *Luxford's case* cited.

2 Ves. Sr., 400. A general release relieved against, as to particulars not in the knowledge of the party.

Evans v. *Llewellyn*, 2 Bro. Ch., 150. A conveyance set

*aside, as improvidently entered into; though no fraud or imposition.

N. B. The report of this case is more full in Cox. See *Leonard* v. *Leonard*, 2 Ball and B., 184.

An omission in an agreement by mistake stands on the same ground as an omission by fraud. Chit. Dig., tit. *Mistake*.

Ramsbottom v. *Gordon*, 1 Ves. & B., 168; 3 Atk., 388; 4 Bro. Ch., 514; 6 Ves., 334, n. *c*.

Cocking v. *Pratt*, 1 Ves. Sr., 400. J. Self, dying intestate, left a widow and daughter, then an infant, who, four months after coming of age, entered into an agreement with her mother concerning the distribution of the personal estate; which agreement was afterwards ratified by the daughter's husband. After the daughter's death, the husband brought a bill, as her administrator, to set aside the agreement, and to have a distributive share according to her right.

Master of the Rolls. "The daughter clearly did not intend to take less than her full share, her two thirds of the value, though what that was did not clearly appear; but she thought what was stipulated for her was her full share.

"The court will look with a jealous eye upon a transaction between parent and child. Whether there has been *suppressio veri* does not clearly appear.

"But there is another foundation to interpose, that it appeared afterwards that the personal estate amounted to more, and the party suffering will be permitted to come here to avail himself of that want of knowledge, not indeed in the case of a trifle, but some bounds must be set to it. The daughter would be entitled to five or six hundred pounds more, which is very material in such a sum as this, and a ground for the court to set it right. The daughter did not act on the ground of a composition, but took it as her full share; and if it appears not so, the court cannot suffer the agreement to stand. As to the ratification by the husband, he was as much in the dark."

Griffith v. *Trapwell*, June, 1732, was cited in the above case, "where one died intestate, leaving two sisters, the plaintiff's wife and the defendant's wife. The latter first got administration, and prevailed on the other to accept of an agreement for her share. There was a further agreement, that the plaintiff's wife should have a further share, reciting that she should have an equal share, and that there should be a decree for that. The plaintiff afterwards discovered the estate to be a great deal more, and brought a bill of review, and both the decree and agreement were set aside."

Pooley et al. v. *Ray*, 1 P. Wms., 354. The executor of a

mortgagee, coming before the master, and not admitting any
*597] of his mortgage to have been paid, proved his deed, and got a report for *the whole amount of his debt, £700, which report was afterwards confirmed and made absolute. Afterwards it appeared, under the mortgagee's own hand, that £353 had been paid by the mortgagor. The defendant had paid his money away to creditors.

Master of the Rolls. "Let the master see whether there has been a double payment, and as to so much as has been overpaid it must be allowed to the plaintiffs." This, on appeal, was confirmed by Lord Cowper.

Honor v. *Honor*, 1 P. Wms., 123. Articles, and a settlement mentioned to be made in pursuance thereof, were both made before marriage, but the settlement varied from the uses of the articles. Decreed to set the settlement aside.

Chancellor. "It is a plain mistake in varying the settlement from the articles, and this appearing upon the face of the papers, the plain reason of the thing, length of time, is immaterial." Same case, 2 Vern., 658; 1 Madd. Ch., 61.

But though a court of law will not grant a new trial merely to enable a party to get fresh witnesses, nor would a court of equity interfere on such grounds, yet where the admissions come from the party himself, upon a bill of discovery, filed after the trial, it is very different, and the court will in such case relieve. 1 Madd. Ch., 77; *Harkey* v. *Vernon*, 2 Cox, 12.

Under peculiar circumstances, however, excusing or justifying the delay, courts of equity will not refuse their aid in furtherance of the rights of the party; since in such cases there is no pretence to insist on laches or negligence, as a ground of dismissal of the suit. 1 Story Eq. Jur., 503, 504; *Lobdell* v. *Creagh*, 1 Bligh N. S., 255; 1 Fonbl. Eq., B. 1, ch. 4, p. 27, and notes; Jeremy Eq. Jur., B. 3, pt. 2, ch. 5, pp. 549, 550.

If the legatee allege that he knew not of his right, time is no bar. Nor when fraud is proved. Fonbl., as above.

Garland v. *Salem Bank*, 9 Mass., 408. An indorser paid a note, ignorant that no demand had been made upon the maker or notice to himself, though he was advised not to pay it. Held to be a payment by mistake, and he recovered back again. 4 Mass., 378; Id., 74; 5 Burr., 2672; 1 T. R., 712; 1 Bos. & P., 326; Doug., 638.

The case of *The Union Bank* v. *The Bank of the United States*, 3 Mass., 74, is a strong case. The marginal note is,—"If A., confiding, though improperly, in the mistaken affirmation of B., pay him money, A. shall recover it back."

The case was, the branch bank had received two bad checks,

which they supposed they had received from the Union Bank. They sent them to the Union Bank by their messenger, stating that they came from the Union Bank; whereupon the Union Bank paid them. Between the time of paying them by the Union Bank and the discovery of the mistake, Rawson, who drew them, failed, and *absconded; so that the [*598 branch bank lost the amount. Judge Parsons and the Supreme Court decided that the loss must fall on the branch bank, who committed the first error.

The cases in Doug. and Bos. & P., are both cases of payments by mistake, and as strong as the two cases in Mass. Reports.

Cases of Settlements and Marriage Articles being reformed on Account of Mistake.

Randall v. *Randall*, 2 P. Wms., 464, in 1728. In that case, the husband had confessed, under hand and seal, that both the articles and settlement limited the estate to his heirs in fee, when it was the intention of the mother of his wife to limit it to the heirs of the wife in fee. The articles and settlement were reformed. Lord Chancellor King decreed the estates to be settled upon the heirs of the wife in fee.

West v. *Erissey*, 2 P. Wms., 349, in 1726. Where the settlement made, before the marriage, varied materially from the articles, but stated to be made "in pursuance of the articles and performance," the settlement will be presumed to depart from the articles by mistake.

See note of Cox to the above case. See 3 Bro. P. C., 347, in 1727.

Honor v. *Honor*, 1 P. Wms., 123, in 1710, before Lord Chancellor Cowper, establishes the same principle. The articles limited the estates to the heirs of the body of the wife. The settlement (made before marriage, and in pursuance of the articles) was to the heirs of the body of the husband of the wife begotten.

Lord Chancellor. "It is a plain mistake in making the settlement vary from the articles."

After reciting the articles, he further says,—"And the articles being so, the settlement, which is said to be in pursuance of the articles, shows there was no alteration of the intention, nor any new agreement, between the making of the articles and the settlement. And this appearing upon the face of the articles and settlement, and in the plain reason of the thing, length of time is immaterial."

In the case of *Motteaux* v. *The London Ins. Co.*, 1 Atk., 545, in 1739, Halhead, as agent of the plaintiff, paid the defend-

ants fifteen pounds premium, being at the rate of three per cent.; which was the current premium then, upon the ship, at and from Fort St. George, and a label of such agreement was, on the 7th of August, 1733, entered in a book, and subscribed by Halhead and two of the directors. The policy was made out from Fort St. George. Lord Hardwicke rectified the mistake, saying that the policy ought to have conformed to the label.

In *Baker* v. *Paine*, 1 Ves., Sr., 458, in 1750, Lord Hardwicke rectified an agreement by previous minutes of the parties.

*599] In *Barstow* v. *Kilvington*, 5 Ves., 592, Lord Eldon rectified *a settlement by a previous letter of the party. See also a similar case cited in a note to that case.

Cases of Compromise.

If a person, after due deliberation, enter into agreement for the purpose of compromising a claim made *bona fide*, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a court of equity, without inquiring whether he in truth was liable to the claim, will compel a specific performance. *Atwood* v. ———, 1 Russ., 353; 5 Id., 149, affirmed on appeal.

If a party, ignorant of plain and settled principle of law, is induced to yield a portion of his indisputable right, equity will relieve; but where title is doubtful, and with due deliberation he enters into compromise, no relief is given, nor is consideration inquired into. 1 Sim. & S., 564.

No remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. *Goodman* v. *Sayers*, 2 Jac. & W., 249.

A compromise of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts in the knowledge of one of the parties only, cannot be supported. *Leonard* v. *Leonard*, 2 Ball & B., 171.

To constitute a fair compromise of right doubtful in point of law, the facts creating this doubt should be fairly stated. Ibid., 181.

It is essential to the validity of a compromise that both parties be in equal ignorance. Id., 182.

Defence of compromise is not proper for answer, but for plea only. 1 Ball &. B., 323.

Authorities as to Presumptions of Title.

"A grant of land will never be presumed from lapse of

time, unless it be so great as to create the belief that it was actually made, or unless the facts and circumstances show that the party to whom it is presumed to have been made was legally or equitably entitled to it." Note to Mathews on Presumptions, 296, ed. of 1830; 6 Cow. (N. Y.), 706; 3 Johns. (N. Y.), 269, 109; 1 Wash. C. C., 70.

No possession of one claiming under a defective title can raise a presumption of a good title. Mathews, 198, note; 5 Har. & J. (Md.), 230; 1 Id., 18; *Beal* v. *Lynn*, 6 Id., 336.

"Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence, being found, from experience, to be generally accordant with truth, and remain of force until repelled by contrary evidence.

*"Presumptions of fact are conclusions drawn from particular circumstances. Many of the presumptions [*600 of law were formerly considered too powerful to admit of contradiction, but this doctrine is now confined principally to the doctrine of estoppels." Mathews, 2; Phil. Ev., 6th ed., 146.

"The grounds upon which legal presumptions rest are various. In some cases on the laws of nature and the general principles of justice, on the nature and general incidents of property. In others, on those innate principles of self-interest and prudence, which generally govern the conduct of men," &c. Mathews, 2.

Other legal presumptions originate in the policy of the law. Of this description, however, as they relate to property, examples are rare.

"Presumptions of fact are such as are usually found by experience to be consequent upon, or coincident with, the facts presumed. They must correspond with, and be adequate to account for, the circumstances actually proved." Mathews, 4.

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents, &c., unless proved to have been lost or destroyed." Mathews, 4, in note; *Brunswick* v. *McKean*, 4 Greenl. (Me.), 511.

"Presumptions from evidence of the existence of particular facts are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." Id., p. 5, note; *Bank of United States* v. *Corcoran*, 2 Pet., 133.

"Following up this principle, courts will, in favor of long

possession, presume as well the existence of the needful instruments of conveyance, as the observance of all such acts and solemnities as are requisite to make actual assurances valid."

Fines and recoveries are an exception, which cannot be presumed without evidence directly pointing to them.

Act of Parliament, and grants from the crown, though assurances of record, are constantly presumed, within even the time of legal memory. Cowp. 102, 215; Jac. & W., 63, 159; 11 East, 488. See Am. authorities in note, p. 6, Mathews.

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands. The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it. It is absurd to say that a man has relinquished a right of which he is not aware." Mathews, 17, 18; Sel. Ch. Cas. 11; 2 P. Wms., 736; per Sir Wm. Grant, 2 Meriv., 362.

In England there is but little difference between the doc-
*601] trine of *prescription, and the doctrine of presuming lost grants, in regard to the objects embraced by the two principles.

The doctrine of prescription never extended to lands in fee, or corporeal hereditaments, nor did it extend to such incorporeal rights as could exist only by matter of record; such as many species of royal franchise, deodands, traitors' or felons' goods, &c.

On the other hand, the doctrine of presuming grants never extended to corporeal hereditaments; but, unlike the doctrine of prescription, it embraced all incorporeal hereditaments, whether evidenced by matters of record, or purely by grant. Patents from the crown, and acts of parliament even, were presumed to exist.

The great difference between the two doctrines consisted mainly in the length of time necessary for their successful operation.

Under the doctrine of prescription, as it exists in England to this day, immemorial usage must be established. Therefore, if it appears that the title to be presumed had no existence at any time subsequent to the 1st Rich. 1 (1189), there is an end to the power and agency of prescription.

On the other hand, while the doctrine of presuming grants embraced a rather wider range of objects or titles, its children were deemed legitimate, though comparatively of modern birth.

This latter doctrine, however, during the whole of its

minority, experienced considerable opposition from many wise, as well as learned, lawyers. 2 Ev. Poth., 139.

The Parliament of England, by the 2d and 3d Wm. 4 (1822), were obliged to remedy some of the evils growing out of judicial fictions. The real property commissioners express themselves as follows:—

"Amid these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seized in fee of the servient, to another seized in fee of the dominant, tenement. But, besides the objection of its being well known to the counsel, judge, and jury, that the plea is unfounded in fact, the object is often frustrated by proof of the fact of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the act."

"In addition to all this," says Best, "it was well observed, that the requiring juries to make artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed. In a word, it became apparent that the evil could only be remedied by legislation, and the statutes of Wm. 4 were passed for that purpose."

*"Whether deeds of conveyance can be presumed, in cases where the law has made provision for their registration, has been doubted. [*602

"The point was argued but not decided, in *Doe* v. *Hirst*, 11 Price, 475. The better opinion seems to be, that though the court will not in such cases presume the existence of the deed as a mere inference of law, yet the fact is open for the jury to find, as in other cases." Note to 1 Greenl. Ev. 52.

In the United States, while the doctrine of presuming a grant has been applied to corporeal as well as to incorporeal hereditaments, and the sphere of its operation very much enlarged, yet, at the same time, the principle of its operation has been circumscribed within very narrow, and in all probability very safe, grounds. It is placed beyond the reach of the innovation of mere book lawyers and book judges, and rests, as a mere matter of fact, upon the common sense of a jury.

The judges in England were obliged to flee to this matter-of-fact view, as a refuge from the rapidly increasing evils growing out of artificial presumptions. In this country, upon this subject, there are no artificial presumptions. It is simply a case of circumstantial evidence.

In 6 Cow. (N. Y.), 725, it is said:—"A grant of land will never be presumed, unless the lapse of time is so great as to create a belief that it was actually made; or unless the facts and circumstances show, that the party to whom it is presumed to have been made was legally or equitably entitled to it." Mathews on Presumption, 296, note, ed. 1836; 6 Cow. (N. Y.), 706; 3 Johns. (N. Y.), 109, 269; 1 Wash. C. C., 70.

Same principle in 2 Wend. (N. Y.), 13–15.

In *Ricard* v. *Williams*, 7 Wheat., 59, this court decided, that "Presumptions of a grant, arising from a lapse of time, are applied to corporeal as well as incorporeal hereditaments. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are entirely consistent with the non-existence of a grant. *A fortiori*, they cannot arise when the claim is of such a nature as is at variance with the supposition of a grant."

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents in the custody of officers charged with their preservation, unless proved to have been lost or destroyed." Cowen & Hill's Notes to Phillips, Part 1, p. 364; *Brunswick* v. *McKean*, 4 Greenl. (Me.), 508.

See Cowen & Hill's notes, generally, on subject of presumptions.

"No possession of one claiming under a defective title can *raise a presumption of a good title." Mathews, 198, note; 5 Har. & J. (Md.), 230; 1 Id., 10; 6 Id., 336.

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"Presumptions from evidence, of the existence of particular facts, are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." *Bank of United States* v. *Corcoran*, 2 Pet., 133.

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands.

"The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it.

"It is absurd to say, that a man has relinquished a right of which he is not aware."

Mathews on Pres., 17, 18; Sel. Ch. Cas., 11; 2 P Wms., 730; per Sir William Grant, 2 Meriv., 362.

Cases upon Presumptive Evidence.

Beedle v. *Beard et al.*, in 4th Ja. 1 (1627), 12 Coke, 5.

In 31st Ed. 1 (1303), the king being seized of the manor of Kimbolton, to which the advowson of the church was appendant, granted said manor, with the appurtenances, to Humphrey de Bohun, Earl of Hereford, in tail general. Humphrey de Bohun, the issue in tail, by his deed, in the 40th Ed. 3 (1367), granted the said advowson, then full of an incumbent, to the prior of Stonely and his successors; and at the next avoidance they held it *in proprio usus;* and upon this appropriation made *concurrentibus iis quere in jure requirunter.* After the death of the incumbent, the said prior and his successors held the said church appropriate, until the dissolution of the monastery. In 27th Hen. 8 (1630), the said manor descended to Edw., Duke of Buckingham, as issue to said estate tail. The reversion descended to Henry VIII. The Duke, in 13th Hen. 8, was attaint of high treason. In 14th Hen. 8, the king granted said manor, &c., with all advowsons appendant, to Richard Wingfield, and the heirs male of his body. In 16th Hen. 8, it was enacted by parliament, that the Duke shall forfeit all manors, &c., advowsons, &c., which he had in 4th Hen. 8.

The king, 37th Hen. 8, "granted and sold for money the said rectory, &c., of Kimbolton, as inappropriate in fee, which by mesne conveyance came to the plaintiff for £12,000. In the 37 Eliz., Beard, the defendant, did obtain a presentation of the queen by lapse, pretending that the said church was not lawfully appropriate to the said prior of Stonely.

"1st. For this, that Humphrey, who did grant it to the said prior, had nothing in it, for that it did not pass to his ancestor by these words, *Manorium cum pertinentibus.*"

*In the case, the advowson was bought and paid for in 1303; was in the possession of the first taker, Earl of Hereford, until 1367, sixty-four years. It was then granted to a corporation, the prior of Stonely, in whose possession it remained until the dissolution of the monasteries, in the reign of Henry VIII., 1530, one hundred and sixty-three years more. It descended to the Duke of Buckingham, upon his attainder was forfeited to the crown, and Henry VIII. granted the manor and advowson to the plaintiff for a pecuniary consideration. The action was tried in 4th Ja. 1, 1627, three hundred and twenty-four years after the possession commenced under the first grant. [*604

Mayor of Kingston upon *Hull* v. *Horner*, Cowp., 102, in 1774.

The declaration stated the right of the plaintiff, as mayor,

to certain water-bailiff dues, for certain goods imported into Kingston.

In support of the title, the plaintiff produced,—

1. An entry upon the corporation books, entitled "A particular note of all such duties, &c., as by the water-bailiffs are to be received for the use of the mayor and burgesses of Kingston upon Hull, according to the order prescribed and set down in the year 1441, and continued and put in use from that time to the present day, 1st April, 1575." In this list were included the duties in question.

2. An order of the corporation, in the 13th Eliz., requiring the water-bailiff to keep these duties separate, &c.

Then followed a particular account of the receipt of these duties from 1545 to 1646, from 1648 to 1678, of persons who had rented the office of water-bailiff; also an account of dues for three years in 1726; and the testimony of persons who had paid the dues from 1734; together with an estimate of repairs by the corporation to the amount of £15,000.

The defence was, that the earliest book of the corporation was the 19th Ed. 3 (1346), and the date of their charter the 27th Ed. 1 (1299), a century subsequent to the time of legal memory, Rich. 1, 1199.

That the title, if any, to the duties in question could be supported only by prescription or charter. That the first did not exist, they being a corporation within legal memory. That the charter authorized the erection of the port, but granted no duties.

To this it was answered, that a usage of three hundred years was a sufficient ground to presume a grant of the duties, in consideration of the repairs, which it was in proof the corporation had constantly done from 1441 to the bringing the action.

Lord Mansfield said, there were two grounds to show that the evidence was sufficient to go to the jury:—

1. That there existed a port, with duties belonging to the king, previous to the charter of 5th Rich. 2. Consequently, a grant by Rich. 2 of the port would carry the duties along with it.

*605] *2. If this charter erected a new port, the king could not create duties. But that there might be some charter from the king creating and giving these duties, upon a ground which would support them in point of law, namely, upon the consideration of repairs, and the general advantage to be derived to the public from its being properly kept up.

The question that arises upon it is, "Whether, upon the evidence, it was properly left to the jury to presume such

grant between 1382 (date of charter) and 1441" (time of first collecting the duties). p. 106.

Lord Mansfield (p. 108). "A jury is concluded, by the statute of limitations, as a bar. So, in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right." Any written evidence, showing a time when the claim did not exist, is an answer to prescription. p. 109.

"But length of time, used merely by way of evidence, may be left to a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." p. 109.

"In questions of this kind, length of time goes a great way; but there is no positive rule which says, that a hundred and fifty years' possession, or any other length of time within memory, is a sufficient ground to presume a charter." p. 110.

The case of *Johnson & Humphrey* v. *Ireland*, 11 East, 279, presented the question, whether "the enfranchisement of copyhold may, upon proper evidence, be presumed even against the house."

The evidence offered and rejected by Heath was an entry, in the parliamentary survey, of sixpence rent against these premises for a hundred and sixty years, in the column of freehold, instead of six shillings and sixpence, in the column of copyhold.

The court admitted the evidence, observing that there were persons, between 1636 and 1649, competent to make the enfranchisement, "the king having continued his functions the greater part of the time." p. 283.

Fenwick v. *Reed*, 5 Barn. & Ald., 228, in 1821. In this case, Reed, the defendant, took possession of the estates of the plaintiff, in 1750, under an agreement to remain in possession until the debts were satisfied out of the rents and profits. In 1801, a suit in chancery was instituted by the plaintiff. Much evidence was offered on both sides. Bayley, Justice, told the jury, "that the real question was, whether they believed that a conveyance had actually taken place."

The court approved of this direction, and said,—"In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the case may be different. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance. As the defendant's *ancestors had [*606 originally a lawful possession, it was incumbent on them to give stronger evidence of a conveyance."

Abbott, Chief Justice, also says,—"In my opinion presumptions of grants and conveyances have already gone to too great lengths, and I am not disposed to extend them farther."

Bayley said,—"The question for the jury was a mere question of fact, whether there had been such a conveyance. The deeds of 1747 and 1752 were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it ever existed."

The case of *Howson* v. *Waterton*, 3 Barn. & Ald., 150 (1819), was a conveyance of copyhold lands (in 1743, by surrender in open court) to charitable uses; was declared void, for not complying with the provisions of 9 Geo. 2, ch. 36, which requires all conveyances to be executed in the presence of two witnesses, to be enrolled in chancery, and for the party to survive one year.

The court was asked to presume an enrollment.

Abbott, Chief Justice, said,—"No instance can be found, where the court have said that an enrollment has been presumed."

Bayley said,—"As to presuming an enrollment, if it had appeared that the rolls of chancery had been searched, and a chasm had been found about that period, it might have been different." p. 142.

Best, on Presumptions, p. 149, says,—"It has been said, (*Beanland* v. *Hirst*, Price, 475; Phill. & Am. Ev., 476), that the registration of the memorial of a deed in a register county cannot be presumed, and that direct proof must be adduced."

But it is difficult to contend, "that there can be any matter of fact which a jury may not presume from possession and circumstances, when that possession and circumstances are sufficiently strong to convince them of its existence. The true conclusion seems to be, that in the case of a memorial of a deed requiring registry, the court will not direct them to make any artificial presumption."

Best cites 1 Greenl. Law Ev., Ar. 46, p. 52. "The same presumption, says Greenleaf (p. 52), has been advised in regard to the reconveyance of mortgages, conveyances from old to new trustees, mesne assignments of leases, and any other species of documentary evidence and acts *in pais* which are necessary for the support of a title, in all other respects evidently just."

"It is sufficient that the party who asks for the aid of this presumption has proved a title to the beneficial ownership, and a long possession not inconsistent therewith; and has

made it not unreasonable to believe, that the deed of conveyance, or other act essential to the title, was duly executed. Where these merits are wanting, the jury are not advised to make the presumption." He cites, among numerous other authorities, *Doe* v. *Cooke*, 6 Bing., *174; 19 Serg. & L., 44; *Doe* v. *Reed*, 5 Barn. & Ald. (N. Y.), 232; *Livett* v. *Wilson*, 3 Bing., 115; 11 Serg. & L., 57; 2 Wend., 14–37. [*607

The case of *Livett* v. *Wilson*, 3 Bing., 115. "Defendant pleaded a right of way, by deed subsequently lost. Plaintiff traversed the grant. There was contradictory evidence. The judge directed the jury, that, if upon this issue they thought defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find for the defendant. If they thought there had been no way granted by deed, they would find for the plaintiff."

The rule to show cause why the verdict for the plaintiff should not be set aside was discharged.

Best, C. J., said, that upon an uninterrupted usage of twenty years, the jury would be authorized to presume a deed. But even in such a case a judge would not be justified in saying they must, but might, find a deed.

Burrough, J., said,—"If there had been such a deed, it is not probable the way would have been constantly in dispute."

The case of *Doe* v. *Cooke*, 6 Bing., 174 (19 Serg. & L., 44), was a case of more than twenty years' possession; but the Court of Common Pleas would not presume the surrender of a term. After stating the particular circumstances of that case, Tindall, C. J., says:—"No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the fact to be presumed, and in such cases only, has it ever been allowed."

Sir Samuel Romilly said, in *Whally* v. *Whally*, 1 Meriv., 441 (1814):—"Length of time cannot affect this case. The statute does not apply, and it is not easy to see for what purpose it is here insisted upon. Time is no bar to relief in equity, unless it be in the excepted cases of mortgage, &c. In all other cases it only operates by way of evidence."

The bill was filed to set aside a conveyance from an uncle to a nephew after forty years, upon a charge of fraud and gross inadequacy of price. The court sustained the deed, upon the ground that it was not merely for a pecuniary consideration, but, as it stated, was also for "love and affection";

and consequently the court, Lord Eldon, said nothing about time.

The opposite counsel admitted that time was not a bar, by a strict analogy to the rule of law, but that it afforded evidence sufficient to raise a presumption. p. 444.

McDonald v. *McDonald*, 1 Bligh, 1819, was the case of a client against his agent and attorney, upon a
*608] *transaction of twenty-five years standing. It was a case of confidence.

The Lord Chancellor Redesdale says:—"The case, therefore, by its circumstances, is taken out of the principles of presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a juryman, it is my opinion that the bond was not intimated."

Wood v. *Veal*, 5 Barn. & Ald., 454, was the case of land under lease from 1719 to 1818; and as far as memory could extend had been used by the public, and lighted, paved, and watched, under an act of parliament, in which it was enumerated as one of the streets of Westminster.

It was submitted to the jury by the court whether there had been a dedication to the public, telling them that there might be a highway without a thoroughfare, and telling them that nothing done by the lessee, without the consent of the owner of the fee, would give the right of way to the public. Bayley, J., said,—"Where the consent is by a person having a limited right, it can only continue for a limited period."

Same principle. *Barkee* v. *Richardson*, 4 Barn. & Ald., 579.

Wright v. *Smythies*, 10 East, 409, is a decision, that no presumption of a grant enrolled can be presumed, because if it existed it might be shown.

In *Vooght* v. *Winch*, 2 Barn. & Ald., 663, it was said,—"If it is admitted that this was a public, navigable river, and that all his Majesty's subjects had a right to use it, an obstruction for twenty years would not have the effect of preventing his Majesty's subjects from using it." p. 667.

In Mathews on Presumptions, p. 17, it is said,—"That no length of time will raise a presumption in favor of encroachments on the public; at least, no period has as yet been mentioned as binding the community."

Carter v. *Murcott*, 4 Burr., 2163, and 7 East, 199, are cited.

In *Stoughton et al.* v. *Baker*, 4 Mass., Parsons, J., says:—"Every owner of a water-mill or dam holds it on the condition or limitation that a sufficient passage-way is left for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, for no laches

can be imputed to the government, and against it no time runs."

In *Livett* v. *Wilson*, 3 Bing., 115, the court instructed the jury, that if they thought there was no deed of the right of way, they must find accordingly, notwithstanding the possession.

Mathews, p. 17, says,—"The apparent assent of the adverse party is, in all cases of this sort, the true and essential source of inference; but it is evident, that, without a total disregard to fact, this cannot be maintained where the claim has formed a constant source of contest."

*See Mathews, 19, also, as to a body of creditors, under an assignment to trustees for their benefit, being also an answer to lapse of time, such persons not being expected, in their collective capacity, to use the same diligence as individuals. 3 Ves., 740; 12 Id., 136, 158. [*609

Piatt v. *Vattier et al.*, 9 Pet., 416, 405 (1835), was a case of clear adverse possession for thirty years, without a claim even, or the shadow of an excuse. The court say, p. 416,—"And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit, independently of the statute. There has been a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in Bartel; and no circumstances are stated in the bill, or shown in evidence, which overcome the decisive influence of such an adverse possession." Per Story, J.

Miller v. *McIntire*, 6 Pet., 61, 62 (1832), was the common case of a bill in a court of equity, where the statute of limitation was applied by analogy, and not where time was used as evidence.

Points of the Respondents.

The complainant's case proceeds upon two propositions; first, that the charter of Massachusetts of March, 1628, intended to trace as her southern boundary a line three miles south of what is now the main stream of what is now called Charles River; second, that therefore the complainant has the right to have the same line of boundary decreed at this time, without regard to any thing which has taken place since the date of the charter.

Both these propositions the respondents controvert. And, first, they contend, that the charter intended to trace, as their southern boundary, a line three miles south of all the waters of the Charles, as a geographical whole; three miles south of

its basin or valley, and of the sources and contributory streams which feed and preserve it.

To enable the court to determine between these two constructions, they will contend, that it is competent to advert to a great body of extrinsic circumstances and evidence, the character, situation, age, and objects of the parties, their knowledge or ignorance of the localities, the existence or non-existence of distinctive names of contributory streams, and, above all, to the contemporary exposition of the instrument afforded by the acts of parties in the age of the charter and subsequently.

And upon this point they maintain the position, that as the language of the charter, "three miles south of Charles River, and any and every part thereof," is vague, general, and flexible, such extrinsic evidence as is above indicated may be resorted to in order to ascertain the sense in which the parties
*610] used it; that even if the language *primâ fronte* bears a particular legal sense, it may be *shown to have been used in a different one; that this might be done, even if the grant was recent, and between individuals; and that it may be done *a fortiori multo* when the instrument is ancient and is the charter of a state.

In support of this proposition of the law of evidence will be cited Greenleaf's Ev., §§ 280, 286–288, 290, 295; 3 Cow. (N. Y.), Phillips, 1362, 1389; 6 Pick. (Mass.), 63; 16 Johns. (N. Y.), 14; 16 Wend. (N. Y.), 663; 6 Mass., 435; 13 Pick. (Mass.), 261; 2 N. H., 369; 1 Myl. & K., 571; 6 Sim., 54; 3 Cowen's Phillips, 1403–1405; 1 Mason, 10, 12; 1 Moo. & M., 300; 19 Johns. (N. Y.), 313; 1 Bing., 445; 3 Campb., 16; 1 Conn. & L., 223–225; 3 Barn. & A., 728.

These cases show that the terms in this charter are so far vague and flexible, that even if they legally import the complainant's construction, it may be proved that a different one was intended. 7 Sim., 310; 3 Atk., 576. See, too, 16 Pet., 534; 2 Inst., 282; 2 Brod. & B., 403.

Proceeding, then, to discuss the question of the original meaning of the charter, under a view of all the surrounding circumstances, the respondents will maintain,—

1. That the burden of proof is upon the complainants; and that, being out of possession, never having been in possession, and presenting the question after a lapse of more than two centuries, they should be holden to make their construction clear to judicial certainty; 13 Pick. (Mass.), 77; 2 Brod. & B., 403.

2. That the charter is to be construed most liberally in favor of the grantee, because it was a grant from a monopo-

list to the people of Massachusetts of that and of all generations. 1 Bancroft's History, 292, 293, 351–354; 11 Pet., 544; 7 Pick. (Mass.), 487.

3. That there is no circumstance or consideration in aid of the complainant's interpretation, beyond the words themselves; that they have never had possession under their interpretation; that there is no proof that the streams and fountains south of what is now the main stream of what is now Charles River have not always been reputed parts of Charles River; and that there is proof that anciently they were so reputed. See depositions of Metcalf, Cowell, Ware, and Mann, in papers put into the case by Massachusetts, pp. 30–32; 1 Douglass's Summ., 415, 463.

4. That there is no judicial evidence that the words themselves, in the age of the date of this charter, used by such parties, in such an instrument, even *primâ fronte*, bore the sense contended for by the complainants; that they do not obviously import that sense; and that, in the absence of other evidence, the court would not, against a possession of two centuries, even *primâ facie*, so construe them.

And, *e contra*, in aid of the respondent's interpretation, they will contend,—

*1. That presumption favors it, arising from long possession. [*611

2. That if the words may bear two senses, that which is most beneficial to the grantee, the settler, and colonist will be taken, rather than that most beneficial to the monopolist grantor.

3. That the words themselves more obviously and naturally import the sense claimed by the remonstrance.

4. That their construction imputes the more probable, reasonable, and usual conduct to these parties, since, under the complainant's construction, the boundary would be a fluctuating and uncertain one, varying with reputation; and would divide a river between the states, giving the main stream to one and the sources and confluent waters to the other, thus promoting strife. Whereas the obvious design of this charter was to give the whole river to Massachusetts. 1 How., 186.

5. That the whole question is settled by the contemporaneous exposition; that Massachusetts, from the planting of the colony, took an open and notorious possession under, according to, and in enforcement of her present doctrine of interpretation, going more than three miles south of what is now the main stream of what is now Charles River; and that during all the period properly denominated contemporary, and down to the year 1750, neither the crown, nor Plymouth, Rhode

Island, nor Connecticut, objected to that interpretation, but on the contrary expressly and repeatedly assented to it; Plymouth in 1638 and 1664, Rhode Island in 1711 and 1718, and Connecticut in 1713. And this conduct of Massachusetts, in assertion of her principle of interpretation, and this contemporary assent of all others adversely interested, constitute a body of circumstantial evidence in favor of the Massachusetts interpretation, which would be decisive of the cause on that point alone.

To show, 1. That Massachusetts took and maintained a possession from the earliest period under her present doctrine of construction will be cited,—Bill 29, 30, 34, 35; Evidence of R. I., 47, 56, 63, 104; Borden's Evidence, 3; 1 Winthrop's Journal, 284; 1 Hutch., 108; 1 Trumb., 185, 186, 401, 402; Connecticut Memorial, 4, 8; Answer, 5; Ev. of R. I., 53, 90, 101, 104, 105, 111, 119, 121; 1 Hutch., 208; Mass. Rep. of 1791, p. 3; Mass. Ev., 22.

2. To show assent of Plymouth, Connecticut, and Rhode Island. 1. Plymouth,—1 Wint., 284; 1 Hutch., 208; 1 Doug., 401; Mass. Rep., 1791, p. 3. 2. Of Connecticut,—Ev. of R. I., 89, 121, and Connect. Memorial, 4. 3. Rhode Island, —Mass. Ev., 22; R. I. Ev., 56, 61.

3. To show that Massachusetts would not have asserted such a possession, on such a doctrine of interpretation, unless she had believed it sound, and that she knew the true meaning of her charter, see 1 Metc. (Mass.), 388; 1 Bancroft, 439, 440, 474, 476; 1 Hutch., 229, *249–251; 1 Belknap, 106, 107, 113, 115, 116; Minot, 38, 43; Brad. Hist. of Mass., 94, 5; R. I. Ev., 46; Doug., 92.

*612]

4. That Connecticut assented with full knowledge of localities. Conn. Mem., 3, 4, 5, 7; R. I. Ev., 104, 121.

If the court should be of opinion that the complainant's interpretation is established to judicial certainty, still the respondents contend, that, by reason of matter *ex post facto*, the bill cannot be maintained,—

1. The complainant's charter bounds Rhode Island, not on the charter line of Massachusetts, but on her actual occupation at the time, which extended south to the present line. 14 Pet., 247.

2. By the Declaration of Independence the then existing boundary-lines of the states became the true lines, without regard to their historical origin, and those lines are unalterable by any jurisdiction. 12 Pet., 681.

3. That it is not competent for the complainants to bring the matter of this boundary into contestation in a court of equity, by reason of their prolonged and gross laches. 1 Story

Eq., 73 (§ 64, *a*); 1 How., 168, 193; 2 Story Eq., §§ 1520, 1522; 2 Story, 215; *Bell* v. *Sanborn*, 8 Cl. & F., 650; 1 Story, 215; 13 Pick. (Mass.), 393; 9 Pet. (N. Y.), 417; 5 Johns. (N. Y.), Ch., 550. They are barred by time. 7 Paige (N. Y.), 197; 6 Pet., 61; 2 Jac. & W., 191; 2 Moll., 157; 12 Eng. Ch.; 2 Sch. & L., 636.

4. That the respondents have a perfect and indefeasible title to soil and jurisdiction up to the existing line, by prescription, a title resting on a possession of more than a century, the highest and most sacred of the titles of nations. 14 Pet., 260, 261.

5. That the existing line has been conclusively established by accord, compromise, award, and treaty; by the deliberate agreements of agents, arbitrators, or ministers plenipotentiary of the complainants, whose acts were subsequently expressly and by implication ratified by the complainants themselves, as a government.

And hereunder the respondents will contend,—

1. That, in 1711, and again in 1718, commissioners were appointed by Rhode Island and Massachusetts, with full powers to determine and settle, by compromise or ascertainment, the line of boundary; and that they did agree and establish the now existing line as the boundary. R. I. Ev., 53, and *id. seq.*

2. That, in making this determination of the line, the commissioners of Rhode Island had full knowledge of all material facts; and that they were uninfluenced by any representations of the commissioners of Massachusetts; and that, if this be so, the case is concluded. 14 Pet., 260. And in support of this position, the respondents will rely on the want of proof of the complainants to show such mistake or misrepresentation, on the legal presumption *against it, on [*613 the probabilities, and on the direct and circumstantial evidence in the case.

1. That the presumptions are against it appears, because to have been ignorant of material facts would manifest a gross neglect of official duty; and this is never presumed. Greenl., § 40, p. 47; 2 Cow. Phill. 296; 12 Wheat., 69; 3 East, 199; 19 Johns. (N. Y.), 347; 11 Wheat., 74.

2. Mistake of law alone is no ground of relief. 12 Pet., 32.

That they must have known the localities. Mass. Ev., 22; R. I. Ev., 52, and *id. seq.*, 55, 57.

3. That in the absence of fraud and misrepresentation of the commissioners of Massachusetts, mistake of facts by the commissioners of Rhode Island would be no ground of relief against the agreements; and that there is no proof of such

fraud or misrepresentation. 14 Pet., 280; 1 Story Equity, §§ 146–151; 2 Wheat., 178; 11 Id., 59; 11 Merlin, 70; 6 Toullier, 62; 4 Johns. (N. Y.), 566; 9 Heineccius, 101; 9 Dowl. & Ry., 731; 1 Story Eq., § 1456; 14 Pet., 276; 6 Pick., (Mass.), 154.

4. That the votes of the Rhode Island Assembly in 1711, 1718, 1719, and 1749 (in Rhode Island Evidence), and her long acquiescence, prove or work a ratification of the acts of her commissioners. That mere silence and inaction alone, so long continued, would prove or work it; but these are unequivocal acts. Story on Agency, §§ 253, 255, 256.

5. That, to avoid the operation of those votes and acts, it is not legally competent to aver that the Assembly and government of Rhode Island were ignorant of the localities or other facts; and that, if it were competent to make that averment, it is disproved by all the presumptions, and direct and circumstantial evidence. 2 Cow. Phill., 288; 12 Wheat., 70, 76; Ang. & A. Corp., 175; 11 Pet., 603; *Fletcher* v. *Peck*, 6 Cranch, 129. See, too, the cases *supra* to the point that official duty is presumed to be done.

6. That if the existing line is to be deserted, and a new one run according to the true sense of the charter, as an open question, it must be removed far south of its present place. Ans. 6 and 7.

In illustration of the points stated above on the part of the complainant, *Mr. Randolph* occupied three days in referring to and reading ancient grants and documents and other papers.

Mr. Choate confined himself to that branch of the argument resulting from the two following points, viz.:—

1. The true interpretation of the charter.
2. The acts of 1713, 1718, &c.

The skeleton of *Mr. Webster's* argument was this:

The case of Rhode Island rests on two propositions:—

*614] *1. That the disputed territory belongs to her, according to the true construction of the original charters.

2. That she has done nothing to abandon, surrender, or yield up her original right to the territory, or to close inquiry into those original rights.

Against these, we maintain four propositions.

1. That the territory belongs to Massachusetts, according to the just interpretation of her original charter, and that no subsequent acts of the British crown or courts of law, nor any

acts of her own, have impaired or lessened her right in this respect.

2. That the line up to which she now possesses has been seated and established by fair and explicit agreements between the two parties, executed without misrepresentation or mistake, and with equal means of knowledge on both sides; and that she has held possession accordingly, from the dates of those agreements.

3. That if all this were otherwise, Massachusetts is entitled, by prescription and equitable limitation, to hold to the limits of her present possession.

4. That Rhode Island, by her own neglect or laches, is precluded from asserting her claim to the disputed territory, if she ever had such claim, or from opening the question for discussion now.

Mr. Whipple, in reply and conclusion.

The case naturally divides itself into three separate and independent questions.

1. Did the disputed territory belong to Rhode Island by virtue of the charter of 1691, commonly called the Province charter?

2. If the court should decide that question in the affirmative, the next question will be, Has Rhode Island transferred a portion of that territory by the contracts of 1710–1718?

3. If the rights of Rhode Island were not affected by those contracts, then the third and only remaining question will be, Are they impaired, or in any way affected, by time?

I. Did the Province charter of 1691 confer this territory upon Rhode Island? The counsel for Massachusetts very correctly commence their arguments with the propositions, that inasmuch as Rhode Island has admitted this territory to be the territory of Massachusetts by the contracts of 1710–1718, and has suffered Massachusetts to remain in possession from 1710 down to the present time, that it is incumbent upon Rhode Island, in order to counteract these adverse influences, to establish a title under the charter so clear, that no two minds can possibly differ concerning it.

By this test we are willing to stand or to fall. The title of Rhode Island under the charter is so clear that no two minds can differ about it. Hardly an attempt has as yet been made to impeach it. The very statement of the question settles it.

*The charter of 1628 describes the territory of Massachusetts as lying between a line "three miles north of the Merrimack river and of any and every part thereof," on the north, and a line "three miles south of Charles river, [*615

and of any and every part thereof, on the south." The lines thus limited on the north and south were to be east and west lines, parallel to each other. The southern line of Massachusetts, by the subsequent charter of Rhode Island, in 1663, is constituted the northern line of Rhode Island.

We contend that these words, yielding to them their obvious and natural import, admit of no doubt. Three miles south of Charles river, and of any and every part thereof, is no more than three miles south of Charles river, and of any and every part of Charles river. These latter words were intended to embrace all the southern curves of the river. Rhode Island contends that the northern line of Massachusetts was intended to be three miles from the Merrimack proper, or the main stream, and the southern line three miles from the most southerly part of the main stream of Charles river; that this construction is imperiously called for by the natural and obvious import of the words, and by the contemporaneous construction of all the parties, grantors and grantees, the crown and all the adjacent colonies, including Massachusetts, from 1622 down to 1710.

1. What is the obvious meaning conveyed by the words "three miles south of Charles river?" Do they comprehend a tributary stream, the head of which may be ten or fifty miles south of the Charles? Do the words "three miles west of the Mississippi river," mean three miles west of the sources of its tributary, the Missouri? Would a grant of territory (either between nations or individuals), ten miles north of the Ohio river, or any part thereof, include all the territory two hundred miles northward, because the Wabash, its principal tributary, extended that distance north? Why have different names been assigned to tributary streams, in ancient and modern times, and by all nations, savage and civilized, if the main stream included the tributary? Have geographers or historians ever described Frankfort and Treves as cities upon the Rhine, because upon streams emptying into the Rhine? Or have they invariably been named as upon the Maine and the Moselle?

Webster defines a river to be "a large stream of water flowing in a channel toward the ocean, a lake, or *another river*. A large stream, copious flow."

Johnson says it is "a land current of water bigger than *a brook*."

In 1642, Massachusetts surveyed a small stream running from the south into the Charles, as and for the Charles river of the charter. At that early period, the main stream had acquired the name of Charles river, far to the westward of its

junction with the brook. But the surveyors of Massachusetts called the brook *Charles river, and mapped it as Charles river,—as the main stream,—omitting to lay [*616 down the river itself. As early as 1670, this brook had acquired the name of Jack's Pasture brook, notwithstanding the attempt of Massachusetts to impress upon it the name of Charles river. Before 1700 it acquired the name of Mill brook, mills having been built upon it. All the public and private grants of towns, corporations, and individuals referred to the main stream as the Charles, and to this brook as Jack's Pasture brook, or Mill brook.

The people of Massachusetts made the same distinction between a river and a brook, one of its tributaries, that all the other members of the human family had made from the creation of the world down to that period. We say, therefore, that the words of the charter admit of but one construction, and never have received a different construction.

This was the construction put upon those words by the grantees of the territory and jurisdiction, and by the grantors of the territory, the Plymouth Company, and the grantors of the jurisdiction, the king and council. All the parties, Massachusetts and the grantors of Massachusetts, so understood these words, and limited their possessions accordingly.

The extended construction now contended for would have carried the northern line of Massachusetts to Lake Winnipiseogee, and an east and west line from that lake would have embraced all the state of New Hampshire, and nearly all of Maine.

But as early as December 30th, 1621, the Council of Plymouth granted to Sir Robert Gorges a territory ten miles by thirty, in the northern part of Massachusetts Bay, embracing Salem, Cape Ann, &c.

In 1628, the same Council of Plymouth granted to Massachusetts a line running east and west, three miles from the Merrimack river.

In 1629, the king and council granted jurisdiction over the territory ceded to Massachusetts by the Plymouth Council.

In November, 1629, the same Council of Plymouth granted what is now called New Hampshire, beginning at the Merrimack river.

In April, 1635, another grant was made to Mason, from said Council, of New Hampshire, with a slight difference of boundaries. In consequence of these subsequent grants as far south as the Merrimack, Massachusetts in 1636 erected her bound-house three miles north of the Merrimack proper, near its junction with the ocean. When pressed with this

fact by Mason, in the trial before king and council, in 1676, Massachusetts gave to this house the name of a possession-house. But it must be observed that Massachusetts never claimed that her territorial rights extended more than three miles north of the Merrimack proper. In the trial be-
*617] fore *the king and council, in 1676, she formally renounced any such claim. Her grant of jurisdiction by the king in 1629, is over the territory (described by the same words, *verbatim*) that was granted to her by the Council of Plymouth.

The ambitious pretensions of Massachusetts to an extension of her jurisdiction over New Hampshire and Maine, the territorial rights to which were in Mason and Gorges, arose out of the fact, that, after 1536, the inhabitants of New Hampshire, being destitute of the powers of government, petitioned the General Court of Massachusetts to be taken under their government and protection. Massachusetts refused to grant these petitions for a number of years. She had erected her bound-house three miles north of the Merrimack proper. She had refused to take the inhabitants of the towns adjoining immediately north under her protection, because she was aware that her jurisdiction did not reach them. In her answer to the charge of Mason before the king and council, in 1676, she admits "that her whole management in those eastern parts was not without the reiterated and earnest solicitation of most of the people there inhabiting."

When her ambition had become fully awakened by these reiterated and earnest solicitations, she employed Woodward and Saffrey to run her north and south lines, and after discovering that a river comprehends all its tributary streams, they run their line on the north so as to comprehend New Hampshire and Maine, and on the south so as to comprehend the territory in dispute.

This extraordinary claim resulted in a series of suits, which extended over a period of nearly a century, in every one of which the pretensions of Massachusetts were overruled.

In 1676, a formal and protracted trial was had between Mason and the colony of Massachusetts, before the two chief justices of England, sitting for the king and council. The complaint of Mason and the answer of Massachusetts contain the elements of the whole controversy. Massachusetts formally renounced any claim to the territory more than three miles north of the Merrimack proper.

In a subsequent trial in relation to the rights of New Hampshire, in 1737, she filed her written claim to begin at a point three miles north of the Merrimack, where it empties

itself into the ocean, and to follow the course of the river to the crotch, where the union of two tributary streams form the Merrimack proper, thus disclaiming, as she did in 1676, the whole tributary-stream principle,—the whole principle upon which she bases her right to the territory now claimed by Rhode Island.

We find, then, that Massachusetts herself, in 1636, and all the grantors of Massachusetts, the Plymouth Council as to the territory, and the king and council as to jurisdiction, had given to these words, "three miles from Charles river," the construction which *Rhode Island now gives to them; the construction which has been given to them among [*618 all nations and in all ages.

A very faint attempt has been made to disturb the smoothness of this current of authority by a resort to contemporaneous grants of territory and jurisdiction. The result of that attempt was, that in every case where the boundary has been "a river" simply, the tributaries and sources of the river have been excluded. New York, in one instrument, came east as far as Connecticut river. She did not claim east of the river proper, to the heads of the easternmost tributary stream, but to the river itself. When the heads and sources of rivers were intended, "to the uttermost heads and sources thereof" were the expressions invariably employed.

After the most minute and widely extended search into all the grants, public and private, from 1620 down to the present period, not an instance has been found in which a boundary by a river has ever been extended beyond the river itself.

We therefore say, that the construction given to these words by the parties themselves, grantors and grantees, accords with their obvious and ordinary meaning.

But if any additional matter could strengthen these views of this question, it will be found in the fact, that in 1676 this construction was given to these words by the king and council; in 1684, the charter of Massachusetts of 1628 was vacated and declared void, and in 1691, another charter, called the Province charter, was granted. The limits of Massachusetts, both as to territory and jurisdiction, were expressed by precisely the same words as those contained in the charter of 1628. Upon these words, the grantors had impressed a certain meaning, no matter for this purpose whether the ordinary or an extraordinary meaning. The grant of 1628, unlike a grant of property, was revocable in its very nature. A grantee of jurisdiction, or other political power, holds by no other tenure than the discretion or caprice of the granting power. Massachusetts existed as a colony during the will

and pleasure of the king and council. She might be deprived of a part or the whole of her jurisdiction at any moment, and with or without any sufficient cause. It belonged to the king and council to decide arbitrarily, if they chose, how much or how little should be granted or taken away. It belonged to them to explain the meaning of the terms by them employed. Their action in this respect is legislative rather than judicial, and the effect of their action is conclusive upon all mankind. Massachusetts accepted the Province charter of 1691 from the king and council, after the same king and council had decided, in 1676, that three miles from Charles river meant from the main steam, or Charles river proper.

It is unimportant, therefore, what this court may deem to be the usual and ordinary meaning of these terms. The granting party here has explained the sense in which these *619] terms are used in this *grant. The party to whom the grant was made knew that such was the meaning of the grantor, and by that explained and understood meaning—explained by one party, and understood by the other—must this court be governed.

On the part of Rhode Island, therefore, we say, that we do show, beyond the capacity of the human mind to doubt, that, under the Province charter of 1691, the south line of Massachusetts and the north line of Rhode Island was a due east and west line, beginning at a point three miles south of Charles River proper.

II. In the discussion of the second point, has Rhode Island parted with her right by the contracts of 1710–1718, we must consider it settled, that in 1710 she had the right, under the charter.

In order to judge fairly of the effect of these contracts, we must consider their nature and character, the main objects of the parties, their powers in relation to the subject-matter, and the terms employed to express their intentions.

In the first place, the parties agree, that both instruments constitute but one contract.

The commissioners of Massachusetts, in their report of 1791 (p. 59 of Bill), speak of the agreement of 1710–1718 as a subsisting agreement. The answer of Massachusetts throughout, but particularly in pp. 20–23, treats both instruments as forming but one contract, the agreement of 1718 being in addition, and not a substitute, to the agreement of 1710. Nor is it contended in the argument, that the agreement of 1718 was to take the place of that of 1710.

In the next place, the sole object of the parties was to ascertain the true charter line. From 1705 to 1710, four acts

were passed by Rhode Island, appointing commissioners to settle the line according to the charter. Massachusetts and Rhode Island were colonies of the mother country, and both were fully aware that Rhode Island possessed no power to transfer any portion of her territory to Massachusetts. There was an incurable incapacity in Rhode Island to sell, and in Massachusetts to purchase, any portion of Rhode Island territory. Neither possessing the power to sell or to purchase territory, the law will presume that neither had any such object in view. It is not pretended that any consideration was paid to Rhode Island. It must, therefore, be taken as the sole object of the meeting of the commissioners in 1710, to find the dividing line, according to the charter of 1691. The contracts themselves express this as their object, in the most explicit manner. They agree, "that the stake set up by Woodward and Saffrey in 1642, being three miles from Charles River, according to charter, be allowed, on both sides, as the commencement of the line," &c. This line was admitted by the Rhode Island commissioners to be three miles from Charles River, upon the authority of a map of Woodward and Saffrey, made in 1642, as the contract [*620
*states, "now shown forth to us, and remaining upon record in the Massachusetts government." These commissioners were Governor Dudley and Governor Jenckes. They did not go upon the land, but met at the house of Dudley, in Roxbury, in midwinter, fifteen miles from the localities referred to in the map. If they had been upon the premises, there must have been a surveyor appointed, and the report would have mentioned his name. This map states that the station was three miles from Charles River, according to charter, whereas it is three miles from the head of Jack's Pasture Brook, that brook being called on the map Charles River. By the map of these sworn surveyors, it appears that the station adopted by the commissioners was three miles from Charles River, according to the charter. In point of fact, it was seven miles and upwards. This map was produced by Dudley from the Massachusetts records. What it represents he represented. Jenckes confided in the integrity of this map, and admitted that the starting-point was three miles from Charles River, according to the charter. In point of fact, it was over seven. In point of fact, the Rhode Island commissioner admitted that over four miles of Rhode Island territory belonged to Massachusetts. And this admission was made upon a false representation, through the medium of false papers. This map was the work of 1642, based upon the principle asserted by Massachusetts, and exploded by king and council in 1676,

and explicitly renounced by Massachusetts in 1676, and subsequently in 1737.

We have attempted to show, that it was no part of the intention of the parties to transfer acknowledged territory from one to the other, neither possessing the requisite power, but that the only object was to ascertain the line called for by the charter. Rhode Island admitted this line to be the true charter line, upon a false representation. Is she bound by it legally or equitably?

It being three miles, according to charter. Was not that fact, it being three miles, the basis of the contract? *Because* it is three miles, *if* it is three miles, as this map states, we agree to run the line such a course to Connecticut River. Suppose it turns out that one or both parties were mistaken, that they began at a station seven miles from the river instead of three, is not the admission void, on the ground of mistake? If the parties had intended to commence at the Woodward and Saffrey station, without regard to its distance from the river, without regard to its conformity to the charter, why were those words inserted in the contract? If they had intended to bind their respective states absolutely, whether the station was three miles or ten miles, why did they insert those words in the contract? Jenckes did not know whether the map was correct or not. He trusted solely to its truthfulness. But in case of error, he did not mean to be bound. He says, "*it being* three miles, according to charter. This is my reason for agreeing *to it." But if the admission is taken to be absolute, and not conditional, then these words are entirely without a meaning. They were inserted as the basis of the contract, or they are surplusage.

*621]

Allen v. *Hammond*, 11 Pet., 71; 1 Story Eq., 143, *b*. Massachusetts herself has claimed the disputed territory from 1710 to the present day, not as Rhode Island territory, ceded to her by the contract, but as Massachusetts territory, under the Massachusetts charter, admitted to be such by the contracts. Page 4 of defendant's plea of 1840; Answer, pages 6–10.

It is a general principle, that where a contract is entered into for the purpose of executing the provisions of a prior instrument, by which the rights of the parties are settled, and the subordinate contract declares that it is made in pursuance of the prior instrument, that any departure from that instrument is presumed to be by mistake. A marriage settlement, declared to be in pursuance of the marriage articles, is void

so far as it departs from the articles. Atherly on Marriage Settlements.

In case of a post-nuptial settlement, it is void, though it does not say that it was in pursuance of the articles, because, after the marriage is consummated, the parties have no power to depart from the articles.

This case combines three elements of mistake, either of which is sufficient to invalidate the contract.

1. The contract declares that it was in pursuance of the charter.

2. The parties had no power to depart from the charter.

3. It was made upon a misrepresentation of a material fact.

This is one answer to the effect of the contracts.

Massachusetts attempts to support them, upon the ground that the right under the charter was doubtful; that Massachusetts claimed under the tributary-stream principle still farther south; that Rhode Island claimed to Charles River proper, and that, with a knowledge of all the localities, with a knowledge that the map of Woodward and Saffrey was drawn from a tributary stream, the Rhode Island commissioners agreed to the Woodward and Saffrey station.

To this we give various answers.

1. That the right under the charter was not doubtful, but clear and conclusive. The charter gives the line three miles from a fixed and permanent object.

2. There is not a tittle of proof, that the Rhode Island commissioners either knew the localities, or that they knew that the Woodward and Saffrey station was three miles from a tributary stream. On the contrary, all the proof is the other way.

The map itself represents the station to be three miles from Charles River. The contract states it to be three miles from the river, according to charter. The map calls the brook Charles River, *and omits a delineation of [*622 Charles River entirely. Instead of laying down the river, and the brook emptying into it, it represents the brook as the only Charles River, and the station as three miles from that only river. The contract itself states that the persons thereafter to be appointed to run the line "were to attend within six months thereafter to show the ancient line of Woodward and Saffrey, and to raise and renew the monuments." This proves that the parties to this agreement were not shown the localities. The line was not run until 1718, and then the commissioners report that they went to the station and run the line, and it does not appear that any of them went near the river, or made any admeasurement of its distance from the

station. It was their duty to report all their proceedings, and the law presumes that they performed their duty.

There is another fatal objection to the ground assumed in argument. The court is asked to presume that the commissioners from Rhode Island knew all the localities, knew also that the Woodward and Saffrey station was seven miles from Charles River and three miles from a tributary stream. If the Rhode Island commissioner knew those facts, it was a fraud in him to conceal them from the legislature of Rhode Island, and to sign a contract which represented the direct reverse,—that the station was but three miles from Charles River according to the charter, when it was seven miles and contrary to the charter. The court is asked to presume that the commissioners stated what they knew to be false. Can this be presumed? If it were true, would it not amount to a designed fraud upon the legislature of Rhode Island?

It is agreed by the answer, that the ratification of these contracts by the legislature of Rhode Island is essential to their validity. Did the legislature of Rhode Island ratify a contract establishing a line three miles from a tributary stream contrary to the charter, or three miles from Charles River according to the charter? If a knowledge of the secret facts, the localities, and the true meaning of the map was essential to bind the commissioners, was it not equally essential to bind the legislature? The obvious meaning of the contract is three miles from Charles River proper. Did the legislature ratify the contract according to its obvious and legal meaning, or according to a meaning impressed upon it by a knowledge of facts which it is not pretended they possessed?

But the whole groundwork of this presumption, which the court is asked to make, that in 1710 Massachusetts claimed from the tributary streams and not from Charles River, wholly fails; for after the decision of 1676, Massachusetts never did claim from a tributary stream.

In 1642, she claimed the right to decide which was the main stream and which the tributary, in point of fact, and she mapped out the brook as the main stream, and called it Charles River.

*623] *In 1710, she showed that map as and for a map of Charles River according to charter, and not as a map of a tributary stream.

In 1750, she took depositions to prove the fact, that the brook was Charles River proper.

In 1791, the Massachusetts commissioners say,—"The branch now called Charles River could not have been known

as Charles River in 1710." The Rhode Island commissioners say,—"That the Massachusetts commissioners pointed out the brook as and for Charles River." From 1642 down to 1791, the claim of Massachusetts rested upon the fact, that the brook was the main stream, and the main stream its tributary, and they impliedly admit, that if the fact was the other way, the case was against them. Until this trial, Massachusetts has never contended for the right to begin the three miles from a tributary stream, but for the fact that the brook was the main stream.

The fact, that as early as 1640 the public authorities of Massachusetts bestowed the name of Charles River upon the main stream, far to the westward of its junction with the brook, and as early as 1670 the name of Jack's Pasture Brook upon the tributary, and that all the boundaries of the towns and private conveyances treated and called the one the main stream, the Charles River proper, and the other the brook, is proved so clearly and decisively that it is not even brought into dispute. The further fact is also proved, that it is obvious to the senses that the one is the main stream, the other but a tributary.

This conclusive proof rendered it necessary for the counsel to shift the ground of defence, and to contend for the first time during the history of this controversy, that Massachusetts had always claimed from a tributary stream as such; that, in 1710, Rhode Island knew all the localities, and intended to allow the validity of that claim, although the language of the contract is precisely the reverse.

In 1749, the Rhode Island commissioners discovered the mistake. Being unable to find the Woodward and Saffrey station, they were obliged to go to the river and measure off the three miles. They then discovered that the line of 1718 was seven miles, instead of three, from the river. They run the line to which we now claim, erected permanent monuments upon it, gave notice of their claim to Massachusetts, and have claimed to that line from that day to this.

We therefore contend:—1. That the right to this territory under the charter is established as clear and certain. 2. That the contracts of 1710 and 1718 were not intended to convey Rhode Island territory to Massachusetts, neither party possessing the power to convey or to purchase. 3. That these contracts were merely admissions that the station was three miles when in fact it was seven, from the river. 4. That these admissions were made upon *an obviously false [*624
statement of the facts, and are not binding in law or in equity.

These are some of the leading views of the Rhode Island

mind upon these vital points of the case, and we have been largely encouraged that they are unanswerable, by the fact, that notwithstanding the extraordinary power of intellect arrayed against us, they remain wholly and entirely unanswered.

Taking it for granted that what has not been answered by counsel will not be overruled by the court, we now proceed to inquire whether the jurisdictional right of Rhode Island, secured to her by a record of the highest and most enduring nature, has been lost through the agency of time.

To our minds it seems a clear proposition, that if time is to exert any influence over the rights of the parties in this case, that influence must be based upon principles never as yet promulgated in the code of any municipal or national law which has come to our knowledge. The artificial system prevailing in the courts of common law and equity, in England and in this country, has been more largely inflated, and made deeper and broader encroachments upon the domain of practical justice and common sense, than any previous system within the range of our learning. Yet that system, extended as it has been by ambitious book lawyers and book judges, contains no form of action capable of bringing time into hostility with any one of the rights or claims of Rhode Island, in the present case.

In the first place, the main reason why time is so prolific of presumptions against the party out of possession is founded upon the ceaseless and untiring activity of avarice. The love of money is the basis of all prescription, presumptions of grant, and statutes of limitations. It is against human experience, that any man should allow another to receive the rents and income, and other benefits of his property, for a series of years, claiming it as his own, and remain silent under such encroachment. The law presumes it more probable that there has existed a lost grant, than that such an anomaly should take place. It is because the man in possession enjoys great advantages, and the man out of possession sustains great losses, that the law so readily concludes the title to be according to the enjoyment. This reason, in many cases, if not in all, would apply but awkwardly to jurisdiction;—a duty, and oftentimes an onerous, sometimes a dangerous, duty, which, instead of courting, we gladly escape from,—and not, like property, an enjoyment, a benefit, indeed, the greatest of worldly blessings in the opinion of the mass of mankind. To forego the performance of a duty does not impregnate time quite so quick with a presumption of the absence of all rights, as to forego the enjoyment, it may be, of many thousands of

dollars of income, claimed by another, enjoyed by another, with a denial of our right by another.

*Then, again, time quiets long possessions of property upon a principle of policy. Property passes from [*625 parent to child, it is transmitted by will, transferred by deeds and other instruments, and in the course of forty or fifty years it acknowledges, it may be, as many distinct owners, many if not the most of whom took it for granted, that the peaceable and undisturbed possessor was the legitimate and undoubted owner. The law encourages this belief, for otherwise no improvements would be made. Heirs, devisees, and purchasers would be unwilling to hazard large expenditures, if a flaw in a deed, or even the entire loss of the paper title, could not be cured by the salutary and benign influences of a long and undisputed possession. But jurisdiction is a chaster and less prolific character. She has no heirs, or devisees, and but here and there a purchaser. Third persons will not be discouraged from making improvements by large expenditures of money, because in the first place there are no third persons connected with jurisdiction, and in the next place, jurisdiction amplifies and enlarges itself without expenditures of any kind, and the policy of the law is to restrain rather than encourage these expensive propensities. It must therefore be admitted that the application of the benign influences of time to such a subject as jurisdiction would be rather gawky, old-maidish, and ungraceful.

But suppose we bring this subject of jurisdiction within the range of all the principles applicable to property; has time any ordinance, any form of action, that can in the slightest degree affect the rights of Rhode Island? We say with the most entire confidence that it has not.

There are but three modes known to the courts of law or equity, in which time exercises her influence upon permanent property:—1. By statutes of limitations; 2. By prescription; and 3. By presumptions of grants.

It is not pretended that statutes of limitations can apply to the case of two states. It would be equally absurd to invoke the common law doctrine of prescription, as administered at law or in equity, for to this day, in England and in this country, prescription is overthrown if the person out of possession can show that the possession commenced at any time subsequent to the 1st of Richard the First. Best Presumptions (47 Law Lib.), 75; *Taylor* v. *Cooke*, 8 Price, 650; 2 Bl. Com., 31; *Fisher* v. *Greaves*, 3 Eagle & Y., *Tithe*, C., 1100.

"The presumption of prescriptive rights, derived from enjoyment, is instantly put an end to, where the right is shown to

have originated within the period of legal memory," that is, 1 Rich. 1, (1189).

Massachusetts was not settled until 1620, and the charter under which she claims was granted in 1628.

*626] In the two first modes in which time operates upon title, she *acts alone, unaided by any other proof, direct or circumstantial. If the period required by the statute of limitations has transpired, or if the possession has been as far back as memory extends, the law presumes that it was coeval with Richard the First, and in both cases time alone constitutes a legal title.

But with the exception of the case of a mortgage, and one or two other analogous cases, time alone, unaided by circumstances, is never sufficient for the third form of its action, by way of presuming a grant.

In *Mayor of Kingston* v. *Horner*, Cowp., 102, Lord Mansfield says,—"A jury is concluded by the statute of limitations. So in the case of prescription, if it be time out of mind, a jury is bound. Any evidence showing a time when the claim did not exist is an answer to prescription." p. 109.

"But length of time, as evidence, may be left to a jury to be credited or not, according to circumstances."

"There is no positive rule which says that one hundred and fifty years, or any other length of time within memory, is a sufficient ground to presume a charter."

The more modern authorities are all collected in Best, and the well settled doctrine in England and in this country now is, that the presumption of a grant is a case of circumstantial evidence, of which time constitutes but a single link.

A jury must believe that a grant was actually made. 6 Cow. (N. Y.), 706; 3 Johns. (N. Y.), 109, 269; 1 Wash. C. C., 70; 2 Wend. (N. Y.), 13–15; 3 Conn., 431; 11 East, 279; 5 Barn. & Ald., 228; 3 Id., 150.

This court, in *Ricardo* v. *Williams*, 7 Wheat., 59, say,—"Presumptions of grant can never arise where all the circumstances are consistent with the non-existence of a grant. *A fortiori*, they cannot arise when the claim is of such a nature as is at variance with the existence of a grant."

The facts of this case conclusively show, that no presumption of a grant (other than the charters and the contracts of the parties, upon the construction of which the case depends) can for a moment be indulged in; because,—

1. From 1628 down to 1775 there was no power competent to make a grant except the mother country. Massachusetts and Rhode Island were colonies, and it is not denied that,

up to 1775, they were incompetent to convey territory or jurisdiction.

2. No other grant from the crown can be presumed (than the charters of 1628, 1691), enlarging the limits of Massachusetts, because all such grants are enrolled, and by the well settled law of England an enrollment cannot be presumed without proof of a spoilation or hiatus in the record. In 3 Barn. & Ald., 150, Abbott, C. J., says,—"No instance can be found, where the court have *said that an enrollment has been presumed." See, also, Best Presumption, 149. [*627

But such enlarged grant must not only have been recorded in England, but in Massachusetts and in Rhode Island, and no such grant would have been made without the most formal notice to both the parties to be affected. No confirmation of the contracts of 1710 and 1718 can be presumed, for the same reasons. Such confirmation must have been upon notice, and would have appeared upon the records of the mother country and both the colonies interested.

III. Any additional grant from the mother country, or from Rhode Island, after 1775, is not only inconsistent with the circumstances of the case, but at war with its whole history from 1710 to the present time. Because any grant prior to 1775, or any confirmation of the contracts of 1710 and 1718, would have been enrolled in the mother country, and upon the records of both Massachusetts and Rhode Island, and any grant by Rhode Island since 1775, or confirmation of the contracts of 1710 and 1718, must have been recorded in Massachusetts and Rhode Island. Some human hands must have touched these grants or confirmations, and some human eyes must have seen them, and when lost from all three of their beds of repose, a hiatus, or lost stick, must have appeared upon the record-books.

How is the fact? The mistake in the admissions of the Rhode Island commissioners (we omit to call it an imposition) was not discovered until 1748. From that time down to 1825, scarcely a year has elapsed during which commissioners from both the States have not been appointed, or continued under former appointments, for the purpose of settling this long-pending dispute. Frequent meetings have been had. All their conversations, arguments, and claims have been in writing, and reports of those conversations made to the respective legislatures of the two States. From the first to the last, no pretence has been made of any hiatus in the records in England, or in either of the two States. Not a syllable has been lisped of any other title than the charters of 1628 and 1691. From first to last, the claim of Massachusetts has

been, and now is, that the territory was hers by charter, that the contracts of 1710 and 1718 conceded the territory as the chartered right of Massachusetts.

It is admitted, it is made the sole foundation of the opposite argument, that, as long ago as 1642, Massachusetts surveyed this territory, and took possession up to the Woodward and Saffrey line, by virtue of the charter, that she has occupied and claimed it from that time down to the present by virtue of the charter. All this is irreconcilable with any other title. Besides, during the period from 1748 down to 1825, neither party, in their various and frequent discussions, pretended that any other question existed between them than what was the proper construction of the charter. *628] Both *admitted that the whole title rested upon that instrument. Massachusetts contended that Jack's Pasture Brook was the main stream in 1710 and 1718, though it had since become a tributary, and Rhode Island contended that it always had been a tributary. As late as 1791, the Massachusetts commissioners, in their report, recommended to their legislature that that question should be referred to arbitrators. In 1750, Rhode Island run the line three miles from Charles River, erected permanent boundaries upon it, gave to Massachusetts a map of that line, with notice that she claimed to it. Here, then, Massachusetts was put upon her defence as early as 1750. Her line, four miles south of ours, was claimed by her as the true charter line. Ours was claimed by us as the true charter line. From that day to this our monuments have stood upon that line, and from that day to this our commissioners have claimed to it. It has been a continual claim. In 1750, Massachusetts took the depositions of witnesses, in order to preserve the evidence of her construction of the charter. All her evidence in favor of that construction is in the case. She knew, then, that at some day or other she must either concede our right by negotiation, or surrender it under legal compulsion. All the moral reasons, therefore, in favor of long possession have no application here. She has lost none of her evidence. The depositions of all her witnesses taken in 1750 are now in the case. None of the legal reasons apply. She took possession under her charter, and therefore can set up no other title. The whole has been a subject of constant dispute from 1750 to 1825, and therefore no presumption of a grant from Rhode Island can arise.

Indeed, it is in vain to attempt to reason upon such a question. It contradicts all our legal and moral instincts to suppose that any principle ever did or ever can exist, which would sanction or even countenance the idea that such a pos-

session, disputed from the moment it was taken to the time of filing the bill, can have any influence upon the title of either party. The law is yet to be made which gives countenance to such gross and glaring injustice.

Mr. Justice McLEAN delivered the opinion of the court.

We approach this case under a due sense of the dignity of the parties, and of the importance of the principles which it involves.

The jurisdiction of the court having been settled at a former term, we have now only to ascertain and determine the boundary in dispute. This, disconnected with the consequences which follow, is a simple question, differing little, if any, in principle from a disputed line between individuals. It involves neither a cession of territory, nor the exercise of a political jurisdiction. In settling the rights of the respective parties, we do nothing more than ascertain the true boundary, and the territory up to that line on either side necessarily falls within the proper jurisdiction.

*James the First, on the 3d of November, 1620, granted to the Council established at Plymouth the [*629 territory on the Atlantic lying between forty and forty-eight degrees of north latitude, extending westward to the sea. And on the 19th of March, 1628, the Council of Plymouth granted to Henry Roswell and others the territory of Massachusetts, which was confirmed by Charles the First, the 4th of March, 1629. This grant was limited to the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof; and also all and singular the lands and hereditaments whatsoever, lying and being within the space of three English miles to the southward of the southernmost part of Massachusetts Bay; and also all those lands and hereditaments whatsoever, which lie and be within the space of three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof," extending westward the same breadth to the sea.

On the 13th of January, 1629, the Council of Plymouth granted to the colony of Plymouth, which on the same day was sanctioned by Charles the First, "all that part of New England, in America aforesaid, and tract or tracts of land that lie within or between a certain rivulet or runlet there commonly called Coahasset towards the north, and the river commonly called Narraganset River towards the south," &c.

The Council of Plymouth surrendered its charter to the king the 7th of June, 1635. On the 23d of April, 1662,

Charles the Second granted the territory of the colony of Connecticut, "bounded on the east by Narraganset River, commonly called Narraganset Bay, where the said river falleth into the sea; and on the north by the line of the Massachusetts plantation," &c.

The charter of Rhode Island was granted the 8th of July, 1663, by Charles the Second, limited on the north by the southerly line of Massachusetts.

It thus appears that the disputed line is the common boundary between Massachusetts and Rhode Island; the latter lying south of the line, and the former north of it. The true location of this line settles this controversy.

More than two hundred years have elapsed since the emanation of the Massachusetts charter, calling for this boundary; and more than one hundred and eighty years, since the date of the Rhode Island charter. In looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired. There is no other test of truth and justice, which applies to the variable condition of all human concerns.

The words of the Massachusetts charter, "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof," do not convey so
*630] clear and definite an idea as to be susceptible of but one construction. Whether *the measurement of the three miles shall be from the body of the river, or from the head-waters of the streams which fall into it, are questions which different minds may not answer in the same way. That the tributary streams of a river, in one sense, constitute a part of it, is clear; but whether they come within the meaning of the charter is the matter in controversy. The early exposition of this instrument by those who claimed under it is not to be disregarded, though it may not be conclusive.

This line is said to have been often a matter of controversy between the Plymouth colony and Massachusetts, as early as 1638, and that in that year Nathaniel Woodward took an observation upon part of Charles River, 41° 50′ north latitude. In 1642, the southern bounds of Massachusetts were ascertained by the said Woodward and Solomon Saffrey, who fixed a station three miles south of the southernmost part of Charles River. And in 1664, a line was run by commissioners from each colony, and their return was accepted by the General Court of Massachusetts, and ordered to be recorded; and it may fairly be presumed that the return was also accepted by Plymouth. This was a construction of the charter by Massachusetts, and assented to by Plymouth, that the three miles

were to be measured not from the main channel of Charles River, but from the head-waters of one of its tributaries. Grants of land were made by Massachusetts and Connecticut on their common boundary, and also towns were established, without a strict regard to the line, which produced much contention. To adjust these disputes, in 1702 commissioners were appointed by the two provinces to ascertain the boundary-line. They set up their quadrant and took their observation at, or not far from, the distance of three miles south of the southernmost part of Charles River, after which they took a second observation at Bissell's house, called for in the line of Woodward and Saffrey; and it was found that Massachusetts had made grants and established towns south of the line. This line was finally established by commissioners appointed by Massachusetts and Connecticut, in which they admit the correctness of the beginning at Woodward and Saffrey's station, "three English miles on the south of Charles River, and every part thereof, agreeably to the charter."

Serious difficulties occurred between the border inhabitants of Massachusetts and Rhode Island, on account of conflicting grants, and the establishment of towns. And after much correspondence and legislative action on the subject by the respective parties, it was finally agreed to appoint commissioners to settle the line. In October, 1710, the General Assembly of Rhode Island "enacted, that whereas Major Joseph Jenks being commissionated to treat with Governor Dudley concerning the settling the bounds between the province of Massachusetts and this government; that in case Governor Dudley and himself should not agree so as to issue the *matter, then Major Jenks is hereby [*631 empowered and authorized to offer and conclude on such other terms as he may judge most proper for the interest of the colony," &c.

The commissioners of both colonies met at Roxbury, January 19th, 1710–11, and after stating the authority under which they acted, and having "examined the several charters and letters patent relating to the line betwixt the said respective governments, and being desirous to remove and take away all occasions of dispute and controversy," &c., "they agree that the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful, approved artists, in the year of our Lord one thousand six hundred and forty-two, and since that often renewed, in the latitude of forty-one degrees and fifty-five minutes, being three English miles distant southward from the southernmost part of the river called Charles River, agreeable to the letters

patent for the Massachusetts province, be accounted and allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island." Other matters were adjusted according to the line of Woodward and Saffrey which need not be referred to. This agreement was signed by Dudley and Jenks, and by three commissioners from Massachusetts and two from Rhode Island. In March, 1711, the Rhode Island legislature sanctioned this agreement, by authorizing the line to be run in pursuance thereof, and the agreement was accepted and approved of by Massachusetts.

In 1716, and also in 1717, commissioners were appointed by Rhode Island to run the line under the agreement at Roxbury, jointly with commissioners from Massachusetts; or if the latter refuse or neglect to act, then to run the line without them. On the 17th of June, 1718, the Rhode Island legislature, after stating that the commissioners had been retarded in settling the line by the agreement made at Roxbury, &c.,—"This assembly, taking the premises under consideration, do hereby enact, constitute, and appoint Major Joseph Jenks, and others, a committee to treat and agree with such gentlemen as are or may be appointed and commissionated, with full power, by the General Assembly of the Province of Massachusetts Bay aforesaid, for the final settling and stating the aforesaid line between the said colonies, hereby giving and granting unto the aforesaid Major Joseph Jenks and others, or the major part of them, our full power and authority to agree and settle the aforesaid line between the said colonies, in the best manner they can, as near agreeable to our royal charter as in honor they can compromise the same," &c.

The commissioners of both colonies met at Rehoboth, the 22d of October, 1718, and under their hands and seals again agreed, "that the stake set up by Nathaniel Woodward and Solomon Saffrey, in the year 1642, upon Wrentham plain, be
*632] the station or commencement to begin the line," &c. This agreement being returned *on the 29th of October, 1718, was accepted by the General Assembly of Rhode Island, and ordered to be recorded; and it was also accepted by Massachusetts. And a joint commission, being appointed by both governments to run the line as established, met on the 5th of June, 1719, and say,—"We, the subscribers, being of the committee appointed and empowered by the governments of the province, &c., for settling the east and west line between the said governments, by virtue of the agreement of the major part of the said committee at the meeting at Rehoboth, on the 22d of October last past, at which time the said line was fully settled and agreed, and by them directed to be

by us run. Having met at the stake of Nathaniel Woodward and Solomon Saffrey, on Wrentham plain, the 12th of May, anno Domini 1719, in the morning, and computed the course of the said agreed line," &c., which line was run by them two miles west of Allom pond, and they erected monuments at different points. This return was approved by the Rhode Island Assembly.

In October, 1748, the legislature of Rhode Island appointed other commissioners to continue the line to the Connecticut River, recognizing the stake set up by Woodward and Saffrey as the place of beginning. The commissioners thus appointed having met, in 1749, twice, at Wrentham, and Massachusetts having failed to appoint commissioners to act with them, the Rhode Island commissioners proceeded to complete the running of the line. In their report they say,—"That we, not being able to find any stake or other monument which we could imagine set up by Woodward and Saffrey, but considering that the place thereof was described in the agreement mentioned in our commission by certain invariable marks, we did proceed as followeth, namely: we found a place where Charles River formed a large current southerly, which place is known to many by the name of Poppotalish pond, which we took to be the southernmost part of said river; from the southernmost part of which we measured three English miles south; which three English miles did terminate upon a plain in a township called Wrentham," &c.

These are the leading facts relied on by the respondent to establish the station of Woodward and Saffrey as the place from which the boundary-line was agreed to be run, and in fact was run. And we are now to consider how these facts and the arguments deduced from them are met by the complainant.

In the first place it is insisted, that the line run by Massachusetts, in 1642, was without authority.

There does not appear to have been any order from the crown to run this line, nor is it supposed to have been usual or necessary for the crown to give such an order, where no controversy respecting the line was brought before it. The general boundary, as named in the charter, was run and [*633 established by the colony or *colonies interested; and where there was no dispute no further action was required. The controversy in regard to their common boundary, between Plymouth and Massachusetts, which seems to have existed as early as 1638, was finally adjusted by running the line in 1664. This line was commenced at the place called the angle

tree, which is said to be about two miles south of the Woodward and Saffrey station.

When the Woodward and Saffrey station was first established, neither Connecticut nor Rhode Island had a political existence. And the Plymouth colony, which in 1691, was incorporated into Massachusetts, having then a distinct political existence and a common boundary with Massachusetts, assented to the line farther south than the above station. At the time this line was run, neither Connecticut nor Rhode Island can scarcely be said to have had a political organization, as the charter of the former was dated only two years before, and that of the latter one year. Massachusetts, then, in establishing the above station of Woodward and Saffrey, and in running the line, does not seem to have acted precipitately, without authority, or in disregard of the rights of other colonies.

The misconstruction of the charter, in going more than three miles south of Charles River, is earnestly insisted on by complainant's counsel. If the words of the charter were clear and unequivocal in this respect, there would be great force in this argument. It would be decisive of this controversy, unless controlled by other facts and circumstances in the case. But who can maintain that a line to be run "three miles south of Charles River, or of any and every part thereof," is clearly limited to three miles south of the main channel of the river. Can the body of the river with more accuracy of language be called a part of it, than its tributary streams. We call that a part which is less than the whole, when we speak of anything made up of parts. We do not call a limb a tree, but it is a part of a tree; and if a measurement is to be made from any and every part of the tree, would its branches be disregarded. When we speak of a river, we speak of it as a whole, whether we refer to it above or below a certain point; as bearing north or south, it is the river, in common language, and not a part of the river. The flowing of the water in the channel of the river gives it its name and character, and these are not changed by its length. We speak of the Upper and Lower Mississippi, but neither the one nor the other is called a part of the Mississippi. Had the Massachusetts charter been designed to limit the line to three miles south of the river, would not the language have been, "three miles south of the most southerly bend in the river."

It would therefore seem that the charter may be construed favorable to the respondent. That the construction of the
*634] complainant is not a forced one is admitted; and the conclusion naturally *follows, that men of equal intel-

ligence may differ in opinion as to the true meaning of the instrument. That Massachusetts more than two hundred years ago construed the charter as her counsel now construe it is clear, and the facts proved authorize the conclusion, that this construction was not, for many years, opposed by Connecticut or Rhode Island, and at no time by Plymouth. But the attention of the court is drawn to the northern boundary of Massachusetts, which the charter describes as "three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof;" which received the construction for which the complainant contends by the king and council.

The northern boundary-line, as claimed by Massachusetts, included Maine and New Hampshire; and it appears that Mason and Gorges, who claimed under grants, some of which were prior in date to that of Massachusetts, petitioned the king against the encroachments of Massachusetts on territory covered by their grants. The answer of Massachusetts was made, and in 1677 the question was brought before the Privy Council. The title to the land claimed by the petitioners was disclaimed by Massachusetts; and the king and council held, as to the government, "that if the province of Maine lies more northerly than three English miles from the River Merrimack, the Massachusetts patent gave no right to govern there."

In 1684, the charter of Massachusetts was vacated on a *scire facias*, by the judgment of the King's Bench, and a new charter was granted in 1691, including Maine and Plymouth, but the southern boundary, as regards the present controversy, was not changed.

The northern boundary was again brought before the king and council in 1740, when the decision was, "that the northern boundary of the province of Massachusetts be a similar curve line, pursuing the course of Merrimack River at three miles distance thereof on the north side, beginning at the Atlantic Ocean, and ending at a point due north of Pawtucket Falls; and a straight line drawn from thence due west," &c. In this decision, the call of the charter was disregarded, on a ground that the tribunal deemed equitable. From this it clearly appears, that the decision was not governed by legal principles, but was an exercise of the king's prerogative; and by the same power was the former case determined, although the opinion of the judges was taken, so that neither decision constitutes a rule in other cases for the action of a court of law. In the first case, there was a conflict of jurisdiction, which the crown had power to settle, upon

principles of expediency, and although the decision purports to be founded on a construction of the charter, yet other considerations may have influenced it. The decision, however, if not regarded as authority in other cases, is entitled to respectful consideration.

*635] *To avoid the effect of the agreements in 1711 and 1718, by the commissioners of both governments, in regard to the line in dispute, the complainant alleges, that its commissioners, relying upon the representations of the Massachusetts commissioners, and the words of the charter, did believe that the station of Woodward and Saffrey was within three miles of Charles river; and that the true situation of that station was not known to the authorities and people of Rhode Island until about the year 1750.

The fact of a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish. It certainly cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge. If the Rhode Island commissioners were misled in the first agreement, as to the locality of this station, it almost surpasses belief, that, seven years afterwards, the subject of the line having been discussed in Rhode Island, and such dissatisfaction being shown by the people as to lead to a new commission, the second commission should again be misled.

It may be a matter of doubt, whether a mistake of recent occurrence, committed by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both of the parties.

It appears, from the report of John Cushing, that he and others, being a committee to unite with a committee of Rhode Island, did meet at Wrentham, in November, 1709, agreeably to appointment, and being shown the line run by Major-General John Leverett, in 1671, the Rhode Island committee was requested to unite with the Massachusetts committee in renewing that line. But they declined doing so, alleging that they knew the line, but could not recognize it as the true one.

It appears, from several depositions in the case, that the station of Woodward and Saffrey was well known in the neighborhood, by tradition and otherwise, by the oldest settlers at Wrentham, in the year 1750; and from Callicott's deposition in 1672, "that, thirty years before, he was present when Woodward and Saffrey established their station, measuring three miles south from a pond out of which the principal part of the river came."

From the year 1750, repeated steps were taken by Rhode Island, in various resolutions, and by appointing commissioners, at different times, to ascertain and run the line in connection with commissioners to be appointed by Massachusetts. Commissioners from both colonies met more than once; but they could make no arrangement changing the line, as established under the agreements in 1711 and 1718. Rhode Island alleged a mistake in her commissioners in the place of beginning, as the ground of these efforts. That the colonies had a right to mark out their boundaries was not denied; *but it was insisted, that they had no power, without [*636 the consent of the crown, to change the limits called for in their charters. These controversies were kept up, as Massachusetts alleges, by the border inhabitants, and others, for party effect. However this may be, they seem not to have subsided with the change of government. At one time, an arrangement was made by Rhode Island to take the subject before the king in council, but the appeal was not effected. In 1746, Rhode Island obtained a decision against Massachusetts, before the king in council, in regard to the boundary on the Narraganset Bay. This boundary was claimed by Massachusetts, after the old colony of Plymouth was annexed to it. Up to this time no dissatisfaction seems to have been expressed by Rhode Island to the Woodward and Saffrey line; and it is deemed unnecessary to state its acts in detail subsequently, showing its objections, as they led to no practical result. They can be of no importance, except in so far as they may conduce to rebut the presumption of acquiescence from the lapse of time. From time to time, up to 1825, Rhode Island adopted resolutions, appointed commissioners to meet those which should be appointed by Massachusetts for the adjustment of this disputed line, but Massachusetts adhered to the agreements.

This is a general outline of this protracted and important controversy. The facts are not stated, where it did not seem to be necessary to state them; but their effect on the case has not been disregarded. It now only remains, by a general view, to come to that conclusion which is authorized and required by the well established principles of law.

The complainant's counsel rely mainly upon two grounds:

1. The misconstruction of the charter.

2. The mistake as to the true location of the Woodward and Saffrey station.

If the first be ruled against the complainant, the second must fall as a consequence. And as regards the first ground, little need be added to what has already been said. The

charter is of doubtful construction, and may, without doing violence to its language, be construed in favor of or against the position of the complainant. In this view, the construction of the charter by Massachusetts, assented to by the old colony of Plymouth, many years before Connecticut or Rhode Island had a political organization, is an important fact in the case. Plymouth was interested in restricting the line to the calls of the charter, for the line constituted the common boundary between the two colonies. And as controversies had arisen respecting this boundary, and commissioners been appointed to settle it, the presumption is that the rights of both colonies were understood and respected in the establishment of the line. And the line thus established was two miles south of Woodward and Saffrey's station. When this
*637] station was afterwards agreed to as *the place from which the boundary was to be run, Massachusetts seems to have considered the change as prejudicial to her rights.

If the commissioners of Plymouth had construed the charter to extend only three miles south of the most southerly bend of Charles river, they could not have assented to the boundary as run. In the absence of proof, the presumption is not to be drawn that they supposed the line established was only three miles south of the river. Connecticut, after the lapse of many years, assented to the line run from the Woodward and Saffrey station as its boundary, and so did the complainant, in the most solemn agreements, as stated. These proceedings conduce strongly to establish a fixed construction of the charter, favorable to the respondent, unless it be clearly made to appear that they were founded on mistake or fraud.

Fraud is not charged, and we have only to inquire into the alleged mistake.

From the nature of this supposed mistake, it is scarcely susceptible of proof. The words of the charter used by Massachusetts in describing Woodward and Saffrey's station, as three miles south of the southernmost part of Charles river, and the statements in certain reports to the legislature of Rhode Island, and the late survey of Simeon Borden, constitute the facts relied on by the complainant as proving the mistake.

Whatever inaccuracy may be detected in the latitude or longitude of the station of Woodward and Saffrey, as given by them, or in the volume of water of the streams called for, the place being identified will control other calls. Streams are often made to change their direction by the improvements of the country, and their volume of water is increased or diminished by the same cause.

If the representations made by the commissioners of Massachusetts as to the location of Woodward and Saffrey's station, by any plausible construction, came within the charter, there was no mistake of fact on which relief can be given. To sustain the allegation of mistake, it must be made to appear not only that the station was not within the charter, but that the commissioners of Rhode Island, in 1711 and 1718, who signed the agreements, believed it to be within three miles of the river, and that they had no knowledge of a fact, as to the true location of it, which should have led them to make inquiry on the subject.

From the notoriety of Woodward and Saffrey's station in 1711, and from the fact that commissioners of Rhode Island met Massachusetts commissioners respecting this line, at Wrentham, in November, 1709, and professed to be well acquainted with Leverett's line, as appears from the report of Cushing, it is difficult to believe that they, at least, were not acquainted with Wrentham plain, and with the station there established.

*This dispute is between two sovereign and independent states. It originated in the infancy of their [*638
history, when the question in contest was of little importance. And fortunately steps were early taken to settle it, in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commmission in this case, as to their authority, capacity, or the fairness of their proceeding. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked by the complainant?

In 1754, William Murray, then attorney-general, afterwards Lord Mansfield, was consulted by Connecticut, whether the agreement with Massachusetts respecting their common boundary, in 1713, would be set aside by a commission appointed by the crown. To which Mr. Murray replied,—"I am of opinion, that, in settling the above-mentioned boundary, the crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend his Majesty will confirm their agreement, which of itself is not binding on the crown, but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries. If the matter was open, the same construction already made in the case of Merrimack river must be put upon the same words in the

same charter applied to Charles river. As to Jack's brook, it is impossible to say whether it is part of Charles river, without a view, at least without an exact plan, and knowing how it has been reputed."

From the settlement referred to up to the time this opinion was given by Mr. Murray, forty-one years only had elapsed. And if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the lapse of more than a century and a quarter. More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.

The possession of the respondent was taken not only under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, *639] for they were authorized "to agree and settle *the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same." Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.

The state of Rhode Island, in pursuing this matter, has acted in good faith and under a conviction of right. Possessing those elements, in an eminent degree, which constitute moral and intellectual power, it has perseveringly and ably submitted its case for a final decision.

The bill must be dismissed.

Mr. Chief Justice TANEY.

This case came before the court in 1838, upon a motion to dismiss the bill for want of jurisdiction; and that question was then very elaborately argued at the bar, and carefully considered by the court. Upon that argument, and upon full consideration, I came to the conclusion that the court had not jurisdiction over the subject-matter in controversy, and my opinion to that effect, with a very brief statement of the principles upon which it was founded, is reported in 12 Pet., 752; wherein I have intimated, that at the final hearing of the case I should examine more fully the grounds upon which jurisdiction was asserted in the opinion from which I dissented.

As the case was legally in court under this decision, it became my duty from time to time to take part in the interlocutory proceedings which were necessary to prepare and conduct the case to final hearing. But, after many unavoidable delays, it has reached that point; and we are now to determine whether Rhode Island is in this court entitled to the relief she asks for. Entertaining upon this subject the opinion heretofore expressed, and which has been confirmed by subsequent reflection, I think she is not; and that this court have no constitutional power to decide the question in dispute *between the states, and consequently [*640 that the bill ought to be dismissed.

I concur, therefore, in the decree just pronounced, and as I do not dissent from the decree, it is unnecessary to state more fully than I have heretofore done my objection to the doctrines upon which jurisdiction was maintained.

Deciding the case, so far as I am concerned, upon this point, I of course express no opinion upon the merits of the controversy; and have not even deemed it necessary to be present at the elaborate arguments upon the evidence which have been made at the present term. For if Rhode Island had proved herself to be justly and clearly entitled to exercise sovereignty and dominion over the territory in question, and the people who inhabit it, yet my judgment must still have been, that the bill should be dismissed, upon the ground that this court, under the Constitution of the United States, have not the power to try such a question between states, or

redress such a wrong, even if the wrong is proved to have been done.

WILLIAM HARDEMAN AND D. HARDEMAN, PLAINTIFFS IN ERROR, *v.* EDWARD ANDERSON, DEFENDANT.

After a case has been docketed and dismissed under the forty-third rule of court, and the plaintiff in error sues out another writ of error, this court will, when the case appears to require it, order a supersedeas to stay all proceedings pending the second writ of error.[1]

The supersedeas is issued under the fourteenth section of the act of the 24th of September, 1789.[2]

THIS was a writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

At the preceding term of this court, namely, on the 28th of February, 1845, *Mr. Howard*, on behalf of the defendant in error, moved for leave to file a certificate that a writ of error had been sued out, and for an order to docket and dismiss the case under the forty-third rule of court.

This order was accordingly passed, and at the close of the term, no record having been filed by the plaintiffs in error, the case was dismissed.

At the present term, *Mr. Crittenden*, counsel for the plaintiffs in error, filed the following affidavit, namely:—

"UNITED STATES OF AMERICA, *Southern District of Mississippi.*

"This day William Hardeman personally appeared before me, commissioner, &c., for taking affidavits in civil cases, &c., and made oath, that some time during the last summer, and many months *previous to the session of the present term of the Supreme Court of the United States, he applied to the clerk of the Circuit Court of the United States for the Southern District of Mississippi, to know what he should do in relation to the record in the case of Edward Anderson against the said Hardeman and others, on a writ of error from said Circuit Court, and the said clerk then told this affiant that he would prepare and send up to the Supreme Court of the United States the transcript of the record in said cause,

*641]

[1] DISTINGUISHED. *Adams* v. *Law*, 16 How., 148. IN POINT. *Ex parte The Milwaukee R. R. Co.*, 5 Wall., 190. CITED. *Slaughter-house Cases*, 10 Wall., 292.

[2] EXPLAINED. *Hogan* v. *Ross*, 11 How., 294, 296.

and that all affiant would have to do would be to procure sureties for costs of suit in the Supreme Court. Trusting to this, and fully believing that said transcript would be duly sent up by the clerk to the Supreme Court, this affiant applied to Daniel W. Dickenson, a member of Congress, and amply solvent, to become his surety for the costs of the Supreme Court, which he promised to do. The said Dickenson was taken sick, and, as he informed affiant, had written to Joseph H. Peyton and Mr. Rayner, members of Congress, to become the sureties for costs. Affiant has been informed this day for the first time, by his counsel in the Circuit Court, that the transcript of said record had not been forwarded by the clerk as aforesaid. Affiant sends the same accompanying this affidavit, and prays that said record be filed and the case docketed, and if said suit be dismissed, that the same be set aside, the record filed, and the case docketed.

"WILL. HARDEMAN."

"Sworn to and subscribed before me on the 26th day of February, A. D. 1845. THOS. SHACKELFORD,
United States Commissioner of Affidavits, &c., for the Southern District of Mississippi."

Mr. Crittenden thereupon submitted the following motion, viz.:—

"HARDEMAN ET AL. *v.* ANDERSON.

"This case was depending before this court at its last term, upon writ of error operating as a supersedeas, and was then dismissed because the record was not filed. The cause of the failure to file is accounted for and explained in the affidavit now submitted to the court. The affidavit was received here within a few days after the close of the last term, and too late, of course, to make the intended motion to set aside the dismission. Since then, the plaintiffs have sued out another writ of error, and executed another bond, &c., but this not operating, *per se*, as a supersedeas, the plaintiffs are exposed to execution on the judgment below; they therefore move the court for a supersedeas," &c.

This motion was sustained by *Mr. Crittenden*, who contended that the plaintiffs in error had used all reasonable *exertion to have the record brought up in time, [*642
and referred to the case of *Stockton et al.* v. *Bishop*, 2 How., 74.

Mr. Howard opposed the motion. It did not appear that all

reasonable exertion had been used by the party. The judgment appealed from was given in May, 1840, and the case was not docketed and dismissed until February, 1845. In the meantime, the plaintiff in error appears to have relied upon the clerk of the court below to send the record up. The effort to obtain security for costs was very faint. If such reasons are allowed to be sufficient to reinstate a case after dismissal under the rule, the rule itself may as well be abolished. Certainly, a court which passes a rule has power to relax it, whenever a proper occasion shall offer. But this motion does not apply to a case which has been dismissed. It is not to reinstate that case, but it is to call forth the power of the court in another case, upon another writ of error. The act of Congress divides appeals into two classes, giving to them very different rights. Where the party is diligent, and prosecutes his writ of error without delay, the law gives a supersedeas. But if he is dilatory, the law is reluctant to deprive him of the benefit of an appeal, but subjects him to the risk of an execution. Thus the rights of creditor and debtor are both protected. But in order to prevent a vexatious and lingering suit, and to supply an omission in the act, a rule of court compels the appellant to prosecute his suit under the penalty of dismissal by an application from the appellee. The appellant has his choice, either to prosecute his appeal with or without the benefit of a supersedeas, and the act of Congress has made a clear distinction between these two modes. But the present motion is to take a case out of one of these classes, and put it in the other.

The case of *Stockton* v. *Bishop* does not apply, because every step required by the act of Congress was taken in that case; and this court not only can, but ought to, protect cases which are in regular progress towards it, according to all the forms of law.

Mr. Justice McLEAN delivered the opinion of the court, directing the following order to be passed:

WM. AND D. HARDEMAN AND WM. P. PERKINS, PLAINTIFFS IN ERROR, *v.* EDWARD ANDERSON.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Friday the 9th instant, by *Mr. Crittenden*, of counsel for the plaintiffs in error, for a writ of supersedeas to stay execution on the judgment below in this cause, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is the opinion of this court that a supersedeas should be

allowed, under the general powers conferred upon this court by the fourteenth section of the act of the 24th of September, 1789, leaving the question, whether a writ of error will lie to the judgment in this case, an open one. Whereupon *it is now here considered and ordered by [*643 this court, that a writ of supersedeas be and the same is hereby awarded, commanding the judges of the Circuit Court of the United States for the Southern District of Mississippi to stay any execution or proceedings on the judgment of the said Circuit Court in this case pending this writ of error, and also command the marshal of the United States for the said district that from every and all proceedings on execution or in any wise molesting the said plaintiffs in error on account of the said judgment, he entirely surcease, the same being superseded.

26*th January*, 1846.

Supersedeas.

UNITED STATES OF AMERICA, *sct.:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United [SEAL.] States for the Southern District of Mississippi, and to the Marshal of the United States for the said District, Greeting:

Whereas, lately, in the said Circuit Court before you, the said judges, or some of you, in a cause lately pending in said court between Edward Anderson, plaintiff, and William Hardeman and D. Hardeman, defendants, a judgment was rendered by the said Circuit Court, at the May term, 1839, of said court, in favor of the said plaintiff, and against the said defendants, for the sum of $8,293.45, with interest thereon at the rate of eight per centum per annum, together with costs and charges of suit, on which judgment an execution of *fieri facias* issued, and was levied by the marshal of said district on certain property of said defendants, which property was left in the hands of the defendants upon their executing a forthcoming bond, with one W. P. Perkins as security, and which forthcoming bond was returned by the said marshal to the said Circuit Court at the next November term thereof, A. D. 1839, "Forfeited," having thereby, according to the laws of Mississippi, the force and effect of a judgment against the said defendants and the said security for the aforesaid debt, interest, and costs, and upon which last-mentioned judgment an execution of *fieri facias* was issued against the goods and chattels, lands and tenements, of the said William Hardeman, D. Hardeman, and W. P. Perkins, for the amount of the said judgment, interest, and costs, as

aforesaid, as also for the sum of $133.81 additional costs subsequently accruing; upon which execution, the aforesaid marshal returned that he had received thereon "$9,125 in Union money, or post notes of the Union Bank," which said return of the marshal last aforesaid the said Circuit Court, at a subsequent term, to wit, on the 20th of May, A. D. 1840, set aside, and awarded an *alias fieri facias* on the judgment last aforesaid. Whereupon, the said Wm. Hardeman, *644] *D. Hardeman, and W. P. Perkins sued out a writ of error in due form of law and in proper time, and filed their bond in error, with sufficient security approved by one of the judges of the said Circuit Court, so as to operate *per se* as a supersedeas, and which said writ of error was abated and quashed by the order of this court on the 28th day of February, A. D. 1845, by virtue of the forty-third rule of court, in consequence of the failure of the aforesaid plaintiffs in error to file a transcript of the record of the case with the clerk of this court, and to have their case docketed, in compliance with the rules of court. Whereupon, the aforesaid plaintiffs in error sued out another writ of error in due form of law, filed their bond in error in a sum double the amount of the aforesaid judgment, with sufficient security approved by one of the judges of the aforesaid Circuit Court, and a citation having been regularly taken out, served upon the defendant in error, and duly returned, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of said writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of December, in the year of our Lord eighteen hundred and forty-five, it is made to appear, on affidavit to the said Supreme Court of the United States, that the failure of the aforesaid plaintiffs in error to file the transcript of the record and docket the writ of error first aforesaid mentioned, and which operated, *per se*, as a supersedeas, was not owing to any neglect or fault on their part, but wholly attributable to the neglect of the clerk of the said Circuit Court to make out in due time, and as requested by the said plaintiffs in error, a transcript of the record, as alleged in said affidavit, and that in consequence thereof they are exposed to an execution on the aforesaid judgment. It is thereupon now here ordered by this court, that a writ of supersedeas be, and the same is, hereby awarded, to be directed to the aforesaid marshal, commanding and enjoining him and his deputies to stay any and all proceedings upon any execution which may have been issued on the aforesaid judgment

of the said Circuit Court in said case, and which has or may come to his hands, and that he return any such execution with the writ of supersedeas to the said Circuit Court, and that the judges of the said Circuit Court cause any such writ of execution to be stayed, and to stay any execution or further proceedings of every kind and character on the judgment of the said Circuit Court in this case, pending the aforesaid writ of error in this court.

You, therefore, the Marshal of the United States for the Southern District of Mississippi, are hereby commanded, that from every and all proceedings on any execution on the aforesaid judgment, or in any wise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you *do forthwith return [*645 any such execution in your hands, together with this supersedeas, to the said Circuit Court, as you will answer the contrary at your peril. And you, the judges of the said Circuit Court, are hereby commanded to stay any execution which may have issued as aforesaid, and to stay any execution or further proceedings on the aforesaid judgment of the said Circuit Court in this case, pending the writ of error last aforesaid in this court.

Witness the Honorable ROGER B. TANEY, Chief Justice of said Supreme Court, this 27th day of January, in the year of our Lord one thousand eight hundred and forty-six.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

ROBERT HOLLIDAY ET AL. *v.* JOSEPH N. BATSON ET AL.

In order to entitle a party to have a case docketed and dismissed, under the forty-third rule of court, the certificate of the clerk of the court below must set forth an accurate entitling of the case.[1]

Mr. Barton having filed and read in open court a certificate in writing, in the following words and figures, to wit:—

"*Clerk's Office, Circuit Court, United States, 5th Circuit, and Eastern District of Louisiana.*

"ROBERT HOLLIDAY ET AL. *v.* JOSEPH N. BATSON ET AL.

"In the above-entitled cause, I certify that a final judgment

[1] APPLIED. *Smith* v. *Clark*, 12 How., 22; *The Protector*, 11 Wall., 87.

was rendered in the Circuit Court of the United States for the 9th (now 5th) Circuit and Eastern District of Louisiana, on the twentieth day of January, eighteen hundred and forty-one, and that a writ of error was taken by the defendants, returnable to the January term, 1842, of the Supreme Court of the United States.

"Witness my hand, and the seal of said court, at New Orleans, this 4th February, 1845.

[SEAL.] DUNCAN N. HENNEN, *Clerk.*"

and moved the court to docket and dismiss the said writ of error, under the forty-third rule of court. It is thereupon now here considered and ordered by the court, that the said motion be, and the same is, hereby overruled, the titling of the case in the said certificate being too vague and uncertain. Per Mr. Chief Justice TANEY.

*646] The above motion was made and overruled at the preceding *term. At the present term, a certificate was filed, with a proper titling, and, on motion of *Mr. Eustis*, the case was docketed and dismissed.

JAMES G. WILSON, PLAINTIFF, *v.* LEWIS ROUSSEAU AND CHARLES EASTON.

The eighteenth section of the patent act of 1836 authorized the extension of a patent, on the application of the executor or administrator of a deceased patentee.[1]

Such an extension does not inure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator), in his capacity, as such. But those assignees who were in the use of the patented machine at the time of the renewal have still a right to use it.[2]

The extension could be applied for and obtained by the administrator, although the original patentee had, in his lifetime, disposed of all his interest in the then existing patent. Such sale did not carry any thing beyond the term of the original patent.

A covenant by the patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement in the machinery, or alteration or renewal of the patent, did not include the extension by an administrator, under the act of 1836. It must be construed to include only renewals obtained upon the surrender of a patent on account

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[1] CITED. *Blanchard's Gun-stock Factory* v. *Warner*, 1 Blatchf., 276.

[2] FOLLOWED. *Simpson* v. *Wilson*, *post* *711; *Wilson* v. *Turner*, *post* *712; *Bloomer* v. *McQuewan*, 14 How., 539, 549 [but see Id., 555]; *Bloomer* v. *Millinger*, 1 Wall., 351. CITED. *Chaffee* v. *Boston Belting Co.*, 22 How., 223; *Eunson* v. *Dodge*, 18 Wall., 416; *Paper Bag Cases*, 15 Otto, 771.

of a defective specification. Parties to contracts look to established and general laws, and not to special acts of Congress.[3]

A plaintiff, therefore, who claims under an assignment from the administrator, can maintain a suit against a person who claims under the covenant.

An assignee of an exclusive right to use two machines within a particular district can maintain an action for an infringement of the patent within that district, even against the patentee.[4]

In the case of Woodworth's planing-machine, the patent granted to the administrator was founded upon a sufficient specification and proper drawings, and is valid.

The decision of the Board of Commissioners, to whom the question of renewal is referred, by the act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case.

The Commissioner of Patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years. Such surrender and renewal may be made at any time during such extended term.[5]

THIS case, and the three subsequent ones, namely, *Wilson* v. *Turner*, *Simpson et al.* v. *Wilson*, and *Woodworth & Bunn* v. *Wilson*, were argued together, being known as the patent cases.* Many of the points of law involved were common to them all, and those which were fully argued in the first case which came up were but incidentally touched in the discussion of the subsequent cases. * They all related [*647 to the rights which were derived under a patent for a planing-machine, taken out by Woodworth, and renewed and extended by his administrators. The validity of the original patent was questioned only in one case, namely, that which came from Kentucky, which was the last argued. There were four cases in all, namely, one from New York, one from Maryland, one from Louisiana, and one from Kentucky. In the course of the argument, counsel referred indiscriminately to the four records, as some documents were in one which were not to be found in another.

The cases will be taken up and reported *seriatim*, and the documents which are cited in the first will not be repeated in the others.

* The reporter intended to publish the arguments of counsel in these patent cases *in extenso*, and with that view applied for and obtained from many of the counsel their arguments prepared by themselves; but circumstances beyond his control prevent him from executing this purpose. He returns his thanks to those gentlemen who so kindly furnished him with their arguments, and regrets that his original design has been frustrated.

[3] FOLLOWED. *Woodworth* v. *Wilson*, *post* *716. CITED. *Prime* v. *Brandon Manuf. Co.*, 4 Bann. & A., 384, 392. See *Clum* v. *Brewer*, 2 Curt., 520.

[4] See *Hill* v. *Whitcomb*, 1 Bann. & A., 40; *Brickill* v. *Mayor, &c. of New York*, 18 Blatchf., 276; 7 Fed. Rep., 482.

[5] See *Wilson* v. *Simpson*, 9 How., 109; *Brooks* v. *Fiske*, 15 Id., 212; *Aiken* v. *Manchester Print Works*, 2 Cliff., 437.

The first in order was the case from New York, the titling of which is given at the head of this report.

It came up from the Circuit Court of the United States for the Northern District of New York, on a certificate of division in opinion.

On the 26th of November, 1828, William Woodworth presented the following petition :—

"To the Honorable Henry Clay, Secretary of State of the United States.

"The petition of William Woodworth, of the city of Hudson, in the county of Columbia and State of New York, respectfully represents:

"That your petitioner has invented a new and improved method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, not known or used before the application by him, the advantages of which he is desirous of securing to himself and his legal representatives. He therefore prays that letters patent of the United States may be issued, granting unto your petitioner, his heirs, administrators, or assigns, the full and exclusive right of making, constructing, using, and vending to others to be used, his aforesaid new and improved method, agreeably to the acts of Congress in such case made and provided; your petitioner having paid thirty dollars into the treasury of the United States, and complied with the other provisions of the said acts.

WILLIAM WOODWORTH.

"*November* 26*th*, 1828."

On the 4th of December, 1828, Woodworth executed to James Strong the following assignment.

"Whereas I, William Woodworth, of the city of Hudson, *648] in the State of New York, heretofore, to wit, on the 13th day of *September, 1828, assigned and transferred, for a legal and valuable consideration, the one equal half of all my right, title, claim, and interest in and to the invention or improvement mentioned and intended in the foregoing petition, oath, and specification, to James Strong of the city of Hudson.

"And whereas, also, the subjoined assignment is intended only to convey and assign the same interest transferred and assigned in the assignment of the 13th of September above

mentioned, without any prejudice to my one equal half part of said invention or improvement, which is expressly reserved to myself and my legal representatives.

"Now, know all men, that I, the said William Woodworth, for and in consideration of the sum of ten dollars, and other valuable considerations me moving, have, and do hereby, for myself and legal representatives, give, assign, transfer, and assure to the said James Strong and his legal representatives the one full and equal half of all my right, title, interest and claim in and to my new and improved method of planing, tonguing, grooving, and cutting into mouldings, either plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, mentioned and intended to be secured by the foregoing petition, oath, and specification, together with all the privileges and immunities, as fully and absolutely as I do or shall enjoy or possess the same; to have and to hold and enjoy the same, to the said James Strong, and his legal representatives, do or may.

"In witness whereof, I have hereunto set my hand and seal, the 4th day of December, 1828.

WILLIAM WOODWORTH. [SEAL.]

"Witness,—
HENRY EVERTS,
DAVID GLEASON."

On the 6th of December, 1828, Woodworth took the following oath:

"*State of New York, Rensselaer County, ss.:*

"On this sixth day of December, A. D. 1828, before the subscriber, a justice of the peace in and for the county of Rensselaer aforesaid, personally appeared the aforesaid William Woodworth, and made solemn oath, according to law, that he verily believes himself to be the true and original inventor of the new and improved method, above described and specified, for planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, *and cutting mouldings on, or facing, metallic, mineral, or other substances; and that he is a citizen of the United States. [*649

JOHN THOMAS, *Justice of the Peace.*"

The above documents appear to be recorded in the third

volume of Transfers of Patent Rights, pages 155, 156, in the patent-office of the United States.

On the 27th of December, 1828, a patent was issued as follows:—

"*Letters Patent to W. Woodworth.*

"The United States of America to all to whom these letters patent shall come:

"Whereas William Woodworth, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, which improvements, he states, have not been known or used before his application; hath made oath that he does verily believe that he is the true inventor or discoverer of the said improvement; hath paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvements, and praying that a patent may be granted for that purpose. These are, therefore, to grant, according to law, to the said William Woodworth, his heirs, administrators, or assigns, for the term of fourteen years from the 27th of December, 1828, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said William Woodworth himself, in the schedule hereto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed. Given under my hand, at the city of [L. S.] Washington, this 27th day of December, in the year of our Lord 1828, and of the independence of the United States of America, the fifty-third.

(Signed,) J. Q. Adams.

"By the President.

(Signed,) H. Clay, *Secretary of State.*"

Certificate of Wm. Wirt, Attorney-General of the United States.

"*City of Washington, to wit:*

*650] "I do hereby certify, that the foregoing letters patent were delivered *to me on the 27th day of December, in the year of our Lord 1828, to be examined; that I have

examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on this 27th day of December, in the year aforesaid.

WM. WIRT,
Attorney-General of the United States."

Schedule.

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said William Woodworth himself, of his improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances.

"The plank, boards, or other material, being reduced to a width by circular saws or friction-wheels, as the case may be, is then placed on a carriage, resting on a platform, with a rotary cutting-wheel in the centre, either horizontal or vertical. The heads or circular plates, fixed to an axis, may have one of the heads movable, to accommodate any length of knife required. The knife fitted to the head with screws or bolts, or the knives or cutters for moulding fitted by screws or bolts to logs, connecting the heads of the cylinder, and forming with the edges of the knives or cutters a cylinder. The knives may be placed in a line with the axis of the cylinder, or diagonally. The plank, or other material resting on the carriage, may be set so as to reduce it to any thickness required; and the carriage, moving by a rack and pinion, or rollers, or any lateral motion, to the edge of the knives or cutters on the periphery of the cylinder or wheel, reduces it to any given thickness. After passing the planing and reducing wheel, it then approaches, if required, two revolving cutter-wheels, one for cutting the groove, and the other for cutting the rabbets that form the tongue; one wheel is placed directly over the other, and the lateral motion moving the plank, or other material, between the grooving and rabbeting wheels, so that one edge has a groove cut the whole length, and the other edge a rabbet cut on each side, leaving a tongue to match the groove. The grooving-wheel is a circular plate fixed on an axis, with a number of cutters attached to it to project beyond the periphery of the plate, so that when put in motion it will perform a deep cut or groove, parallel with the face of the plank or other material. The rabbeting-wheel, also of similar form, having a number of cutters on each side of the plate,

projecting like those on the grooving-wheel, cuts the rabbet on the side of the edge of the plank, and leaves the *651] tongue or match for the *groove. By placing the planing wheel axis and cutter knives vertical, the same wheel will plane two planks or other material in the same time of one, by moving the plank or other material opposite ways, and parallel with each other against the periphery of the planing or moulding wheel. The groove and tongue may be cut in the plank or other material at the same time, by adding a grooving and rabbeting wheel.

"Said William Woodworth does not claim the invention of circular saws or cutter-wheels, knowing they have long been in use; but he claims as his invention the improvement and application of cutter or planing wheels to planing boards, plank, timber, or other material; also his improved method of cutters for grooving and tonguing, and cutting mouldings on wood, stone, iron, metal, or other material, and also for facing and dressing brick; as all the wheels may be used single and separately for moulding, or any other purpose before indicated. He also claims, as his improved method, the application of circular saws for reducing floor-plank, and other materials, to a width.

"*Dated Troy, December 4th*, 1828.

"WILLIAM WOODWORTH.

"HENRY EVERTS, } Witnesses."
D. S. GLEASON, }

On the 25th of April, 1829, one Uri Emmons obtained a patent for a new and useful improvement in the mode of planing floor-plank, and grooving, and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing-machine. The said letters patent, and specification attached thereto, being in the following words and figures:

Uri Emmons's Patent.

"United States of America to all to whom these letters patent shall come:

"Whereas, Uri Emmons, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the mode of planing floor-plank and grooving and tonguing the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called 'the cylindrical planing-machine,' which improvement he states has not been known or used before his application,

hath made oath that he does verily believe that he is the true inventor or discoverer of the said improvement, hath paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are therefore to grant, according to law, to the said Uri Emmons, his *heirs, administrators, or assigns, for the [*652 term of fourteen years from the twenty-fifth day of April, one thousand eight hundred and twenty-nine, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given, in the words of the said Uri Emmons himself, in schedule hereto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

"Given under my hand, at the city of Washington, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States of America the fifty-third.

[SEAL.] (Signed,) ANDREW JACKSON.

"By the President.

(Signed,) M. VAN BUREN."

"*City of Washington, to wit:*—

"I do hereby certify that the foregoing letters patent were delivered to me on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and twenty-nine, to be examined; that I have examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on the twenty-fifth day of April in the year aforesaid.

"(Signed,) J. MACPHERSON BERRIEN,

"*Attorney-General of the United States.*"

Schedule.

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said Uri Emmons himself, of his improvement in the mode of planing floor-plank, and grooving, and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing-machine.

"The machinery for the improvement consists,—

"1st. Of a frame of wood or metal.

"2d. Of the gear and fixtures combined and connected together for the above-named operation, the principle of which consists in running the plank, boards, or timber over, under, or at the sides of a cylinder of wood or metal, on which knives are placed, straight or spiral, with their edges exactly corresponding with each other, having from two to twelve knives or edges; also burrs or saws, similar to those used for cutting teeth in brass wheels, to groove and tongue the edge of the boards or plank as they pass through between rollers, or on a carriage, by the surface of the cylinder. *653] *The shape, form, and construction of the above principle may be varied in shape and position, dimensions, &c., still the same in substance,—the same principle producing the same effect. I have, by experimental operation, found that the following mode in form is the best:—

"1st. A frame composed of two pieces of timber, from twelve to eighteen feet long, about six by ten inches broad, placed about fifteen inches apart, framed together with four girths, one at each end, and at equal distances from the centre, and flush with the under side. This frame is supported by posts of a proper length, framed into the under side of the above pieces of timber, and braced so as to be of sufficient strength to maintain the operative posts. There is placed a roller in the centre, of metal or hard wood, across the frame, the surface of the roller being even with the surface of the frame; directly above, and parallel with this roller, is hung the cylinder, with two or four spiral edges or knives, six to ten inches diameter, and hung on a cast-steel arbor, resting in movable boxes attached to the sides of the frame, so as to set the cylinder up and down from the roller, to give the thickness of the timber to be planed. On each side of the cylinder is placed a pair of feeding-rollers, of hard wood or metal, the under one of each pair being level with the centre one. The upper ones are hung in boxes, which are pressed down with springs or weights, so that when the timber comes between them, they will hug and carry it through. These rollers are connected and turned by wheels, at a velocity of about twelve feet surface of the roller per minute. The cylinder with two edges to make about two thousand five hundred revolutions per minute, cutting five thousand strokes every twelve feet; this can be varied according to the number of edges, power, and velocity of the different parts. The power is attached to the cylinder by a bolt running on a pulley, on the outward end of the cylinder shaft. Each way from the feeding-rollers

are placed rollers about two feet apart for the timber to rest on while running through. On one side of the frame is fastened a straight edge, to serve as a guide, lined with metal; on the other side, rollers are placed in a piece of timber, which is pressed up to the plank or board to keep it close to the guide or straight edge by a spring. The grooving and tonguing is done by burrs or circular cutters similar to a saw: these burrs are hung on perpendicular spindles, the arbors of which rest in boxes attached to the inward side of the frame, a burr on one side to cut the groove, and on the other is placed two burrs, just as far apart as the thickness of the above one, for cutting the groove. At or near one end of the frame is hung a shaft, with a drum or roller, from which belts pass over to pulleys on each spindle of the burrs or circular cutters, which must have about the same velocity of the cylinder. These burrs are placed on one side of the cylinder, opposite to each *other, so as to cut the tongue to match the groove; on the other side of the cylinder is an arbor parallel with the cylinder, on which are placed circular cutters for planing the edges of the board or plank as they pass through. The cutter on the side next to the guide is stationary on the arbor; the opposite one is movable in the arbor, but fastened with screws to set it for different widths. A belt runs from a pulley on the end of the arbor, outside the frame, to the said drum, as also the same from the cylinder, each having about the same motion. The feeding-rollers are put in motion by a belt from the slow part of the driving power. I have also put in operation a carriage for feeding, but rollers save the time of running the carriage back. [*654

"Now, what I, the said Uri Emmons, consider and claim as my improvement, and for which I solicit a patent, is as follows, namely:—

"1st. The principle of planing boards and plank with a rotary motion, with knives or edges on a cylinder, placed upon the same, straight or spiral, as before described, which I put in operation at Syracuse, in the county of Onondaga, in the state of New York, in the early part of the year 1824.

"2d. The burrs for grooving and tonguing, in contradistinction from the mode used by William Woodworth, he using the duck-bill cutters.

"3d. The feeding, by running the timber through on a carriage, or between feeding-rollers, guided by a straight edge, as before described.

"In testimony that the aforegoing is a true specification of my said improvement, as before described, I have hereunto

set my hand and seal, the eighth day of April, in the year of our Lord one thousand eight hundred and twenty-nine.

(Signed,) URI EMMONS.

"Witnesses,—THOS. THOMAS.
SILAS HATHAWAY."

On the 16th of May, 1829, the said Emmons sold his entire interest in the last-mentioned patent to Daniel H. Toogood, Daniel Halstead, and William Tyack, by the following instrument:—

Deed from Emmons to Toogood, Halstead, and Tyack.

"Whereas Uri Emmons, of the state of New York, machinist, has received letters patent of the United States of America, dated April 25th, one thousand eight hundred and twenty-nine, [for] the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a new and useful improvement in the mode of planing floor-plank, and grooving and tonguing, and straightening the edges of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing-machine.

*655] "*Now, know all men by these presents, that I, Uri Emmons, of the city of New York, in consideration of five dollars, to me in hand paid by Daniel H. Toogood, Daniel Halstead, and William Tyack, all of said city of New York, who fully viewed and considered the said improvement, and the said patent and specifications therein contained, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, to the said Daniel H. Toogood, Daniel Halstead, and William Tyack, their heirs, executors, administrators, and assigns, the full and exclusive right and liberty derived from the said patent, of making, using, and vending to others to be made, used, and sold, the said improvement, within and throughout the United States of America. To have and hold and enjoy all the privileges and benefits which may in any way arise from the said improvement by virtue of said letters patent. And I do hereby empower the said Daniel H. Toogood, Daniel Halstead, and William Tyack, their heirs, executors, administrators, and assigns, to commence and prosecute to final judgment and execution, at their own cost, any suit or suits against any person or persons who shall make, use, or vend the said improvement, contrary to the intent of the said letters patent and law in such case made and provided, and to receive, for their own benefit, the avails thereof, in such manner as I might do.

"In witness whereof, I have hereunto set my hand and seal, this sixteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine.

URI EMMONS. [SEAL.]

"Witnesses,—THOMAS AP THOMAS.
ALEX. DEDDER."

"*City and County of New York, ss.:*

"Be it remembered, that on the sixteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine, before me, personally appeared Uri Emmons, known to me to be the person described in, and who executed, the within deed, and acknowledged that he executed the same for the purposes therein mentioned; and there being no material alterations, erasures, or interlineations, I allow the same to be recorded.

THOMAS THOMAS, *Commissioner, &c.*"

On the 28th of November, 1829, the following mutual deed of assignment was executed between Woodworth and Strong, on the one part, and Toogood, Halstead, Tyack, and Emmons, on the other part, by which Woodworth and Strong convey to Toogood, Halstead, and Tyack all their interest in the patent of December 27th, 1828, in the following places, namely:—In the city and county of Albany, in the state of New York; in the state of Maryland, except the western part which lies west of the Blue Ridge; in Tennessee, Alabama, South Carolina, Georgia, the Floridas, *Louisiana, Missouri, and the territory west of the Mississippi; and Toogood, Halstead, Tyack, and Emmons conveyed to Strong and Woodworth all their interest in Emmons's patent of 25th April, 1829, for the rest and residue of the United States; by which mutual deed of assignment the parties agreed, that any improvement in the machinery, or alteration, or renewal of either patent, such improvement, alteration, or renewal should accrue to the benefit of the respective parties in interest, and might be applied and used within their respective districts. [*656

Mutual Deed between Woodworth, Strong, Toogood, Halstead, Tyack, and Emmons.

"Know all men by these presents, that William Woodworth, now of the City of New York, the patentee of an improved method of planing, tonguing, grooving, &c., &c., plank, boards, &c., by letters patent from the United States, dated December 29th, 1828, and James Strong, of the city of Hudson, in the State of New York, the assignee of one equal

half of the rights and interests secured by the aforesaid letters patent, of the one part, and Uri Emmons, of the city of New York, the patentee of an improvement in the mode of planing floor-plank, and grooving, tonguing, and straightening the edges of the same, &c., by letters patent from the United States, dated April 25th, 1829, and Daniel H. Toogood, Daniel Halstead, and William Tyack, of the city of New York, the assignees, by deed dated the 16th day of May, 1829, of all the rights and interest secured by the last aforesaid patent to said Emmons, of the other part, in consideration of the following covenants and agreements, do hereby covenant and agree as follows:—

"First. The said Woodworth and Strong, and their assigns, have, and hereby do assign to the said Toogood, Halstead, and Tyack, and their assigns, all their right and interest in the aforesaid patent to William Woodworth, to be sold and used, and the plank or other materials prepared thereby to be vended and used, in the following places, namely:—In the city and county of Albany, in the state of New York; in the state of Maryland, except the western part thereof which lies west of the Blue Ridge; in Tennessee, Mississippi, Alabama, South Carolina, Georgia, the Floridas, Louisiana, and the territory west of the River Mississippi, and not in any other state or place within the limits of the United States or the Territories thereof. To have and to hold the rights and privileges hereby granted to them and their assigns for and during the term of fourteen years from the date of the patent; and they are also authorized to prosecute, at their own costs and charges, any violation of the said patent, in the same manner as the patentee, Woodworth, might lawfully do.

*657] "Secondly. The said Emmons, Toogood, Halstead, and Tyack, *in consideration aforesaid, have, and hereby do covenant and agree to assign, and do assign, for themselves and assigns, to the said Woodworth and Strong and their assigns, all their right and interest in the aforesaid patent granted to the said Uri Emmons, to be sold and used, and the plank or other material prepared thereby to be vended and used, in all and singular the rest and residue of the United States, and the Territories thereof, that is to say, in all places other than in those especially assigned to the said Toogood, Halstead, and Tyack, as aforesaid. To have and to hold the said rights and privileges hereby granted to them and their assigns for and during the term of fourteen years from the date of the said letters patent to the said Uri Emmons; and they are also authorized to prosecute, at their own costs and charges,

any violation of the said patent, in the same manner as the patentee, Uri Emmons, might lawfully do.

"Thirdly. And the two parties further agree, that any improvement in the machinery, or alteration, or renewal of either patent, such alteration, improvement, or renewal shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts as hereinbefore designated.

"Witness our hands and seals, at the city of New York, the 28th of November, 1829.

WILLIAM WOODWORTH.	[SEAL.]
JAMES STRONG.	[SEAL.]
WILLIAM TYACK.	[SEAL.]
D. H. TOOGOOD.	[SEAL.]
DANIEL HALSTEAD.	[SEAL.]
URI EMMONS.	[SEAL.]

"Sealed and delivered, in presence of
THOMAS AP THOMAS,.
Witness to the signing of Toogood, Tyack,
Halstead, and Emmons."

Under this mutual assignment, the respective parties and their assignees would possess the following rights, namely: if they claimed under Woodworth's patent, to use the same for fourteen years from the 29th of December, 1828, that is to say, until the 29th of December, 1842; and if they claimed under Emmons's patent, to use the same for fourteen years from the 25th of April, 1829, that is to say, until the 25th of April, 1843.

On one or the other of these days, therefore, if things had remained in the same condition, all rights either in the patentees or their assignees would have ceased, as far as respected an exclusive use of the thing patented.

In 1836, Congress passed an act from which the following is an extract, and the construction of which was the chief controversy. (Act approved 4th July, 1836, ch. 357, 5 Lit. & Brown's ed., 117, *§ 18.) "And be it further [*658 enacted, that whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent-office, setting forth the grounds thereof; and the Commissioner shall, on the applicant's paying the sum of forty dollars to the credit of the treasury, as in the case of an original application for a patent, cause to be published in one or more of the principal news-

papers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application, and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. And the Secretary of State, the Commissioner of the Patent-office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the evidence produced before them, both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to the said board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault upon his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the Commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the term; which certificate, with a certificate of said board of their judgment and opinion as aforesaid, shall be entered on record in the patent-office; and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein. Provided, however, that no extension of a patent shall be granted after the expiration of the term for which it was originally issued."

On the 3d of February, 1839, William Woodworth, the patentee, died; and on the 14th of February, 1839, William W. Woodworth took out letters of administration upon his estate, in the county of New York.

*659] In 1842, William W. Woodworth, the administrator, *applied for an extension of the patent under the above-recited act of 1836, and on the 16th of November, 1842, the board issued the following certificate:

"In the matter of the application of William W. Wood-

worth, administrator on the estate of William Woodworth, deceased, in writing to the Commissioner of Patents for the extension of the patent for a new and useful improvement in the method of planing, tonguing, and grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances, granted to the said William Woodworth, deceased, on the 27th day of December, 1828, for fourteen years from said 27th day of December.

"The applicant having paid into the treasury the sum of forty dollars, and having furnished to the undersigned a statement in writing, under oath, of the ascertained value of the invention, and of the receipt and expenditures thereon, sufficiently in detail to exhibit a true and faithful account of loss and profits in any manner accruing to said patentee from or by reason of said invention; and notice of application having been given by the Commissioner of Patents, according to law, said board met at the time and place appointed, namely, at the patent-office, on the 1st September, 1842, and their meetings having been continued by regular adjournments until this 16th day of November, 1842, they, on that day, heard the evidence produced before them, both for and against the extension of said patent, and do now certify, that, upon hearing of the matter, it appears to their full and entire satisfaction, having due regard to the public interest therein, that it is just and proper that the term of said patent should be extended, by reason of the patentee, without neglect on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use.

"Washington city, Patent-office, November 16th, 1842.

DANIEL WEBSTER,
Secretary of State.
CHAS. B. PENROSE,
Solicitor of the Treasury.
HENRY L. ELLSWORTH,
Commissioner of Patents."

And on the same day the Commissioner of Patents issued the following certificate:

"Whereas, upon the petition of William W. Woodworth, administrator of the estate of William Woodworth, deceased,

*for an extension of the within patent, granted to William Woodworth, deceased, on the 27th day of December, 1828. The Board of Commissioners, under the eighteenth section of the act of Congress approved the 4th day of July, 1836, entitled an act to promote the progress of useful arts, to repeal all acts and parts of acts heretofore made for that purpose, did, on the 16th day of November, 1842, certify that the said patent ought to be extended.

"Now, therefore, I, Henry L. Ellsworth, commissioner of patents, by virtue of the power vested in me by said eighteenth section, do renew and extend said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, namely, the 27th day of December, 1842, which certificate of said Board of Commissioners, together with this certificate of the Commissioner of Patents, having been duly entered of record in the patent-office, the said patent now has the same effect in law as though the term had been originally granted for the term of twenty-one years.

"In testimony whereof, I have caused the seal of [SEAL.] the patent-office to be hereunto affixed, this 16th day of November, 1842.

"HENRY L. ELLSWORTH,
"*Commissioner of Patents.*"

On the 2d of January, 1843, William W. Woodworth, the administrator, filed the following disclaimer:

"To all men to whom these presents shall come, I, William W. Woodworth, of Hyde Park, in the county of Duchess and State of New York, Esq., as I am administrator of the goods and estate which were of William Woodworth, deceased, hereinafter named, send greeting:

"Whereas letters patent, bearing date on the twenty-seventh day of December, in the year of our Lord eighteen hundred and twenty-eight, were granted by the United States to William Woodworth, now deceased, for an improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, boards, plank, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on, or facing, metallic, mineral, or other substances. And whereas, before the term of fourteen years, for which the said letters patent were granted, had fully expired, such proceedings were had that, pursuant to the act of Congress in such case made and provided, the said letters patent were renewed or extended for the term of seven years from and

after the expiration of the said term of fourteen years, and to the certificate granting the said extension and renewal unto me in my said capacity, bearing date on the sixteenth day of November now last past, and which is duly recorded according to act of Congress in that behalf, reference is *hereby made, as showing my title and interest in and to the said letters patent. [*661

"And whereas the said William Woodworth, through inadvertence, accident, or mistake in his application for letters patent, made his specification of claim too broad, in this, namely, that he, the said William Woodworth, claimed as his improved method the application of circular saws for reducing floor-plank and other material to width, of which he was not the original and first inventor. And whereas some material and substantial part of the said patented thing was justly and truly the invention and improvement of the said William Woodworth.

"Now therefore know ye, that I, the said William Woodworth, in my capacity aforesaid, and as the person to whom the said certificate was granted as aforesaid, have disclaimed, and do by these presents, for myself, and for all claiming under me, disclaim, all and any exclusive right, title, property, or interest of, in, or to the application of circular saws for reducing floor-plank or other materials to a width, by reason of the aforesaid letters patent, and the aforesaid renewal or extension thereof.

"In testimony whereof, I have hereto, in my capacity aforesaid, set my hand and seal, on this second day of January, in the year eighteen hundred and forty-three.

WILLIAM W. WOODWORTH,
Administrator of W. Woodworth, deceased. [SEAL.]

"Executed in presence of
CHAS. W. EMESN.
B. R. CURTIS."

In March, 1843, Woodworth, the administrator, made an assignment of his patent rights in some of the States to James G. Wilson, the plaintiff. At what time the assignment was made for New York, the record in that case did not state, but it was one of the admitted facts that he was the grantee. The assignment first referred to was recorded in the patent-office in Liber 4, pp. 291, 292, on the 20th of March, 1843.

On the 9th of August, 1843, the administrator assigned his right to Wilson, in and for the State of Maryland.

On the 26th of February, 1845, Congress passed the following act:

"An Act to extend a Patent heretofore granted to William Woodworth.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the patent granted to William Woodworth on the twenty-seventh day of December, in the year one thousand eight hundred and twenty-eight, for his improvement on the method
*662] of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or *any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings on and facing several other substances, a description of which is given in a schedule annexed to the letters patent granted as aforesaid, be, and the same is, hereby extended for the term of seven years from and after the 27th day of December in the year one thousand eight hundred and forty-nine; and the Commissioner of Patents is hereby directed to make a certificate of such extension in the name of the administrator of the said William Woodworth, and to append an authenticated copy thereof to the original letters patent, whenever the same shall be requested by the said administrator or his assigns.

"Approved February 26, 1845.

"A true copy from the roll of this office.

"R. K. CRALLE, *Chief Clerk.*

"*Department of State, March* 3, 1845."

And on the 3d of March, 1845, the following certificate was issued:

"In conformity, therefore, with the directions in the said act contained, I, Henry L. Ellsworth, Commissioner of Patents, do hereby certify, that the patent therein described is, by the said act, extended to William W. Woodworth, administrator of said William Woodworth, for the term of seven years from and after the twenty-seventh day of December in the year one thousand eight hundred and forty-nine; and this certificate of such extension is made on the original letters patent, on the application of William W. Woodworth, the administrator of the said William Woodworth.

"In testimony whereof, I have caused the seal of the
[L. S.] patent-office to be hereunto affixed, this 3d day of March, 1845. HENRY L. ELLSWORTH,

"*Commissioner of Patents.*"

On the 8th of July, 1845, a new patent was issued, with an amended specification, as follows:

"The United States of America to all to whom these letters patent shall come:

"Whereas, William W. Woodworth, administrator of William Woodworth, deceased, of Hyde Park, N. Y., has alleged that said William Woodworth invented a new and useful improvement in machines for planing, tonguing, and grooving, and dressing boards, &c., for which letters patent were granted, dated the 27th day of December, 1828, which letters patent have been extended (as will appear by the certificates appended thereto, copies of which are hereunto attached) for fourteen years from the expiration of said letters patent; and which letters patent are hereby cancelled on *account of a defective specification, which he [*663 states has not been known or used before said William Woodworth's application; has made oath that he is, and that said William Woodworth was, a citizen of the United States; that he does verily believe that said William Woodworth was the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of fifteen dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose.

"These are therefore to grant, according to law, to the said William W. Woodworth, in trust for the heirs at law of said W. Woodworth, their heirs, administrators, or assigns, for the term of twenty-eight years from the twenty-seventh day of December, one thousand eight hundred and twenty-eight, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said William W. Woodworth, in the schedule hereunto annexed, and is made part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the patent-office has been hereunto affixed. [L. S.]

"Given under my hand, at the city of Washington, this eighth day of July, in the year of our Lord one thousand eight hundred and forty-five, and of the independence of the United States of America the seventieth.

JAMES BUCHANAN, *Secretary of State.*"

"Countersigned, and sealed with the seal of the patent-office.

HENRY H. SYLVESTER, *Acting Com'r of Patents.*"

The schedule referred to in these letters patent, and making part of the same:—

"To all whom it may concern:—Be it known, that the following is a full, clear, and exact description of the method of planing, tonguing, and grooving plank or boards, invented by William Woodworth, deceased, and for which letters patent of the United States were granted to him on the 27th day of December, in the year one thousand eight hundred and twenty-eight; the said letters patent having been surrendered for the purpose of describing the same invention, and pointing out in what it consists, in more clear, full, and exact terms than was done in the original specification.

*664] *"*Amended Specification.*

"The plank or boards which are to be planed, tongued, or grooved are first to be reduced to a width by means of circular saws, by reducing-wheels, or by any other means. When circular saws are used for this purpose, two such saws should be placed upon the same shaft, on which they are to be capable of adjustment, so that they may be made to stand at any required distance apart; under these the board or plank is to be forced forward, and brought to the width required; this apparatus and process do not require to be further explained, they being well understood by mechanicians.

"When what has been above denominated reducing wheels are used, these are to consist of revolving cutter-wheels, which resemble in their construction and action the planing and reducing-wheel to be presently described; these are to be made adjustable like the circular saws, but the latter are preferred for this purpose. The plank may be reduced to a width on a separate machine.

"When the plank or boards have been thus prepared (on a separate machine), they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing-wheel; which wheel may be made to revolve either horizontally or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon may be moved forwards by means of a rack and pinion, by an endless chain or band, by geared friction-rollers, or by any of the devices well known to machinists for advancing a carriage or materials to be acted upon in machines for various purposes. The plank or board is to be moved on towards the cutting edges of the cutters or knives, on the planing-cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board in a direction contrary to that in which it is made to

advance; the edges of the cutters are, in this method, prevented from coming first into contact with its surface, and are made to cut upwards from the reduced part of the plank towards said surface, by which means their edges are protected from injury by gritty matter, and the board or plank is more evenly and better planed than when moved in the reverse direction.

"After the board or plank passes the planing-cylinder, and as soon, or fast, as the planing-cylinder has done its work on any part of the board or plank, the edges are brought into contact with two revolving cutter-wheels, one of which wheels is adapted to the cutting of the groove, and the other to the cutting of the two rebates that form the tongue. When the axis of the planing and reducing-wheel stands vertically, the grooving and tonguing wheels are placed one above the other, with the plank edgewise between *them; when the axis of the planing-wheel stands horizontally, these [*665 wheels are on the same horizontal plane with each other, standing on perpendicular spindles.

"The grooving-wheel consists of a circular plate fixed on an axis, and having one, two, three, four, or more cutters, which are to be screwed, bolted, or otherwise attached to it, the edges of which cutters project beyond the periphery of the plate to such distance as is required for the depth of the groove; their thickness may be such as is necessary for its width; they are, of course, so situated as to cut the groove in the middle of the edge of the board, or as nearly so as may be required. The tonguing-wheel is similar in form to the grooving-wheel, but it has cutters on each of its sides, or otherwise, so formed and arranged as to cut the two rebates which are necessary to the formation of the tongue.

"The grooving and tonguing cutters, at the same time and by the same operation, reduce the board or plank to an exact width throughout. When the axis of the planing-wheel is placed vertically, the knives or cutters may be made to plane two planks at the same time; the planks being in this case moved in contrary directions, and so as to meet the edges of the revolving knives or cutters. When the machine is thus constructed, a second pair of grooving and tonguing wheels may be made to operate in the same way with those above described. A machine to operate upon a single plank or board, and having the axis of the planing-wheel placed horizontally, will however be more simple and less expensive than that intended to operate on two planks simultaneously.

"In the accompanying drawing, fig. 1 is a perspective representation of the principal operating parts of the machine

when arranged and combined for planing, tonguing, and grooving; and when so arranged as to be capable of planing two planks at the same time, the axis of the planing-wheel being placed vertically. A A is a stout substantial frame of the machine, which may be of wood or of iron, and may be varied in length, size, and strength, according to the work to be done. B B are the heads of the planing-cylinder, and C C, the knives or cutters, which extend from one to the other of said heads, to the peripheries of which they may be attached by means of screws. The knives C C, with the faces forming a planing angle, may be placed in a line with the axis J, of the cylinder, or they may stand obliquely thereto, as may be preferred; but in the latter case the edge should form the segment or portion of a helix; *b* represents a pulley near to the upper end of the axis J; and I, a pulley or drum, which may be made to revolve by horse, steam, or other motive power, and from which a belt may extend around the pulley *b*, to drive the planing-cylinder and other parts of the machinery; G is the carriage, which is represented as being driven forward by means of a rack *and pinion, H; against this carriage, the plank K, which is to be planed, tongued, and grooved, is placed, and is made to advance with it. It will be manifest, however, that the plank may be moved forward by other means, as, for example, by an endless chain or band, passing around drums or chain-wheels, or by means of geared friction-wheels borne up against it. To cause the carriage and plank to move forward readily, there may be friction-rollers, *f f f*, placed horizontally, and extending under them; the rollers, *f f f*, which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed in cutting from the planed surface upwards; they may be borne against it by means of weights or springs, in a manner well known to machinists. In a single horizontal machine, the horizontal friction-rollers may be geared, and the pressure-rollers placed above them to feed the board with or without the carriages, a bed-plate being used directly under the planing cylinder.

*666]

"Fig. 2 is a separate view of the planing-cylinder, with its knives or cutters; and fig. 3, an end view of one of the heads. E E are the revolving cutters, or tonguing and grooving wheels, and D D whirls upon their shafts, which may be driven by bands, or otherwise, so as to cause said wheels to revolve in the proper direction.

"Fig. 4 is a side view of one of these wheels; fig. 5 is an edge view of the tonguing-wheel; and fig. 6, an edge view of

the grooving-wheel; the latter being each shown with two cutters in place. The number of cutters on these wheels may be varied, but they are represented as furnished with four. The cutters may be fixed on the sides of circular plates, with their edges projecting beyond the periphery of said plate.

"The edges of the plank, as its planed part passes the planing-cylinder, are brought in contact with the above-described tonguing and grooving wheels, which are so placed upon their shafts as that the tongue and groove shall be left at the proper distance from the face of the plank, the latter being sustained against the planing-cylinder by means of the carriage or bed-plate, or otherwise, so that it cannot deviate, but must be reduced to a proper thickness, and correctly tongued and grooved.

"In fig. 1, above referred to, only one carriage and one pair of cutter-wheels are shown, it not being deemed necessary to represent those on the opposite side, they being similar in all respects.

"Fig. 7 represents the same machine, with the axis of the planing-cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B, the heads of the planing-cylinder; C C, the knives or cutters attached to said heads. To meet the different thicknesses of *667] the planks *or boards, the bearings of the shaft or cylinder may be made movable, by screws or other means, to adjust it to the work; or the carriage or bed-plate may be made so as to raise the board or plank up to the planing-cylinder. E and E′ are the revolving cutters, or tonguing and grooving wheels, which are placed upon vertical shafts, having upon them pulleys, D D, around which pass belts or bands from the main drum, I, to which a revolving motion may be given by any adequate motive power.

"From the drum, I, a belt, L, passes also around the pulley, *b*, on the shaft of the planing-cylinder, and gives to it the requisite motion. There may in this machine be a horizontal carriage moved forward by a rack and pinion, in a manner analogous to that represented in fig. 1; but in the present instance the plank is supposed to be advanced by means of one or two pairs of friction or feed rollers, shown at *f f′*; the uppermost, *f′ f′*, of the pairs of rollers may be held down by springs, or weighted levers, which it has not been thought necessary to show in this drawing, as such are in common use. The lowermost of these rollers may be fluted or made rough on their surfaces, so as to cause friction on the under side of the plank. M M′ are pulleys on the axles of these lower rol-

lers which are embraced by bands, N N′, which also pass around a pulley, O, on a shaft which crosses the frame, A A, and has a pulley, T, on it, which is embraced by the belt, P, on a pulley, Q, on the shaft of the main drum, I; these bands and pulleys serve to give motion to the feed-rollers, as will be readily understood by inspecting the drawing. R R are guide-strips, used in place of the rollers used for the same purpose, and also for bearing or friction rollers, when the machine is vertical, to direct one edge of the plank, and against its opposite edge; any pressure may be used equal to the weight of the board or plank, when worked in a vertical position. One of the cutter-wheels should be made adjustable, to adapt it to stuff of different widths.

"The planing-cylinder, and likewise the cutter or tonguing and grooving wheels, may be constructed in the manner represented in figures 2, 3, 4, 5, and 6, and hereinbefore fully described. One of the heads of the planing-wheel may be made movable, to accommodate its width to the width of the boards or plank to be planed.

"The respective parts of this machine may be varied in size, as may also the velocity of the motion of the planing-cylinders and cutter-wheels; but the following has been found to answer well in practice. The planing-cylinder, having four knives or cutters, may be twelve inches in diameter, and may make two thousand and upwards revolutions in a minute. In a machine like that shown in fig. 7, the main drum, I, may be two feet in diameter, and may be driven with the speed of five hundred
*668] and upwards revolutions in a minute. The pulleys on the planing-cylinder, and on the *cutter-wheels, may be six inches in diameter. The plank should be moved forward at the rate of about one foot for every hundred revolutions of the cutter-wheel; and, of course, the diameter of the feed-rollers and of the pulleys by which they are turned must be so graduated as to produce this result. The size and speed of the above parts of this machine may be in some degree varied; but the above have been found to work well.

"Having thus fully described the parts and combination of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate without changing the principle or mode of operation of the machine, what is claimed therein as the invention of William Woodworth, deceased, is the employment of rotating planes, substantially such as herein described, in combination with rollers, or any analogous device, to prevent the boards from

being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplaned surface, as described.

"And also the combination of the rotating planes with the cutter-wheels for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards, &c., at one operation, as described. And also the combination of the tonguing and grooving cutter-wheels for tonguing and grooving boards, and at one operation, as described.

"And, finally, the combination of either the tonguing or the grooving cutter-wheel for tonguing or grooving boards, &c., with the pressure-rollers, as described, the effect of the pressure-rollers in these operations being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the centre of the cutter-wheels, whilst it is moved through by machinery. In the planing operation, the tendency of the plane is to lift the boards directly up against the rollers; but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

WILLIAM W. WOODWORTH,
Administrator of William Woodworth, deceased.

"Witnesses:—
JAMES MILHOLLAND,
CHS. M. KELLER."

The above papers show the title of the administrator, who was the grantor of Wilson, the plaintiff in the suit. The record in the New York case was exceedingly brief, and contained neither the declaration nor pleas, but only the state of the pleadings and the existence of demurrers. But from the eighth fact in the statement of facts, in which it is said that "the defendants trace no title to themselves to a right to use said machines from the assignment *made by [*669
William Woodworth and James Strong to Halstead, Toogood, and Tyack," the inference must be, that their defence was in showing an outstanding title.

The following is the entire case presented by the New York record.

"*United States of America, Northern District of New York:*

"At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, on Tuesday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and forty-five, and in the seventieth year of American independence.

"Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

"JAMES G. WILSON
v.
LEWIS ROUSSEAU AND CHARLES EASTON.

"*State of the Pleadings.*

"This is an action on the case to recover damages for the alleged infringement of letters patent issued to William Woodworth, on the 27th day of December, 1828, for the term of fourteen years, for an improvement in machinery for planing, tonguing, and grooving boards and plank at one operation; which letters patent were, on the 16th day of November, 1842, extended for seven years more, such extension being granted to William W. Woodworth, as administrator of said William Woodworth.

"To the first count of the plaintiff's declaration, the defendants interposed three several special pleas in bar, to each of which pleas the plaintiff demurred, and the defendants joined in demurrer. To the second count of the plaintiff's declaration, the defendants demurred, and the plaintiff joined in demurrer.

"The case coming on to be argued at this term, the following questions occurred for decision, to wit:—

"1. Whether the eighteenth section of the patent act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee.

"2. Whether, by force and operation of the eighteenth section of the act of July 4th, 1836, entitled "An act to promote the progress of the useful arts," &c., the extension granted to William W. Woodworth, as administrator, on the 16th day of November, 1842, inured to the benefit of assignees, under the original patent granted to William Woodworth, on the 27th day of December, 1828, or whether said extension inured to the benefit of the administrator only, in his said capacity.

"3. Whether the extension specified in the foregoing
*670] second point inured to the benefit of the administrator to whom the same *was granted, and to him in that capacity exclusively; or whether, as to the territory specified in the contract of assignment made by William Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th day of November, 1829 (and set forth in the second plea of the defendants to the first count of the declaration), and by legal operation of the covenants contained in said contract, the said extension inured to the benefit of the said Toogood, Halstead, and Tyack, or their assigns.

"4. Whether the plaintiff, claiming title under the extension from the administrator, can maintain an action for an

infringement of the patent right within the territory specified in the contract of assignment to Toogood, Halstead, and Tyack, against any person not claiming under said assignment; or whether the said assignment be of itself a perfect bar to the plaintiff's suit.

"5. Whether the extension specified in the second point could be applied for and obtained by William W. Woodworth, as administrator of William Woodworth, deceased, if the said William Woodworth, the original patentee, had, in his lifetime, disposed of all his interest in the then existing patent, having, at the time of his death, no right or title to, or interest in, the said original patent; or whether such sale carried with it nothing beyond the term of said original patent; and, if it did not, whether any contingent rights remained in the patentee or his representatives.

"6. Whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town; or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee.

"7. Whether the letters patent of renewal issued to William W. Woodworth, as administrator aforesaid, on the 8th day of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law; or whether the same be void, for uncertainty, ambiguity, or multiplicity of claim, or any other cause.

"8. Whether the court can determine, as matter of law, upon an inspection of the said two patents and their respective specifications, that the said new patent of the 8th of July, 1845, is not for the same invention for which the said patent of 1828 was granted.

"9. Whether the decision of the Board of Commissioners, who are to determine upon the application for the extension of a patent, under the eighteenth section of the act of 1836, is conclusive upon the question of their jurisdiction to act in the given case.

"10. Whether the Commissioner of Patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and *pending the existence [*671
of an extended term of seven years; or whether such surrender and renewal may be made at any time during such extended term.

"On which questions the opinions of the judges were opposed.

"Whereupon, on a motion of the plaintiff, by William H. Seward, his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided.

"It is ordered that the foregoing state of the pleadings, and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of the plaintiff by his counsel, and the law in that case made and provided, to wit:—

"1. That William Woodworth, as the inventor of a machine, or improvement in machinery, for planing, tonguing, and grooving boards and plank at one operation, on the 27th day of December, in the year 1828, applied to the proper department of the government for a patent for said invention, and upon the same day, on filing his specifications and explanatory drawings, and complying with the other legal prerequisites, letters patent, signed by the President, and under the seal of the United States, were duly issued to the said William Woodworth, granting to him the exclusive right, throughout the United States, to construct and use, and vend to others to be used, the machine or improvement patented, for and during the term of fourteen years from the said 27th day of December, 1828.

"2. That subsequently, to wit, on the 28th day of November, 1829, the said William Woodworth and James Strong, who had become jointly interested with said Woodworth in the rights secured by the said letters patent by contract of assignment of that date, transferred to Daniel H. Toogood, Daniel Halstead, and William Tyack all their right and interest in and to the said patent for certain parts and portions of the United States in said contract specifically set forth, including the city and county of Albany, in the state of New York, which is the domicile of the defendants.

"3. That the *habendum* in said contract of assignment is in the words following, to wit:—

"'To have and to hold the rights and privileges hereby granted for and during the term of fourteen years from the date of the patent.'

"And that the third clause in said contract of assignment is in the following words, to wit:—

"'And the two parties further agree, that any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration, or renewal, shall inure to the

benefit of the respective parties interested, and may be applied and used within their respective districts as hereinbefore designated.'

*"That previous to the expiration of the fourteen [*672 years' limitation of said patent, William Woodworth, the patentee, died, to wit, on the 9th of February, 1839; that William W. Woodworth was thereupon duly appointed, and now is, administrator of the estate of the said William Woodworth, and that said Woodworth, in his lifetime, had sold all his interest in the said original patent.

"5. That William W. Woodworth, as administrator aforesaid, on the 16th day of November, 1842, under the eighteenth section of the act of Congress of July 4th, 1836, applied to the Board of Commissioners created by the said section for an extension of said patent; and that, upon complying with the requisites in said section prescribed, an extension of said patent was granted by said board to William W. Woodworth, as administrator of the estate of William Woodworth, on said 16th day of November, 1842, and letters patent of extension were on said day duly issued to him, granting to him, in his aforesaid capacity, the exclusive right to make and use, and vend to others to be used, the said invention or improvement, for the term of seven years from and after the term of limitation of said original patent.

"6. That on the 8th day of July, 1845, the said William W. Woodworth, in his capacity as administrator aforesaid, and in accordance with the provisions of the thirteenth section of the said act of July 4th, 1836, made a surrender to the Commissioner of Patents of the letters patent to him granted on the 16th day of November, 1842, for an insufficiency of the specification upon which said original patent was issued, and upon filing a corrected and amended specification, with explanatory drawings, a copy of which is annexed hereto and made a part of this statement, the said Commissioner, on said 8th day of July, 1845, issued to the said William W. Woodworth new letters patent of said invention for the unexpired term of the first extension thereof, and of the extension granted by special act of Congress on the 26th day of February, 1845.

"7. That the defendants in this action have erected and put in operation, in the town of Watervliet, which is within the county of Albany and state of New York, one or more machines for planing, tonguing, and grooving boards and plank, substantially the same in principle and mode of operation as that the subject of the patent granted to William Wooodworth.

"8. That the defendants trace no title to themselves to a

right to use said machines from the assignment made by William Woodworth and James Strong to Halstead, Toogood, and Tyack.

"9. That the plaintiff in this action is the grantee of William W. Woodworth, as administrator, of the exclusive right to construct and use, and vend to others to be used, two of said patented machines within said town of Watervliet, in said county of Albany and state of New York."

*673] *The case was argued by *Mr. Seward*, *Mr. Latrobe*, and *Mr. Webster* (the two latter dividing the points), on behalf of the plaintiff, and *Mr. Stevens*, for the defendants. The reporter has been kindly furnished with the arguments of these gentlemen, but his limits will not permit their publication *in extenso*, and he is unwilling to take the responsibility of condensing them.

Mr. Justice NELSON delivered the opinion of the court.

The questions in this case come before us on a certificate of division of opinion from the Circuit Court of the United States for the Northern District of New York, involving the construction of various provisions of the act of Congress to promote the progress of useful arts, commonly called the patent act. We shall examine the questions in the order in which they appear on the record. The first is as follows:—

1. Whether the eighteenth section of the act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee.

The eighteenth section provides, in substance, that whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent-office, setting forth the grounds thereof. That the Secretary of State, the Commissioner of the Patent-office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the application; the patentee shall furnish to the board a statement in writing, under oath, of the value and usefulness of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of the invention; and if, upon a hearing of the matter, it shall appear to the satisfaction of the board, having a due regard to the public interest, that it is just and proper the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense

bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension for the term of seven years from and after the expiration of the first term, &c.

This is the substance of the section, so far as is material to the consideration of the question; and it will be seen, that, according to the words of the provision, the application is to be made by, and the new term to be granted to, the patentee himself, and hence the objection on account of its having been granted to the administrator.

The main argument relied on to support the objection is, that the patentee had no interest or right of property in the extended term at *the time of his death. That [*674 all he had was a mere possibility, too remote and contingent to be regarded as property, or any right of property, in the sense of the law, and therefore not assets or rights in the hands of the administrator which would authorize an application within the meaning of the statute.

At common law, the better opinion, probably, is, that the right of property of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public, as common property, and subject to the common use and enjoyment of all.

The act of Congress for the encouragement of inventors, and to promote the progress of the useful arts, and for the purpose of remedying the imperfect protection, or rather want of protection, of this species of property, has secured to him, for a limited term, the full and exclusive enjoyment of his discovery.

The law has thus impressed upon it all the qualities and characteristics of property, for the specified period; and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his legal representatives, and becomes part of the assets.

Congress have not only secured to the inventor this absolute and indefeasible interest and property in the subject of the invention for the fourteen years, but have also agreed, that upon certain conditions occurring and to be shown, before the expiration of this period, to the satisfaction of a board of commissioners, an indifferent tribunal designated for the purpose, this right of property in the invention shall be continued for the further term of seven years. Subject to this condition,

the right of property in the second term is as perfect, to the extent of the intent, as the right of property in the first.

The circumstances upon which the condition rests, and the occurrence of which gives effect and operation to the further grant of the government, are by no means uncommon, or difficult to be shown. They have often happened to inventors in the course of their dealings with this species of property. The act of Congress contemplates their occurrence again, and has therefore provided further security and protection, by enlarging the interest and right of property in the subject of their invention.

The provision is founded upon the policy of the government to encourage genius, and promote the progress of the useful arts, by holding out an additional inducement to the enjoyment of the right secured under the first term; and as an act of justice to the inventors for the time, ingenuity, and expense bestowed in bringing out the discovery, frequently of incalculable value to the business interests of the country. And it is

*675] apparent, therefore, unless the executor or administrator is permitted to take the place of the *patentee in case of his death, and make application for the grant of the second term, which continues the exclusive enjoyment of the right of property in the invention, the object of the statute will be defeated, and a valuable right of property, intended to be secured, lost to his estate.

The statute is not founded upon the idea of conferring a mere personal reward and gratuity upon the individual, as a mark of distinction for a great public service, which would terminate with his death; but of awarding to him an enlarged interest and right of property in the invention itself, with a view to secure to him, with greater certainty, a fair and reasonable remuneration. And to the extent of this further right of property, thus secured, whatever that may be, it is of the same description and character as that held and enjoyed under the patent for the first term. In its nature, therefore, it continues, and is to be dealt with, after the decease of the patentee, the same as an interest under the first, and passes, with other rights of property belonging to him, to the personal representatives, as part of the effects of the estate.

It would seem, therefore, from the nature of this interest in an extended term itself, as well as from a consideration of the object and purpose of the statute, plainly expressed upon its face, in providing for the prolonged enjoyment and protection of this species of property, that the Board of Commissioners

were well warranted in making the renewed grant to the administrator, upon his complying with the conditions.

An argument has been urged against this conclusion, grounded upon the tenth and thirteenth sections of the patent law. The former provides in express terms for the issuing of a patent to the executor or administrator, in case of the death of the inventor before it is taken out; and the latter, for a surrender of a patent defective by reason of an insufficient description, and the reissuing of a new one. These are supposed to be analogous cases, and manifest the sense of Congress, that, without the expressed provisions of law, the patent in the one case, and the surrender in the other, could not be issued to, or be made by, the legal representative. The argument is no doubt a proper one, and entitled to consideration; but is not necessarily conclusive.

As it respects the provision for a surrender by the executor or administrator, which is most analogous to the question in hand, we think there could be no great doubt that the right would exist in the absence of any such express authority, regard being had to the nature of the property, and the rights and duties of the legal representative, within the spirit and object of the patent law. It would be the surrender of a patent, the legal interest and property in which had become vested in him as part of the assets, which he was bound to take care of, and protect against waste; a step necessary to perfect the title and give value to the property *would seem to be not only directly within the line of [*676 his duty, but in furtherance of the chief object of the law, namely, to secure remuneration to the meritorious inventor.

It has also been argued, that the executor or administrator could not comply with the terms and conditions of the eighteenth section, upon which the right of property in the extended term is made to depend. In other words, that he would be unable to furnish to the Board of Commissioners a statement under oath of the usefulness of the invention, and of the receipts and expenditures of the patentee, exhibiting a true and faithful account of the loss and profit in any manner accruing from, and by reason of, the invention. This argument assumes as a matter of fact that which may well be denied. Suppose the dealings of the patentee in the subject of his discovery have been carried on through the instrumentality of agents or clerks, or, if not, that the patentee himself, as business men usually do, has kept an accurate account of his receipts and expenditures, all difficulty at once disappears. The account-books of a deceased party, in many of the States of the Union, identified and the handwriting

proved, are received as legal evidence of the demand in the courts of justice, and afford full authority, upon legal principles, for the admission of the books before the board, in support of the application. We perceive no great difficulty in a substantial compliance with the terms of the section, on the part of the executor or administrator.

The second question is, Whether, by force and operation of the eighteenth section already referred to, the extension granted to W. W. Woodworth, as administrator, on the 16th day of November, 1842, inured to the benefit of assignees under the original patent granted to William Woodworth, on the 27th day of December, 1828, or whether said extension inured to the benefit of the administrator only, in his said capacity.

The most of this section has already been recited in the consideration of the first question, and it will be unnecessary to repeat it. It provides for the application of the patentee to the commission for an extension of the patent for seven years; constitutes a board to hear and decide upon the application; and if his receipts and expenditures, showing the loss and profits accruing to him from and on account of his invention, shall establish, to the satisfaction of the board, that the patent should be extended by reason of the patentee, without any fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for his time, ingenuity, and expense bestowed upon the same, and the introduction of it into use, it shall be the duty of the commissioners to extend the same by making a certificate thereon of such extension for the term of seven years from and after the first term; "and thereupon the said patent shall
*677] have the same effect in law as though it had been originally granted for the term of twenty-one *years." And then comes the clause in question:—"And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein."

The answer to the second question certified depends upon the true construction of the above clause respecting the rights of assignees and grantees.

Various and conflicting interpretations have been given to it by the learned counsel, on the argument, leading to different and opposite results, which it will be necessary to examine.

On one side, it has been strongly argued, that the legal operation and effect of the clause save and protect all the rights and interests of assignees and grantees in the patent existing

at the time of the extension; and thus secure and continue the exclusive use and enjoyment of these rights and interests for the seven years, to the same extent, and in as ample a manner, as held and enjoyed under the first term. That if A. holds an assignment of a moiety of the patent, he will hold the same for the new term of seven years; if of the whole patent, then the whole interest for that period. And that as soon as the new grant is made to the patentee, the interest therein passes, by operation of this clause, to the assignees of the old term, in proportion to their respective shares.

On the other side, it has been argued, with equal earnestness, that, according to the true construction and legal effect of the clause, protection is given, and intended to be given, only to the rights and interests of assignees and grantees acquired and held by assignments and grants from the patentee in and under the second or new term; and that it does not refer to, or embrace, or in any way affect the rights and interests of assignees or grantees holding under the old.

In connection with this view, it is said that the rights thus protected in the new term may be acquired by means of the legal operation of the clause, either from a direct assignment or grant after the extension of the patent, or by an appropriate provision for that purpose, looking to an extension, contained in the assignment or grant under the old.

It is not to be denied, but that, upon any view that has been taken or that may be taken of the clause, its true meaning and legal effect cannot be asserted with entire confidence; and, after all, must depend upon such construction as the court can best give to doubtful phraseology and obscure legislation, having a due regard to the great object and intent of Congress, as collected from the context and general provisions and policy of the patent law.

The rule is familiar and well settled, that, in case of obscure and doubtful words or phraseology, the intention of the lawmakers is to be resorted to, if discoverable from the context, in order to fix and control their meaning so as to reconcile it, if possible, with the general policy of the law.

*Now, the serious difficulty in the way, and which renders the first interpretation inadmissible, except upon the most explicit and positive words, is, that it subverts at once the whole object and purpose of the enactment, as is plainly written in every line of the previous part of the section. It gives to the assignees and grantees of the patent, as far as assigned under the old term, the exclusive right and enjoyment of the invention—the monopoly—in the extended term for the seven years; when, by the same provision, it [*678

clearly appears that it was intended to be secured to the patentee as an additional remuneration for his time, ingenuity, and expense in bringing out the discovery, and in introducing it into public use. It gives this remuneration to parties that have no peculiar claims upon the government or the public, and takes it from those who confessedly have.

The whole structure of the eighteenth section turns upon the idea of affording this additional protection and compensation to the patentee, and to the patentee alone, and hence the reason for instituting the inquiry before the grant of the extension, to ascertain whether or not he has failed to realize a reasonable remuneration from the sale and use of the discovery,—the production of an account of profit and loss to enable the board to determine the question; and as it comes to the one or the other conclusion, to grant the extended term or not.

It is obvious, therefore, that Congress had not at all in view protection to assignees. That their condition on account of dealing in the subject of the invention, whether successful or otherwise, was not in the mind of that body, nor can any good reason be given why it should have been.

They had purchased portions of the interest in the invention, and dealt with the patent rights as a matter of business and speculation; and stood in no different relation to the government or the public, than other citizens engaged in the common affairs of life.

Nothing short of the most fixed and positive terms of a statute could justify an interpretation so repugnant to the whole scope and policy of it, and to wise and judicious legislation.

We think this construction not necessarily required by the language of the clause, and is altogether inadmissible.

Then as to the second interpretation, namely, that the clause refers to, and includes, assignees and grantees of interests acquired in the new term, either by an assignment or grant from the patentee after the extension, or by virtue of a proper clause for that purpose, in the assignment under the old term.

The difficulty attending this construction lies in the uselessness of the clause upon the hypothesis,—the failure to discover any subject-matter upon which to give reasonable *679] operation and effect to it,—and hence, to adopt the construction is to make the clause *virtually a dead letter, the grounds for which conclusion we will proceed to state.

The eleventh section of the patent act provides, that every

patent shall be assignable, in law, either as to the whole interest, or any undivided part thereof, by an instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, &c., shall be recorded in the patent-office. And the fourteenth section authorizes suits to be brought in the name of the assignee or grantee, for an infringement of his rights, in a court of law.

One object of these provisions found in the general patent system is to separate the interest of the assignee and grantee from that which may be held by the patentee, and to make each fractional interest held under the patent distinct and separate; in other words, to change a mere equitable into a legal title and interest, so that it may be dealt with in a court of law.

Now, in view of these provisions, it is difficult to perceive the materiality of the clause in question, as it respects the rights of assignees and grantees held by an assignment or grant in and under the new term, any more than in respect to like rights and interests in and under the old.

The eleventh and fourteenth sections embrace every assignment or grant of a part or the whole of the interest in the invention, and enable these parties to deal with it, in all respects, the same as the patentee. They stand upon the same footing under the new term, as in the case of former assignments under the old. Nothing can be clearer. It is impossible to satisfy the clause by referring it to these assignments and grants; or to see how Congress could, for a moment, have imagined that there would be any necessity for the clause, in this aspect of it. It would have been as clear a work of supererogation as can be stated.

The only color for the argument in favor of the necessity of this clause, in the aspect in which we are viewing it, is as respects the contingent interest in the new term, derived from a provision in an assignment under the old one, looking to the extension. As the right necessarily rested on contract, at least till the contingency occurred, there may be some doubt whether, even after its occurrence, the eleventh and fourteenth sections had the effect to change it into a vested legal interest, so that it could be dealt with at law; and that a new assignment or grant from the patentee would be required, which could be enforced only in a court of equity. To this extent there may be some color for the argument,—some supposed matter to give operation and effect to the clause.

But what is the amount of it? Not that the clause creates or secures this contingent interest in the new term, for that depends upon the contract between the parties, and the

contract alone, and which, even if the general provisions of the law respecting *the rights of assignees and grantees could not have the effect to change into a legal right, might be enforced in a court of equity.

The only effect, therefore, of the provision in respect to assignees and grantees of this description would be, to change the nature of the contingent interest after the event happened, from a right resting in contract to a vested legal interest; or, to speak with more precision, to remove a doubt about the nature of the interest in the new term, after the happening of a certain contingency, which event in itself was quite remote. This seems to be the whole amount of the effect that even ingenious and able counsel have succeeded in finding, to satisfy the clause. It presupposes that Congress looked to this scintilla of interest in the new term, which might or might not occur, and cast about to provide for it, for fear of doubts as to its true nature and legal character, and the effect of the general system upon it.

We cannot but think a court should hesitate before giving a construction to the clause so deeply harsh and unjust in its consequences, both as it respects the public and individual rights and interests, upon so narrow a foundation.

But there are other difficulties in the way of this construction.

The eleventh section, regulating the rights of assignees and grantees, provides, "that every patent shall be assignable at law," &c., "which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States," &c., "shall be recorded."

Now it will be apparent, we think, from a very slight examination of the clause in question, that it does not embrace assignees or grantees, in the sense of the eleventh section, at all; nor in the sense in which they are referred to when speaking of these interests generally under the patent law, without interpolating words or giving a very forced construction to those composing it.

The clause is as follows: — "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein."

It will be seen that the word "exclusive," used to qualify the right of a grantee in the eleventh section, and, indeed, always when referred to in the patent law (§ 14), and also the words "to make," "and to grant to others to make and

use," are dropped, so that there is not only no exclusive right in the grantee, in terms, granted or secured by the clause, but no right at all,—no right whatever,—to make or to grant to others to make and use the thing patented; in other words, no exclusive right to make or vend. And it is, we think, quite obvious, from the connection and phraseology, that assignees and grantees are placed, and were intended to be placed, in this respect, upon the same footing. We should scarcely be *justified in giving to this term [*681
a more enlarged meaning as to the right to make and sell, as it respects the one class, than is given to the others, as they are always used as correlative in the patent laws, to the extent of the interests held by them. The clause, therefore, in terms, seems to limit studiously the benefit, or reservation, or whatever it may be called, under or from the new grant to the naked right to use the thing patented; not an exclusive right even for that, which might denote monopoly, nor any right at all, much less exclusive, to make and vend. That seems to have been guardedly omitted. We do not forget the remaining part of the sentence, "to the extent of their respective interests therein," which is relied on to help out the difficulty. But we see nothing in the phrase, giving full effect to it, necessarily inconsistent with the plain meaning of the previous words. The exact idea intended to be expressed may be open to observation; but we think it far from justifying the court in holding, that the grant or reservation of a right to use a thing patented, well known and in general use at the time, means an exclusive right to make and use it; and not only this, but an exclusive right to grant to others the right to make and use it, meaning an exclusive right to vend it.

The court is asked to build up a complete monopoly in the hands of assignees and grantees in the thing patented, by judicial construction, founded upon the grant of a simple right to use it to the extent of the interest possessed; for the argument comes to this complexion. A simple right to use is given, and we are asked to read it an exclusive right, and not only to read it an exclusive right to use, but an exclusive right to make and vend, the patented article.

Recurring to the patent law, it will be seen that Congress, in granting monopolies of this description, have deemed it necessary to use very different language. The grant in the patent must be in express terms, for "the full and exclusive right and liberty of making, using, and vending," in order to confer exclusive privileges. The same language is also

used in the act when speaking of portions of the monopoly in the hands of assignees and grantees. (§§ 11, 14).

We cannot but think, therefore, if Congress had intended to confer a monopoly in the patented article upon the assignees and grantees by the clause in question, the usual formula in all such grants would have been observed, and that we should be defeating their understanding and intent, as well as doing violence to the language, to sanction or uphold rights and privileges of such magnitude by the mere force of judicial construction.

We conclude, therefore, that the clause has no reference to the rights or interests of assignees and grantees under the new and extended term, upon the ground,—

*682] 1. Because, in that view, giving to the words the widest construction, *there is nothing to satisfy the clause, or upon which any substantial effect and operation can be given to it; it becomes virtually a dead letter, and work of legislative superfluity; and

2. Because the clause in question, upon a true and reasonable interpretation, does not operate to vest the assignees and grantees named therein with any exclusive privileges whatever, in the extended term, and therefore cannot be construed as relating to or embracing such interests in the sense of the law.

The extension of the patent under the eighteenth section is a new grant of the exclusive right or monopoly in the subject of the invention for the seven years. All the rights of assignees or grantees, whether in a share of the patent, or to a specified portion of the territory held under it, terminate at the end of the fourteen years, and become re-invested in the patentee by the new grant.[1]

From that date he is again possessed of "the full and exclusive right and liberty of making, using, and vending to others the invention," whatever it may be. Not only portions of the monopoly held by assignees and grantees as subjects of trade and commerce, but the patented articles or machines throughout the country, purchased for practical use in the business affairs of life, are embraced within the operation of the extension. This latter class of assignees and grantees are reached by the new grant of the exclusive right to use the thing patented. Purchasers of the machines, and who were in the use of them at the time, are disabled from further use immediately, as that right became vested exclusively in the

[1] See *Railroad Co.* v. *Trimble*, 10 Wall., 380.

patentee. Making and vending the invention are prohibited by the corresponding terms of his grant.

Now, if we read the clause in question with reference to this state of things, we think that much of the difficulty attending it will disappear. By the previous part of the section, the patentee would become re-invested with the exclusive right to make, use, and vend the thing patented; and the clause in question follows, and was so intended as a qualification. To what extent, is the question. The language is, "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein;" naturally, we think, pointing to those who were in the use of the patented article at the time of the renewal, and intended to restore or save to them that right which, without the clause, would have been vested again exclusively in the patentee. The previous part of the section operating in terms to vest him with the exclusive right to use, as well as to make and vend, there is nothing very remarkable in the words, the legislature intending thereby to qualify the right in respect to a certain class only, leaving the right as to all others in the patentee, in speaking of the benefit of the renewal extending to this class. The renewal vested him with the whole right to use, and therefore there is no great impropriety of language, if intended to protect *this class, by giving them in terms the benefit of the renewal. [*683 Against this view it may be said that "the thing patented" means the invention or discovery, as held in *McClurg* v. *Kingsland*, 1 How., 202, and that the right to use the "thing patented" is what, in terms, is provided for in the clause. That is admitted, but the words, as used in the connection here found, with the right simply to use the thing patented, not the exclusive right, which would be a monopoly, necessarily refer to the patented machine and not to the invention; and, indeed, it is in that sense that the expression is to be understood generally throughout the patent law, when taken in connection with the right to use, in contradistinction to the right to make and sell.

The "thing patented" is the invention; so the machine is the thing patented, and to use the machine is to use the invention, because it is the thing invented and in respect to which the exclusive right is secured, as is also held in *McClurg* v. *Kingsland*. The patented machine is frequently used as equivalent for the "thing patented," as well as for the invention or discovery, and no doubt, when found in connection with the exclusive right to make and vend, always means the

right of property in the invention, the monopoly. But when in connection with the simple right to use, the exclusive right to make and vend being in another, the right to use the thing patented necessarily results in a right to use the machine, and nothing more. Then, as to the phrase "to the extent of their respective interests therein," that obviously enough refers to their interest in the thing patented, and in connection with the right simply to use, means their interest in the patented machines, be that interest in one or more at the time of the extension.

This view of the clause, which brings it down in practical effect and operation to the persons in the use of the patented machine or machines at the time of the new grant, is strengthened by the clause immediately following, which is, "that no extension of the patent shall be granted after the expiration of the term for which it was originally issued." What is the object of this provision? Obviously, to guard against the injustice which might otherwise occur to a person who had gone to the expense of procuring the patented article, or changed his business upon the faith of using or dealing with it, after the monopoly had expired, which would be arrested by the operation of the new grant. To avoid this consequence, it is provided that the extension must take place before the expiration of the patent, if at all. Now, it would be somewhat remarkable if Congress should have been thus careful of a class of persons who had merely gone to the expense of providing themselves with the patented article for use or as a mattter of trade, after the monopoly had ceased, and would be disappointed and exposed to loss if it was again renewed, and at the same time had overlooked the class who in addition to this expense and change of business *684] *had bought the right from the patentee, and were in the use and enjoyment of the machine, or whatever it might be, at the time of the renewal. These provisions are in juxtaposition, and we think are but parts of the same policy, looking to the protection of individual citizens from any special wrong and injustice on account of the operation of the new grant.

The consequences of any different construction than the one proposed to be given are always to be regarded by courts, when dealing with a statute of doubtful meaning. For between two different interpretations, resting upon judicial expositions of ambiguous and involved phraseology, that which will result in what may be regarded as coming nearest to the intention of the legislature should be preferred.

We must remember, too, that we are not dealing with the

decision of the particular case before us, though that is involved in the inquiry; but with a general system of great practical interest to the country; and it is the effect of our decision upon the operation of the system that gives to it its chief importance.

The eighteenth section authorizes the renewal of patents in all cases where the Board of Commissioners is satisfied of the usefulness of the invention, and of the inadequacy of remuneration of the patentee. Inventions of merit only are the subject of the new grant; such as have had the public confidence, and which it may be presumed have entered largely, in one way and another, into the business affairs of life.

By the report of the Commissioner of Patents it appears, that five hundred and two patents were issued in the year 1844,—for the last fourteen years, the average issue yearly exceeded this number,—and embrace articles to be found in common use in every department of labor or art, on the farm, in the workshop, and factory. These articles have been purchased from the patentee, and have gone into common use. But, if the construction against which we have been contending should prevail, the moment the patent of either article is renewed, the common use is arrested, by the exclusive grant to the patentee. It is true the owner may repurchase the right to use, and doubtless would be compelled from necessity; but he is left to the discretion or caprice of the patentee. A construction leading to such consequences, and fraught with such unmixed evil, we must be satisfied, was never contemplated by Congress, and should not be adopted unless compelled by the most express and positive language of the statute.

The third question certified is, whether the extension of the patent granted to W. W. Woodworth, as administrator, on the 16th of November, 1842, inured to the benefit of the administrator exclusively, or whether, as to certain territory specified in the contract of assignment made by W. Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th of November, 1829, and *by legal operation of the [*685 covenants contained in said contract, the said extension inured to the benefit of said Toogood, Halstead, and Tyack, or their assigns?

William Woodworth was the original patentee, and took out letters patent on the 27th of December, 1828; and soon after conveyed a moiety of the same to James Strong. One Uri Emmons also obtained a patent for a similar machine on the 25th of April, 1829, and soon after conveyed all his interest in the same to Toogood, Halstead, and Tyack. With a view to avoid litigation, both parties mutually assigned to each

other their interests in the respective patents to different and separate portions of the United States; and in the assignment from Woodworth and Strong to Toogood, Halstead, and Tyack, the following covenant was entered into by the parties: "And the two parties further agree, that any improvement in the machinery, or alteration, or renewal of either patent, such improvement, alteration, or renewal shall inure to the benefit of the respective parties interested, and may be applied and used within their respective districts, as herein before designated."

At the time this covenant was entered into, there was no provision in the patent laws authorizing an extension or renewal of the same beyond the original term of fourteen years. The first act providing for it was passed in July, 1832. Before this time, the only mode of prolonging the term beyond the original grant was by means of private acts of Congress upon individual applications.

A construction had been given by the Circuit Court of the United States, in New York, as early as 1824, by which the patentee, on surrendering his patent on account of a defective specification, would be entitled to take out a new patent correcting the defect, which construction was afterwards upheld by this court in *Grant* v. *Raymond*, 6 Peters, 218, and the principle since ingrafted into the patent law by the act of 1832.

The court is of the opinion, that the covenant in question should be construed as having been entered into by the parties, with a reference to the known and existing rights and privileges secured to patentees under the general system of the government established for that purpose; that the parties would naturally look to the established system of law on the subject in arranging their several rights and obligations, in dealing with property of this description, rather than to any possible change that might be effected by private acts of Congress upon individual application. Contracts are usually made with reference to the established law of the land, and should be so understood and construed, unless otherwise clearly indicated by the terms of the agreement. If the parties in this case contemplated any alteration or modification of their rights, more advantageous, by the further legislation of
*686] Congress, we think some more specific provision having reference to it should have been *inserted in their covenant. The term renewal may be satisfied by a reference to the law as it then stood. The patentee might surrender his patent, and take out a new one, within the fourteen years; and the term was used, probably, to guard against any ques-

tion that might be raised as to the right under the assignment in the new patent, if a surrender and new issue should become necessary. The specification accompanying the patent was a complicated one, and has been the subject of much controversy, and the necessity of a surrender for correction and amendment might very well have been anticipated.

We think this view satisfies the use of the term, and that no right is acquired in the new grant by virtue of the assignment or covenant.

The fourth and fifth questions certified are answered by the opinion of the court upon the first and second questions.

The sixth question certified is as follows:—Whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within the said town; or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee.

The plaintiff is the grantee of the exclusive right to construct and use, and to vend to others to be used, two of the patented machines within the town of Watervliet, in the county of Albany.

The fourteenth section of the patent law authorizes any person, who is a grantee of the exclusive right in a patent within and throughout a specified portion of the United States, to maintain an action in his own name for an infringement of the right.

The plaintiff comes within the very terms of the section. Although limited to the use of two machines within the town, the right to use them is exclusive. No other party, not even the patentee, can use a right under the patent within the territory without infringing the grant.

The seventh question certified is as follows:—Whether the letters patent of renewal issued to W. W. Woodworth, as administrator, on the 8th of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law, or whether the same be void for uncertainty, ambiguity, or multiplicity of claim, or any other cause.

The court is satisfied, upon an examination of the specification and drawings referred to in the question certified, that it is sufficiently full and explicit, and is not subject to any of the objections taken to it.

The remaining questions will be sufficiently answered by the certificate sent to the court below.

*Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, 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, agreeably 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,—

1. That the eighteenth section of the patent act of 1836 did authorize the extension of a patent on the application of the executor or administrator of a deceased patentee.

2. That, by force and operation of the eighteenth section of the act of July 4th, 1836, entitled "An act to promote the progress of the useful arts," &c., the extension granted to William W. Woodworth, as administrator, on the 16th day of November, 1842, did not inure to the benefit of assignees under the original patent granted to William Woodworth on the 27th day of December, 1828, but that the said extension inured to the benefit of the administrator only, in his said capacity.

3. That the extension specified in the foregoing second point did inure to the benefit of the administrator, to whom the same was granted, and to him in that capacity exclusively; and that, as to the territory specified in the contract of assignment made by William Woodworth and James Strong to Toogood, Halstead, and Tyack, on the 28th of November, 1829, (and set forth in the second plea of the defendants to the first count of the declaration), and by legal operation of the covenants contained in said contract, the said extension did not inure to the benefit of the said Toogood, Halstead, and Tyack, or their assigns.

4. That the plaintiff, claiming title under the extension from the administrator, can maintain an action for an infringement of the patent right within the territory specified in the contract of assignment to Toogood, Halstead, and Tyack, against any person not claiming under said assignment. And that the said assignment is not, of itself, a perfect bar to the plaintiff's suit.

5. That the extension specified in the second point could be applied for and obtained by William W. Woodworth, as administrator of William Woodworth, deceased, although the said William Woodworth, the original patentee, had in his lifetime disposed of all his interest in the then existing patent, having at the time of his death no right or title to or

interest in the said original patent; and that such sale did not carry any thing beyond the term of said original patent; and that no contingent rights remained in the patentee or his representatives.

6. That the plaintiff, if he be an assignee of an exclusive right *to use two of the patented machines [*688 within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town.

7. That the letters patent of renewal issued to William W. Woodworth, as administrator as aforesaid, on the 8th day of July, 1845, upon the amended specification and explanatory drawings then filed, are good and valid in law; and are not void for uncertainty, ambiguity, or multiplicity of claim, or any other cause.

8. That the question involved in the eighth point propounded does not present any question of law which this court can answer.

9. That the decision of the Board of Commissioners, who are to determine upon the application for the extension of a patent under the eighteenth section of the act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case.

10. That the Commissioner of Patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years; and that such surrender and renewal may be made at any time during such extended term.

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Mr. Justice McLEAN.

As I dissent from the opinion of the court, in their answer to the second question certified, I will state, in few words, the reasons of my dissent.

The question is, whether the extension of the patent, under the act of 1836, to William W. Woodworth, the administrator, inured to the benefit of the assignees of the first patent.

I had occasion to consider this question in the case of *Brooks and Morris* v. *Bicknell and Jenkins*, on my circuit, and on a deliberate examination of the eighteenth section of the above act, I came to the conclusion, that unless the assignment gave to the assignee the right in the extended or renewed patent, his interest expired with the limitation of the original patent.

The lamented Justice Story, without any interchange of opinion between us, about the same time, gave the same construction to the section. The late Mr. Justice Thompson, and several of the district judges of the United States, have construed the act in the same way.

The eleventh section of the act makes the patent assignable in law, either as to the whole interest or any undivided part thereof, by any instrument of writing, which is required to be recorded in the patent-office within three months from the date.

*689] By the eighteenth section, the patentee may make application *for the extension of his patent to the Commissioner, who is required to publish a notice of such application "in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent." "And the Secretary of State, the Commissioner of the Patent-office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the evidence produced before them both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to said board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of the said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the Commissioner to renew and extend the patent," &c.; "and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein."

This section embraces patents previously issued, and the construction now to be given to it operates on all cases of extensions under it, whether the assignments were made before or after the passage of the act.

The object of this section is so clearly expressed as not to

admit of doubt. It was for the exclusive benefit of the patentee; for the extension can only be granted when it shall be made to appear that the patentee, "without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for his time, ingenuity, and expense," &c. This, then, being the clear intent of Congress, expressed in this section, it must have a controlling influence in the construction of other parts of the section. A statute is construed by the same rule as a written contract. The intent of law-makers, and of the persons contracting, where that intent clearly appears, must be carried into effect. Where the statute or the contract is so repugnant in its language as not to show the intent, then no effect can be given to it. If the words used be susceptible of such a construction as *not only to show the intent, but to enable the court to give effect to it, it is the duty of the court so to construe it. [*690

Bacon, on the construction of statutes, says,—"The most natural and genuine way of construing a statute is to construe one part by another part of the same statute; for this best expresseth the meaning of the makers." And,—"If any part of a statute be obscure, it is proper to consider the other parts; for the words and meaning of one part of a statute frequently lead to the sense of another." "A statute ought, upon the whole, to be so construed, that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

That the patentee may have his patent extended, though the assignee held the entire interest in it, is undoubted. He has only to show that he has not been reimbursed, &c., within the meaning of the section, to establish his claim for an extension. And, in such a case, if the benefit of the extension go to the assignee, he having the entire interest in the patent, how is the patentee benefited? And yet the law was enacted exclusively for his benefit. Does not such a construction defeat the object of the law? And if it does, can it be maintained? Where the assignment of the patent has been for less than the whole, the same objection lies, though the object of the law is subverted only to the extent of the assignment.

The interest of the assignee, it is supposed, is protected by the provision, that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein." There can be no doubt that the words, "to the extent of their respective interest therein" refer to their right to use the thing patented; and this, it is contended, is the benefit which results

to the assignee from the renewal. That this would seem to be the import of these words, disconnected from other parts of the section, is admitted; but such a construction is wholly inadmissible, when the object of the section is considered.

The patent is extended for the benefit of the patentee. This is so obvious that no one will deny it. And the above construction gives the benefit to the assignee. Here is a direct repugnancy, and there is no escape from it; for the same repugnancy exists, though in a less degree, where a part of the patent only has been assigned. Under such circumstances, we must inquire whether this repugnancy may not be avoided by giving another and a different application to the provision, of which the words may be susceptible.

The benefit of the renewal is given to the assignees; but to what extent?—to the extent of their interest in the renewal. But it is said, that this cannot be the true construction, as it renders the provision inoperative. If, by the assignment, *691] there was an express *contract that the assignee should enjoy the same interest in the renewal or extension of a patent, this would secure such interest, without the provision.

To this it may be answered, that such an assignment of a thing not *in esse* would, at most, only be a contract to convey the legal right. But, under the eighteenth section, the assignment after the extension becomes a legal transfer. In addition to this, the right under the extension being legal, all purchasers would be affected with notice, where the assignment had been recorded in the patent-office. This view gives effect to the section, and harmonizes its provisions. The other construction makes the parts of the section repugnant and nullifies the whole of it. Now, which is the more reasonable view? But, in addition to this, what conceivable motive could Congress have had to give a boon to the assignee? How is he injured by the extension?

Without the extension, the assignee would only have a right, in common with all others, to use the invention. This could be of no more value to him than the worth of his machinery; for competition equally open to all cannot be estimated of any value. Under the assignment, the assignee claims a monopoly. Now, did Congress intend to give him this boon? Why should he be an object of public munificence? He laid out his money in the purchase of the patent right, because he believed it would be profitable. And, in most cases, the assignee speculates upon the poverty of the inventor. Inventors are proverbially poor and dependent. The history of this patent illustrates strongly this fact. Half

of the right was originally assigned to pay the expense and trouble of taking out the patent. Another part of the patent was assigned to compromise a pretended claim to a similar invention.

The hardship complained of by the assignee is more imaginary than real. If the patentee takes all the benefit of the extension, the assignee loses, it is said, the value of his machinery. This does not necessarily follow. For if the machinery has been judiciously selected, and put in operation at a proper place, it will sell for its value generally, if not always. If the invention be of great value, as is undoubtedly the case in this instance, the machinery will be wanted by any one who may wish to continue the business, under the extended patent. So that the loss in the sale of the machinery would not be greater than would have been suffered by a sale if the patent had not been extended.

This construction, then, inflicts little or no injury on the assignee, whilst the other construction, as has been shown, defeats the object of the statute. But this inconvenience or loss to the assignee is duly considered and weighed, under the statute, as the board, in granting the extension, must have a due regard to the public interest. Notice is to be given, as far as practicable, to all persons interested against the extension of the patent, who may *appear before [*692
the board and oppose it. And it was stated in the argument, that the assignees of this patent did oppose the extension of it. Little did they suppose at the time that they were resisting a boon secured to them by the above section. Whatever loss, real or imaginary, the assignee may suffer from the extension of the patent, is a loss or inconvenience which results from the general advancement of the public good, and for which society does not, and indeed cannot, make compensation. The price of property is affected by general legislation. An embargo is laid, and ships, during its continuance, are valueless. The increase or diminution of the tariff affects beneficially or injuriously the value of machinery used in manufactures. The reduction of the price of the public lands affects the price of lands generally in the new states. An act authorizing a company or individual to construct a railroad renders useless turnpike roads in its neighborhood, and the public houses established thereon; but for these injuries no compensation is made. Indeed, it is difficult to find any great public enterprise which does not, in a greater or less degree, affect injuriously private rights. But these must yield to the general welfare of society.

All enlightened governments reward the inventor. He is

justly considered a public benefactor. Many of the most splendid productions of genius, in literature and in the arts, have been conceived and elaborated in a garret or hovel. Such results not only enrich a nation, but render it illustrious. And should not their authors be cherished and rewarded?

If the assignee under the eighteenth section take anything, in my judgment he takes the whole extent of his interest,—the whole or nothing. And it appears to me the construction given by the court is, if possible, less warranted by the section, than to hold that the assignee takes under the extension the entire interest assigned.

The words, "and the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein," cannot, it seems to me, by any known rule of construction, be held to give to the assignee or grantee the right to use the machine he may have had in operation at the time the extension took effect. The words, "to use the thing patented," are descriptive of the right assigned or granted, and refer to such right, not to the mere use of the machine. "The extent of their respective interest therein" undoubtedly covers the whole interest, and cannot refer merely to the number of machines the individual may have in operation.

Mr. Justice WAYNE expressed his dissent from that part of the opinion of the court which, in answer to the second *693] question, gave a right to an assignee to continue the use of the patented *machine, and said he would probably file his reasons with the clerk.

Mr. Justice WOODBURY.

There is one of the leading questions certified to us in this cause, in the decision of which I have the misfortune to differ from a majority of the court.

As that decision bears on several of the other questions, and also disposes entirely of some of the four causes connected with this matter, which have been so long and so ably under argument before us, I consider it due to the importance of this subject to the parties and the public, as well as just to myself, to state the reasons for my dissent.

The difference in our views arises in the construction of the eighteenth section of the patent law of July 4th, 1836, and relates to the benefits which may be enjoyed under it by assignees and grantees.

Before the passage of that law, a patent could not, under any circumstances, be extended in its operation for the benefit

of any body beyond its original term, except by a special act of Congress. But this section allowed a patentee to apply to a board of officers and obtain from them a renewal of his patent for seven years longer, provided he offered to them satisfactory proofs that his expenses and labor in relation to the patent had not been indemnified. It provided further, that the renewal be indorsed on the back of the original patent; "and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." It then added, "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." This last clause creates the chief embarrassment. In this case, the patentee having died, and we having just decided that a renewal was legally granted to his administrator, the controverted question about which we differ is, whether that renewal inures exclusively to the use of the patentee through his administrator, or goes either in full or in part to his assignees and grantees under the old patent. In the present case it is conceded, that by the contract of assignment or grant, nothing is expressly conveyed but the old patent, and in words, only for the original term of "fourteen years."

The question is not, then, whether, when assigning an interest in the old term, before or after the passage of the act of 1836, it might not be competent and easy to use language broad and explicit enough to transfer an interest in any subsequent extension by means of the contract of assignment, and this be confirmed by the words of the eighteenth section; but whether those words alone transfer it, or were intended to transfer it, when the contract of assignment, *as in this case, was made before the act of 1836 [*694 passed, and referred, *eo nomine*, only to the old patent, and expressly limited the time for which the patent was assigned to the old term.

In such case, it seems to me that both the language and spirit of this section restrain its operation to the patentee or his legal representatives, and convey no rights in the extension to assignees or grantees, whether prior or subsequent, except where the patentee had clearly contracted that they should have an interest beyond the original term.

But the majority of the court hold here, that this clause independent of any expression in the assignment, transfers an interest in the extension to all assignees and grantees, so that they may continue to use any machines already in operation during the new term, without any new contract, or any new compensation for such farther use.

The argument on the part of the assignees, in all the cases before us, on this subject, has been, that by force of this section all assignees before authorized to make, vend, or use these machines, for fourteen years, could continue to make and vend, as well as use them, for seven more, without any new contract or new consideration; and that "grantees of the right to use" should have a like prolongation of all their interests. And such seems to have been the opinion of the Circuit Court in Maryland, in *Wilson* v. *Turner*, October term, 1844, Chief Justice Taney presiding, though other points besides arose there, and were disposed of in that opinion.

But now, for the first time, it is believed, since the passage of the patent law, this court, by force of the last clause in the eighteenth section, not only give to assignees and grantees a greater or longer interest in the thing patented than was given in the contract of assignment to them, but undertake to introduce a novel discrimination, not seeming to me to be made in the clause itself, and give to assignees of the patent right itself an extension of only a part of their former interest, but to "grantees of the right to use" the patent, an extension of all their former interests.

We propose to examine the objections to this decision of the court, first, on the principle of giving to old assignees and grantees an extension of their interests to the new patent at all, unless the contract of assignment to them was manifestly meant to embrace any new term; and, after that, to examine the propriety of the discrimination in allowing a right in the renewed patent to grantees of the use, to the extent of all their old interests, and withholding a like privilege from assignees of the patent itself.

First, it has been repeatedly decided, that "a thing which is in the *letter* of a statute is not within the statute, unless it be within the intention of the makers." Dwar. Stat., 692; Bac. Abr. *Statute*, T; 2 Inst., 107, 386.

*695] *Here the great design of the whole section was to extend assistance to an unfortunate and needy class of men of genius, who had failed to realize any profits from their valuable inventions during the first term of their patents. The intention of the makers of this law is usually conceded to have been relief to such patentees, and not to assignees or grantees.

It was the former, and not the latter, who were sufferers, and whom Congress had before, by special acts of extension, occasionally tried to indemnify for their losses; and to whom now, in a more summary way, on application and proof by

them alone, an extension was authorized to be given by a board of officers, in order that they and not others might reap the profits of such extension.

But, by allowing the benefit of it to go to the former assignees of only the old patent, the intention of the makers appears to be defeated, and those profited who have not proved any loss or suffering, but, on the contrary, may have already derived great advantages from the assignment.

It might thus happen, likewise, where, in a case like this, the patentee has assigned all his old patent before the extension, and the use of it under the extension would constitute all or its chief value, that neither he nor his representatives—he whose genius had produced the whole invention, at the sacrifice of time and toil, and whose sufferings, losses, and disappointments the law is expressly made to indemnify—would receive the smallest pittance from it; but those reap all its advantages who may already have grown rich by the assignment to them of the old patent, and who nobody can pretend were the particular or principal objects of relief. Under such a construction, how absurd would it be for such a patentee ever to apply for an extension, when he must do it at new cost and expense, and then have the whole fruits of it stripped from him by persons who had neither paid for the extension, nor had it conveyed to them. It is an equal violation of the leading intention of this section, and of most of these principles and of much of this reasoning, to allow, as the opinion of the court does, such persons to take, unpaid for and unbought, a *part* of the benefits of the renewal, as to take the *whole* of them.

Secondly, by the construction of the court, contracts and vested rights seem to be radically encroached upon. Under it, an assignee of an old patent, limited in the contract conveying it to fourteen years, will, for some purposes, get it for twenty-one years, directly in conflict with the express stipulation of the parties. Congress will, in this way, be made unworthily to tamper with the private obligations of individuals, and will impair them by taking from the rights of one, and enlarging or adding to the rights of the other; and this without any new consideration or new engagement passing between them, but, on the contrary, against the wishes, assent, and interests of one. That view, also, involves us in the unreasonable inference, *that Congress intended to violate a solemn compact, to disturb the vested rights and written agreements of parties, when the language used is susceptible of a different construction, and one that is consistent with what is just, and with the spirit of the whole section. [*696

By that view, an assignee or grantee will obtain "a right to use the thing patented" for a term of seven years longer than he contracted or paid for, while the patentee, without any such agreement in his contract assigning or granting the right to use, and without any new consideration, will be deprived of all his new and vested rights in the extension, so far as regards that use, and will have his former contract impaired virtually in its whole vitality, by making him part with the use for a term of twenty-one years, when the contract says but fourteen, and making him do it, also, without any application by others for the extension, any proof by others of not being indemnified, any payment by others of the costs and expenses for procuring the additional seven years, and when the avowed and cardinal object of the renewal was to indemnify him alone for losses which he and not others had sustained. Well may he say, as to these new and extended interests attempted to be conferred on assignees and grantees beyond the contract of assignment, *in hæc fedeра non veni.*

Thirdly, the construction I contend for seems to me the only one consistent with the language used in the latter portion of the eighteenth section. By this, no part of those troublesome four lines is senseless, or expunged, or ungrammatical, or contradictory to the object of the previous portion of the section. While the construction opposed to this must, in my view, require interpolations or extirpations of words, and a violation of the object of the rest of the section, in order to give to the clause the meaning the advocates of that construction impute to it. Look at the phraseology of the clause. "*The benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein,*" but surely to no more than that *extent.* It would violate both the words and design to have them enjoy more than the extent of their interests therein, quite as much as not to let them enjoy all of the extent of them. In the construction of statutes it is a well settled axiom, that, "to bring a case within the statute, it should be not only within the mischief contemplated by the legislature, but also within the plain, intelligible import of the words of the act of parliament." *Brandling* v. *Barrington*, 6 Barn. & C., 475. In this case the assignees and grantees were not within either the mischief intended to be remedied, that is, a want of indemnity for losses by the patentee; or within the "plain, intelligible import of the words," as their contract of assignment or grant did not extend to the renewed

term at all, for any purpose whatever, but was expressly limited to the fourteen years of the original patent.

There must be some measure of their respective interests, when *the act passed. What was it? Clearly, [*697 the contracts under which they had been acquired. Nothing had been done, either in other acts or previous portions of this, to increase those interests beyond the contracts, but merely to enable assignees and grantees of exclusive rights to protect them by suits in their own names. The present clause, also, does not profess to increase those interests, but simply to let assignees and grantees enjoy them under the renewal, if by their extent by the contract which limits and defines them they run into the extended term. Various hypotheses and metaphysical refinements have been resorted to for the purpose of putting a meaning on the words of this clause differing from this, which is so plain and so consistent with the spirit of the section; and virtually making it provide, that assignees and grantees shall have more benefits under the renewal in the thing patented than the "extent of their respective interests therein."

But before testing more critically the extent of those interests by the only standard applicable to them, it will be necessary to consider separately the true meaning of two of the words employed in this clause, namely, "*renewal*" and "*therein.*"

Much research has been exhibited, in attempting to draw distinctions in this case between the words *renewal* and *extension.* But I am not satisfied that any exist, when these words are employed as in this act of Congress, or in contracts relating to this subject. It is true, that some "renewals" are not "extensions," in the sense of prolonging the term of the patent,—that is, when an old patent is surrendered and a new one taken out, or a renewal made for the rest of the term,—while all *extensions* prolong the term. But still "renewals" are as often used for a prolongation of the term, or for a new term, as *extensions* are, and in this very section, "*to renew and extend*" is used as if synonymous, and this in sound analogy to the use of the word *renewal* on several other subjects. Thus, to renew a lease is to extend it another term. To renew an office is to extend it another term. To renew griefs, *revocare dolores*, is to extend them. Again; the second "*therein*," at the close of the clause, has been considered by some as meaning "in the *renewal*," and by others "in *the right to use*," and by others still, "in the thing patented." But, grammatically, it refers to the "thing patented,"

and hence "the interests therein" are "the interests in the *thing patented.*"

Phillips treats it as a matter of course to mean "in the *patent,*" and uses that as synonymous to "therein," and though, in regard to my construction of the whole clause, the result is much the same, whether "therein" is considered to mean in "the thing patented," or "the patent," or "the renewal," yet I incline to the first view of it as that most strictly grammatical and the most natural, as well as coming nearest to the views of this court in **M'Clurg* v. *Kingsland*, 1 How., 210. Further objections to its meaning "in the right to use" will be stated hereafter, under another head. Passing, then, to a more careful scrutiny of the whole clause, it would seem, that there could be but one rational test of "the extent" of the interests of assignees and grantees in the thing patented, and that such test must be the previous contract of assignment or grant, under which alone they hold any interests.

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If that contract grants to them one fourth or one half of the old patent, or the use of it in one state or county, and for a term of five years, or ten, or fourteen, from the issue of the patent, then such and such alone is the extent of their interests, and they will not run into the new term. But if the contract goes further, and grants one half or all of the old patent to assignees, and for a term not only of fourteen years, but twenty-one years, or any number to which the patentee may afterwards become entitled by any extension or new grant, then such is the extent of their interests, and they will in such case run into the new term. This view gives meaning and spirit to every word, and excludes or alters none. This, too, conforms to the design of the section in taking away no part of the benefit intended to be conferred by it on the patentee, unless he has chosen to dispose of it clearly and deliberately, and receive therefor, either in advance or after actually granted, such additional consideration as he deemed adequate and contracted to be sufficient.

If after the word "*extent*" in this clause, there had been added, what is the legal inference, *both in time and quantity*, this meaning might have been still more clear to some. But without those words, the extent of interest seems to me to depend as much on the length of time the patent is granted to the assignee, as on the dimensions of territory over which he may use it, or the proportion of the whole patent he is authorized to use. It is like a leasehold interest in land, or a grant of it. The extent of interest by such a grant of land

is more or less, as the term is shorter or longer, quite as much as if the land conveyed is more or less in quantity.

The word "extent," in common parlance, varies somewhat in meaning, according to the subject to which it is applied, and as that changes, it may as well refer to time as to space, or proportion; and more especially so, when applied to interests, as in patents, for a particular term of years.

There is another analogy in support of this view, that has not been urged in the ingenious arguments offered, but has struck me with some force. A patent was the description once applied to commissions for office; and the records of this court at first speak of the commissions of the judges as patents.

Now what is the extent of interest the incumbent has in any *office under his commission or patent? [*699 Clearly, in part, the length of time it is to run, whether four years, during good behavior, or for life, and in part only its yearly profits; often quite as much depending on that length of time, as the amount of the salary or fees annually attached to the office.

What is the chief objection in reply to all this? Nothing, except that the assignee could get protected to the extent of his interest, in this view, by the contract alone, without the aid of the provision at the close of the eighteenth section, and hence that the provision is in this view unnecessary or nugatory, and must have been inserted for some other purpose. But were it in reality unnecessary, that would not require us to consider it as intending something different from its word, or different from the previous contracts of the parties. Legislatures often add clauses to acts, which do not prove to be in reality necessary, but are inserted from abundant caution and to remove future doubts or litigation. So, in this very act, in the eleventh section, it is declared, that a patent may be assigned. Yet this is probably unnecessary, as an interest like that of a patentee can of course be assigned, on common law principles, without the aid of a statute.

When we look, however, to another circumstance,—that, though a contract of assignment would, without any clause in the statute, pass the interest to the assignee, yet it would not enable him to sue in his own name,—we can discover another reason for this provision still more effective. A clause had been inserted in a previous part of the act to enable the assignee to sue in his own name on the old patent, if violated; and, probably in doubt whether such provision would be extended to assignees under the renewal, when having any interest therein, it was provided further, that "the benefit of

the renewal" should reach them to the extent of their interests therein,—a part of which benefit would be to sue in their own name for any infringement on their rights to it, as fully as they could do for a violation of their rights in the original patent, and as if that had been for twenty-one years. The provision thus would be far from nugatory, by clearly conferring on them every power and privilege to sue under the extension which they possessed under the original patent.

By means of this provision, also, in another view, the condition of the parties might be changed, from a reliance on a contract alone that they should have a certain interest in the new patent, to a vested interest in it; or, in another view still, from an executory to an executed right.

There is, in the construction given by some of the majority of the court to the clause immediately preceding this, another ample reason for inserting such a provision.

The previous clause, stating, that "thereupon the said patent shall have the same effect in law as though it had been originally granted for *the term of twenty-one years," *700] would, it is argued, if the section had there ended, have conferred on any assignee or grantee of the old patent, or any part of it, the extended term, so as to enable them to use the patent as if it originally had been granted for twenty-one years instead of fourteen.

Suppose, then, for a moment, that this construction was considered by Congress proper, or only possible, it is manifest that the additional clause which follows had a second and most pregnant object,—no less than to prevent that consequence, so hostile to the design of inserting the whole section, —to grant an extended term for the benefit and indemnity of the patentee, and not of the assignee. In this view, the last clause might well be added, as a limitation on what would otherwise be the inference from that just preceding it; and might well declare, instead of this inference, that assignees of the old patent should not hold it, in all cases, as if originally granted for twenty-one years, though patentees might; but that assignees should hold only in conformity to "the extent of their respective interests" in the thing patented. In other words, if by contract they had acquired clearly an interest for twenty-one years, they should hold for that time; but if by contract they had acquired an interest for only five or fourteen years, they should hold it only to that extent. This is rational, consistent with the great object of the section, and gives new and increased force and necessity to the clause. The assignees would then, after the renewal, hold the patent for all the time they had stipulated, and for all they had paid, but for no more.

It will be perceived, that very few assignees or grantees, prior to the passage of the act of 1836, would in this view be likely to come under this provision, and be benefited by it; because, not knowing that any future law would pass allowing an extension, very few would be likely to anticipate one, and provide in their contract and pay for a contingent interest in its benefits.

This would make the provision, in practice, apply chiefly to future assignees, who, knowing that such a provision existed, might be willing to give something for a right to any extension which might ever take place under it; and therefore might expressly stipulate in the assignment for that right. Indeed, the arguments on the part of the patentee in this case have mostly proceeded on the ground that this provision was intended to apply solely and exclusively to future assignees. Considering that any other construction is in some degree retrospective, and that this would give force to the provision, as well as preserve the spirit of the section, I should be inclined to adopt it, if mine did not produce a like effect, and was not alike free from objection, as limited by me; because I do not make the provision retrospective except in cases where the parties had expressly contracted that the prior assignee should receive the benefit of any extension, and in that case it has the preference in its operation *over [*701 the other view, as it carries into effect that express compact, and does not cramp the force of it to the future alone, where the language and the consideration are equally applicable to past engagements of this character.

This conclusion is also strengthened by being in harmony with all the leading rules of construction applicable to statutes, while that adopted by the court seems, to my mind, to violate some of the most important of them.

Besides those already referred to, it is well settled, that "if a particular thing be given or limited in the preceding parts of a statute, this shall not be taken away or altered by any subsequent general words of the same statute." Dwar., 658; *Standen* v. *The University of Oxford*, 1 Jones, 26; 8 Co., 118, *b*. Here a particular benefit is, by the former part of the eighteenth section, conferred on a patentee, for reasons applicable to him alone; and yet, in this case, by the opposite construction, a few general words towards the close are construed so as in some respects to destroy entirely all those benefits to the patentee; and that, too, when the language is susceptible of a different construction, more natural and perfectly consistent with the previous particular grant to the patentee.

Some collateral considerations have been urged in support of the conclusions of the court on this branch of the construction, which deserve notice. On a close scrutiny, they appear to me to amount to less in any respect than is supposed, and in some particulars strengthen the grounds of dissent. Thus, it has been said that the English act of the 5th and 6th of William the Fourth, passed September 18th, 1835, was before Congress in 1836, and was intended to be copied or adopted; and as, under that, assignees have been allowed to participate in the extended time, it has been argued that such was the intention here. But it is doubtful whether that act was before the committee when they reported the bill in 1836, as the intervening time had been short, and the eighteenth section, on examining the journals and files, appears not to have been in the bill at all as originally introduced, or as originally reported: but was afterwards inserted as an amendment in the Senate. The consideration of this section, therefore, does not seem to have been so full as of the rest of the bill; and it is very far, in language, from being a copy of the English act. Assignees are not named at all in that act; and though, in extensions under it, assignees have in two or three cases been allowed to participate, it has only been where an enlarged equity justified it,—as where the patentee consented, or was to receive a due share in the benefits, or had clearly conferred a right in the extension by the assignment; and where, also, the assignees are expressly named in the new grant or patent as entitled to a share of it. See Webs. Pat. Cas., 477.

*702] *There, also, an assignee, under like circumstances, would doubtless benefit by the renewal, under its ordinary operations; and the practice in England, thus limited, will fortify rather than weaken the construction I adopt of the true design of the last clause in our own law.

There is much, also, in another collateral consideration here, which does not apply in Great Britain, and which restricts conferring the benefit of an extension, or an extension itself, on an assignee by or under any statute, if it goes beyond what a patentee had himself contracted to do.

Here the Constitution limits the powers of Congress to give patents to inventors alone.

"The Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."—Article I., § 8.

No authority is conferred to bestow exclusive rights on others than "authors and inventors" themselves.

Hence a patent could not probably be granted to an

assignee, nor an extension bestowed on one, independent of the assent or agreement of the patentee, or of its inuring to his benefit, without raising grave doubts as to its being a violation of the Constitution. But so far as inventors have expressly agreed that assignees shall be interested in their patents, or in the extensions of them, the latter may well be protected; and so, as far as administrators represent the inventor of patentee, when deceased, the grant to them is substantially a grant to the inventor, as the benefit then inures to his estate and heirs. But to grant an exclusive right to an assignee would confer no benefit on the patentee, or his estate; and it would violate the spirit as well as letter of the Constitution, unless the inventor had himself agreed to it, and had substituted the assignee for himself by plain contract, whether for the original term or any extension of it.

Cases have been cited in this country, likewise, where Congress, in ten or twelve instances, have renewed patents to the inventors; but they have never done it to assignees. And though in two out of the whole, which were renewed after the term had expired and the assignees and the public were in the free use of the patent, some limitations have been imposed on requiring further payments from the assignees for the longer use of the old patent; yet in these only, and under such peculiar circumstances, has it been done, and in these no term was granted by Congress directly to the assignee rather than the patentee; and this limitation or condition in favor of the assignee, in the grant to the patentee, is of very questionable validity, unless it was assented to by the patentee. In this case it is most significant of the views of Congress to relieve the patentee rather than assignees, that by a special law, passed February 26th, 1845, they have conferred on the representative of the original patentee still *another term of [*703
seven years without mentioning the assignees in any way, and without any pretence that the benefits of this extension were designed for them.

The argument, that the assignee is sometimes a partner, and makes liberal advances, furnishes a good reason, in a pecuniary view, why an assignment should be made to him of such an interest in the old patent as will indemnify him, but furnishes none for giving him, even if he regards money above public spirit or benevolence, more than an indemnity; or for giving him a benefit in any renewal, which it has never been agreed he should have, and for which he never has paid.

So the reasoning, that the assignee stands in the shoes or in the place of the patentee, and represents him, and therefore should have an interest in the extension, applies very well, so

far as he is assignee, or so far as the contract extends. But he no more stands in the shoes of the patentee beyond the extent of his contract, than an entire stranger does. Such are the cases of *Herbert* v. *Adams*, 4 Mason, 15, and that cited in 1 Hawk. P. C., 477, note.

In one, the assignee of the old patent represented the patentee as to that, and that only; and in the other, where by law a further copyright was authorized in all cases, and the patentee assigned his whole interest, the second term passed also; because the law had previously given it absolutely, without contingency or evidence of losses, but in connection with, or appurtenant to, the first copyright.

Again, it has been urged that the assignee should have the benefit of the extension; otherwise he may have made large expenditures, in preparing for a free use of the patent after the original term expires, and will lose them in a great degree, or be obliged to pay largely for the continued use of the patent. But this same reasoning applies equally well to the whole world as to the assignee; because any individual, not an assignee, may have incurred like expenditures in anticipation of the expiration and free use of the old patent. In fact, the argument is rather a legislative than judicial one, and operates against the policy of the whole section, rather than the construction put on the last clause.

But the hardship to any person, in such case, is more apparent than real. The price to be paid for the new patent is not so much as the gain by it, and hence those who have proposed to use it and do use it after the extension, and pay anew for a new or further term, gain rather than lose or they would have employed the old machinery in operation before this invention.

Nor is it any relief to the community at large, as seems by some to have been argued, to hold that the renewal, or a large part of it, vests in the assignee and grantee rather than in the patentee. For the great mass of the people must still purchase the patent, or the *right to use it, of some one, and must pay as much for it to the assignee as to the patentee.

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Finally, the construction of the court, by conferring any privilege whatever on assignees and grantees beyond the extent of their interests in the thing patented, when those interests, as in this case, were expressly limited in the contract to the term of the old patent, goes, in my view, beyond the language of the act, beyond the contract of assignment, beyond the consideration paid for only the old term, and

beyond any intention in the legislature for relief or indemnity to others than unfortunate patentees.

I feel not a little fortified in these views on the case, by several decisions and opinions that have heretofore been made, in substantial conformity to them. Indeed, independent of opinions in some of the actions now before us (from which an appeal has been taken, or the cause has come up on a certificate of division), every reported case on this subject has been settled substantially in accordance with these views. See *Woodworth* v. *Sherman*, and *Woodworth* v. *Cheever et al.*, Cir. Ct. for Mass., May Term, 1844, decided by Justice Story; *Van Hook* v. *Wood*, Cir. Ct. for New York, October Term, 1844, by Justice Betts; *Wilson* v. *Curteis & Grabon*, Cir. Ct. for Louisiana, by Justice McCaleb; *Brooks & Morris* v. *Bicknell et al.*, Cir. Ct. for Ohio, July Term, 1844, by Justice McLean (West. L. J., October, 1845); Butler's opinion, as Attorney-General, in *Blanchard's case* (Op. Att.-Gen., pp. 1134 and 1209).

All that remains for me is to advert a moment to that branch of the construction adopted by the majority of the court, which, after giving to both assignees and grantees a benefit in the new patent or term beyond "the extent of their interests" under the contract of assignment, undertakes to go still farther, and make a discrimination between assignees and grantees, as to the enjoyment, under the renewal, of their different original interests. It gives to the latter, the grantees, by the mere force of this last clause in the eighteenth section, the enjoyment of all their old interests during the whole of the new term; but it gives to the former, the assignees, the enjoyment of only about a third portion of their old interests during that term. In other words, it gives to "grantees of the right to use the thing patented" a continuance of all their interests; but to assignees, whose interests extended to the right to make and to vend, as well as use, the thing patented, a continuance of only a part of theirs. In such a discrimination, uncountenanced and unwarranted, as it seems to me, by either the words or the spirit of the act of Congress, I am sorry to find another strong ground of dissent to the opinion of the court. The act does not say, as is their construction, that "the benefit" of only "the right to use the thing patented" shall extend to any one, whether an assignee or grantee; but that the benefit of the renewal 'shall [*705 extend to both, "to the extent of their respective interests," though differing clearly in extent as they do, and as will soon be more fully shown.

"Judges are bound to take the act of parliament as the

legislature have made it." 1 T. R., 52, and Dwar. Stat., 711. But the words in this act, "the right to use the thing patented," must be transposed, and other words altered in their ordinary meaning, to make these a description of the interests conferred.

They are now a description of one kind of purchasers, that is "grantees of the right to use the thing patented," to whom the renewal should extend, if they had stipulated for any interests therein by their contracts. The clause refers to two classes, who may in such case be benefited by the renewal. "Assignees" are one class, and "grantees of the right to use the thing patented" are the other class. This accords with the language itself, and also with the punctuation of this clause, as examined by me in manuscript on file in the Senate, and as printed by the state department, having no comma or other pointing in it except after the word "patented." It accords, too, with what is well understood to be the fact, that assignees and grantees usually constitute two distinct classes of purchasers, the former being those who buy a part or all of the patent right itself, and can protect their interests by suits in their own name; and the latter being those who buy only "the right to use the thing patented," and generally, except where the use is exclusive (fourteenth section), cannot institute suits in their own name for encroachments upon it. In the face of this, to hold that assignees and grantees mean the same thing here, and that the words "of the right to use the thing patented" apply equally to both, is a departure from the above established usage in employing those terms, and gives a different meaning to them from what is previously twice given in this very act. Thus in the eleventh section an "assignment" is mentioned as one thing, and "a grant and conveyance of the exclusive right," &c., as another, and in the fourteenth section, "assigns" are spoken of as if one class, and "grantees of the exclusive right," &c., as if another. And why does the conclusion to this clause say "to the extent of their *respective* interests therein," if such assignees and grantees as to patents were not in this very clause considered by Congress as having different interests, and that these were to be protected according to their *respective* extents? It would have said, and must be made to say, if sustaining the construction of the court, "to the extent of that *right*," or "to the extent of that *interest*," and there stop. Manifestly, then, there is not conferred on these two classes, by this clause, either in its spirit or *in totidem verbis*, merely "the right to use the thing patented," but on the contrary, "the benefit of the renewal," "to the extent of their respective interests in

the *thing patented." The interests of the grantees may be limited to the use, and those of the assignees may not be, but include the right to make and vend as well as use; yet large or long as may be the interests of either, the benefit of the renewal is to cover them, if *the extent* of them, under the original assignment or grant, reached to the new term. One is not to have the whole of his interests protected and the other a part only, when their equities are the same. But the assignee is to have to the extent of his, which is to make, vend, and use; and the grantee only "of the right to use" is to have to the extent of his.

This, to my apprehension, is unquestionably the substance of what Congress has said on this topic; and yet it is only by supposing new language not in the act, or by transposing some of the old, so as not to be in harmony with the original structure of the sentence, or by giving a meaning to words different from what has been established and, in my view, only by doing this, that any foundation can be laid in support of this part of the construction approved by the court. But "it is safer," said Mr. J. Ashurst, "to adopt what the legislature have actually said, than to suppose what they meant to say." 1 T. R., 52; 6 Ad. & E., 7.

It may be well, also, not to forget, that it is always more judicial, and less like legislation, to adhere to what Congress have actually said, and that it is more imperative to do this when by adhering to it you carry out, as in this case, the manifest intention of the previous part of the section. Nor can the inconsistency produced by the construction of the court be without influence in creating doubts as to its correctness; as by it "the benefit of the renewal" will be extended to assignees and grantees not in a ratio with their "respective interests,"—the words of the law,—nor in conformity to their respective contracts, nor according to the respective considerations they have paid, nor in proportion to the respective losses they have sustained, but, under the same general permission as to the extent of the "respective interests" of both, one class will be allowed to the full extent of his previous interests, and the other to only a part of that extent.

By what authority, let me respectfully ask, is this general permission thus divided, and in one class or case limited and in the other not? By what legal authority are assignees cut off from a valuable portion of their interests in a patent, while grantees to use the thing patented are allowed to exercise the whole of theirs, and both under one and the same general permission, covering all "their *respective* interests"? To make this discrimination, and allow to one class the full extent of

their interests and to the other not the full extent of theirs, when the law says it shall be "to the extent of their *respective* interests," and when their respective contracts and equities show that this should include both the duration and quantity
*707] of their interests, looks like a distinction in a great degree arbitrary, *and not a little in conflict with the plain words and design of the act of Congress.

But, besides this further departure from what seems to me the obvious meaning of the eighteenth section, caused by this branch of the construction of the court, it will fail, I fear, as any compromise of the difficulties arising under this section, if any compromise be expected from it. It is not likely to avert ruin from most of those indigent inventors, who have in their distresses resorted for aid to the delusive provisions of that section. Their very necessities and embarrassments, which are the justification for granting the renewal to them, have usually forced them to sell and assign all the original patent, as was the case with Woodworth in this instance; and if in such circumstances the law is to strip them of all benefits under the renewal, and, without any contract to that effect, confer those benefits on the assignees and grantees of the old patent, the law is perfectly suicidal as to the only design to be effected by its bounty. But if, seeing this, the construction is modified, as here, by the court, so as to deprive the patentee in such cases of only the benefits of the use of his old patent or old machines during the new term, this qualification in the operation of the law will, it is apprehended, usually prove a mere mockery, working, in most cases, as fully as the court's construction without the qualification would, the entire defeat of the laudable object of the renewal towards patentees. In one or two of the cases now before us, the patentee, under this construction, will still be subjected to defeat and burdensome costs. In relation to its effect on the present patent as a whole, all the consequences cannot now be ascertained. But it is admitted, that the inventor had assigned the whole of the old patent, so that no right whatever to use will remain in his representatives to dispose of; or if a right remains where machines are not now in actual use, probably enough are now in use to supply for some time the public wants in most parts of the United States.

The right to continue to use them will probably last during the whole seven years the renewal runs, as the machine will usually, with proper repairs, do service beyond that time. It will not, then, be very difficult to calculate what value, during the seven years, will be derived from the right to make and vend machines, when the use of others already in existence is

scattered over every section of the country, and they may be employed all the time of the extended patent, without the assignees or grantees ever having paid or being obliged to pay a dollar for that extended use.

Looking, then, to the beneficent design of the eighteenth section, to enforce the Constitution, by advancing science and the arts, and protecting useful inventions, through the security for a longer term to men of genius of a property in their own labors, in cases where they had not been already remunerated for their time and expenses, I cannot but fear that the construction given by the majority *of the court will [*708 prove most unfortunate. It will tend to plunge into still deeper embarrassment and destitution, by losses in litigation and by deprivation of a further extended sale of their inventions, those whose worth and poverty induced Congress to attempt to aid them.

Nor would a different construction tie up, as some suppose, the future use of numerous patents. Of the fourteen thousand five hundred and twenty-six heretofore issued, since the Constitution was adopted, I am enabled, by the kindness of the Commissioner of Patents, to state, that only ten have been renewed under the eighteenth section during nearly ten years it has been in operation.

And if the individuals who use the improved machines, the fruit of the toil and expense and science of others, were obliged in but one case in a year, over the whole country, to pay something for that further use, is it a great grievance? They are not obliged to employ the patent at all, and will not unless it is better by the amount they pay than what was in use before. And is it a great hardship or inequitable, when they are benefited by another's talents, money, and labor, to compensate him in some degree therefor?

While other countries, and Congress, and our state courts are adopting a more liberal course yearly towards such public benefactors as inventors, I should regret to see this high tribunal pursue a kind of construction open to the imputation of an opposite character, or be supposed by any one to evince a feeling towards patentees which belongs to other ages rather than this (and which I am satisfied is not cherished), as if patentees were odious monopolists of the property and labors of others, when in truth they are only asking to be protected in the enjoyment and sale of their own,—as truly their own as the wheat grown by the farmer, or the wagon built by the mechanic.

Nor should he allow any prejudices against the utility of patents generally, and much less against the utility of the

invention now under consideration, to make our constructions more rigid in this case. The settled doctrine of the courts now, under the lights of longer experience, though once otherwise, is in doubtful cases to incline to constructions most favorable to patentees.[1] *Grant et al.* v. *Raymond*, 6 Pet., 218; 1 Sumn., 485; *Wyeth* v. *Stone*, 1 Story, 287; *Blanchard* v. *Sprague*, 2 Id., 169. Nor is it strange that this should be the case in the nineteenth century, however different it was some generations ago, when we daily witness how the world has been benefited since by the patented inventions and discoveries in steam, in all its wonderful varieties and utilities, and in cleaning, spinning, and weaving cotton by machinery for almost half the human race, and in myriads of other improvements in other things, shedding so benign a light
*709] over the age in which we live, and most of them excited and matured only *under the protection secured to their inventors by an enlightened government.

Some estimate can be formed of the usefulness of the present patent, and its title to favor, when one machine is computed to perform the labor of planing and grooving in one day that would require fifty days by a man, and which is supposed to reduce near seven tenths the expense of such work in every building where the improved method is used,—as it ere long will be by the many millions of our own population, and in time over the civilized world. Every honest social system must shield such inventions, and every wise one seeks undoubtedly to encourage them.

To be liberal, then, in the protection of patentees, is only to be just towards the rights of property. To stimulate them in this and other ways to greater exertions of ingenuity and talent is to increase the public wealth, and hasten the progress of practical improvements, as well as of science. And to discountenance encroachments on their rights, and defeat piracies of their useful labors, is calculated in the end to better the condition of every rank in society, and introduce wider and faster all the benefits of a superior state of civilization and the arts.

[1] CITED. *Hogg* v. *Emerson*, 6 How., 486.

ANDREW P. SIMPSON, JOSEPH FORSYTH, AND BAGDAD MILLS, APPELLANTS, *v.* JAMES G. WILSON.[1]

The decision of the court in the preceding case of *Wilson* v. *Rousseau et al.*, namely, that when a patent is renewed under the act of 1836, an assignee under the old patent has a right to continue the use of the patented machine, but not to vend to others, again affirmed.[2]

An assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, authorizes the assignee to vend elsewhere, out of the said territory, the product of said machine.

The restriction upon the assignee is only that he shall use the machine within the specified territory. There is none as to the sale of the product.

THIS case came up on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Louisiana, sitting as a court of equity.

Wilson was a complainant below, who filed a bill, and obtained an injunction against Simpson, Forsyth, and Mills. After sundry proceedings in the case, Forsyth put in a plea, and a rule was obtained, that the plaintiff should show cause why the injunction should not be dissolved. Upon argument, the court dismissed the rule, and the case was set down for hearing by consent of parties; the complainants not admitting the facts alleged in the plea, but for the purpose of raising the questions of law which they involved, and obtaining a speedy decision of the same.

*Upon the argument, the division of opinion arose which will be presently stated. [*710

The facts in the case were these:

The patent for planing, &c., having been obtained by Woodworth in 1828, as has been particularly mentioned in the report of the preceding case of *Wilson* v. *Rousseau et al.*, Forsyth, one of the defendants below, became an assignee under that patent for all its rights within the county of Escambia, in West Florida. This took place in 1836.

Woodworth, the patentee, having died, his administrator, in 1842, obtained a renewal of the patent under the act of 1836; and in 1843 assigned to Wilson, the complainant below, all the rights under the extended patent for the States of Louisiana, Alabama, and the Territory of Florida.

On the 13th of April, 1844, the said Wilson instituted proceedings in equity, in the Circuit Court of Louisiana, against the defendants, on the ground that they infringed on his just

[1] See further decision, *Wilson* v. *Simpson*, 9 How., 109.

[2] See *Blanchard's Gun-stock Factory* v. *Warner*, 1 Blatchf., 258.

rights by setting up and putting in operation the said patented machines in the Territory of Florida; and by vending in New Orleans large quantities of dressed lumber, plank, &c., the product of the machines there established.

In May, 1845, the cause came up for hearing, as above stated, when the following points were ordered to be certified to this court, namely:—

"J. G. WILSON *v.* SIMPSON ET AL. No. 1225.

"This case coming on to be heard on demurrer filed to the plea of Joseph Forsyth, one of the defendants, set down for hearing by consent, and the matters of law arising on said plea, the following points became material to the decision, and being considered, the court were divided in opinion on the following points:—

"1. Whether, by law, the extension or renewal of the said patent, granted to William Woodworth, and obtained by William W. Woodworth, his executor, inured to the benefit of said defendant, to the extent that said defendant was interested in said patent before such renewal and extension.

"2. Whether, by law, the assignment of an exclusive right to the defendant, by the original patentee, or those claiming under him, to use said machine, and to vend the same to others for use, within the county of Escambia, in the Territory of West Florida, did authorize said defendant to vend elsewhere than in said county of Escambia, to wit, in the city of New Orleans, State of Louisiana, plank, boards, and other materials, product of a machine established and used within the said county of Escambia, in the Territory of West Florida.

"Wherefore, upon the request of defendants' counsel, it is ordered and directed, that the foregoing points of law be certified for the opinion of the Supreme Court of the United States."

*711] *The case was argued by *Mr. Gilpin* and *Mr. Westcott*, for the defendants below, who were the appellants in this court, and by *Mr. Henderson* and *Mr. R. Johnson*, for Wilson.

Mr. Justice NELSON delivered the opinion of the court.

The questions in this case come up on the certificate of a division of opinion in the court below. The judgment of this court in the previous case of *Wilson* v. *Rousseau et al.*, upon the second question certified in that case, disposes of the first question certified here, and is answered accordingly.

The second question certified involves the point, whether

or not the assignment of an exclusive right to make and use, and to vend to others, planing-machines, within a given territory only, authorizes the assignee to vend elsewhere, out of the said territory, the plank, boards, and other materials, the product of said machines.

The court have no doubt but that it does; and that the restriction in the assignment is to be construed as applying solely to the using of the machine. There is no restriction, as to place, of the sale of the product. Certificate accordingly to court below.

Order.

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 Louisiana, 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 agreeably 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:—

1. That, by law, the extension and renewal of the said patent granted to William Woodworth, and obtained by William W. Woodworth, his executor, did not inure to the benefit of said defendant to the extent that said defendant was interested in said patent before such renewal and extension; but the law saved to persons in the use of machines at the time the extension takes effect the right to continue the use.

2. That an assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, does authorize an assignee to vend elsewhere, out of the said territory, plank, boards, and other materials, the product of such machine.[1]

It is therefore now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

JAMES G. WILSON, COMPLAINANT AND APPELLANT, v. JOSEPH TURNER, JUNIOR, AND JOHN C. TURNER, DEFENDANTS. [*712

[1]The decision of the court in the two preceding cases, namely, that where a patent is renewed under the act of 1836, an assignee under the old patent has a right to continue the use of the machine which he is using at the time of the renewal, again affirmed.

THIS case came up, by appeal, from the Circuit Court of the United States for the District of Maryland, sitting as a court of equity.

The bill was filed by Wilson, as the assignee of William W. Woodworth, the administrator of Woodworth, the patentee, as stated in the report of the preceding case. It set out the patent and assignment, and then prayed for an injunction and account.

The answer referred to the mutual assignment made between Woodworth and Strong on the one part, and Toogood, Halstead, Tyack, and Emmons of the other part, which was recited in the preceding case, and traced title regularly down from these latter parties to the defendants.

A statement of these facts was agreed upon by counsel, and all the documents set forth at length; and upon this statement, together with the bill and answer, the cause was argued.

At April term, 1845, the court dismissed the bill, and from this decree the case was brought up, by appeal, to this court.

It was argued by *Mr. Phelps* and *Mr. Webster*, for Wilson, the appellant, and *Mr. Schley*, for the appellees, who were the defendants below.

Mr. Justice NELSON delivered the opinion of the court.

The judgment of the court in the previous case of *Wilson* v. *Rousseau et al.*, disposes of the questions in this case, and affirms the decree of the Circuit Court.

WILLIAM W. WOODWORTH, ADMINISTRATOR, &C., AND E. V. BUNN, ASSIGNEE, COMPLAINANTS AND APPELLANTS, *v.* JAMES, BENJAMIN, AND ALPHEUS WILSON.

An objection to the validity of Woodworth's patent for a planing-machine, namely, that he was not the first and original inventor thereof, is not sustained by the evidence offered in this case.

Nor is the objection well founded, that the specifications accompanying the application for a patent are not sufficiently full and explicit, so as to enable a mechanic of ordinary skill to build a machine.

An assignee of an exclusive right to use ten machines within the city of Louisville, or ten miles round, may join his assignor with him in a suit for a violation of the patent right, under the circumstances of this case.[1]

*713] *THE bill was filed in this case, in the Circuit Court for the District of Kentucky, by the complainants,

[1] CITED. *Nelson* v. *McMann*, 4 Bann. & A., 211.

setting forth that William Woodworth was the inventor and patentee of a certain planing-machine, describing it: also, the extension of the said patent to W. W. Woodworth, as administrator, and that E. V. Bunn, one of the complainants, took an assignment from the said W. W. Woodworth for the exclusive right of making, using, and vending machines for planing, &c., under the extension of the patent, within the limits of the city of Louisville, and in the district of country ten miles around said city.

The bill further charges, that the defendants have, in violation of the rights of the complainants, erected and put in operation in the city of Louisville a planing-machine, &c., which machine is, in all its material parts, substantially like and upon the plan of the machine of the complainants, and persist in using the same.

The defendant James Wilson answered the bill, substantially denying most of the material allegations contained in it. The other defendants answered by denying that they had any interest in the machine.

The court granted an injunction, enjoining the defendant James Wilson from using the machine.

Afterwards an application was made to the court, on behalf of the complainants, for a rule upon the defendant, James Wilson, to show cause why an attachment should not be issued against him for a violation of the injunction, which was accordingly granted.

The defendant showed cause by affidavit, in which he affirms, that immediately on the service of the injunction he had ceased to use the machine mentioned in the bill, and conformed himself to the order of the court, and that he had purchased and set up Bicknell's planing-machine, which he was using, and which was substantially different from the machine of the complainants.

Much testimony was taken in the court below, on the question whether the machine which the defendant had substituted and was using was, in all its material and substantial parts, like Woodworth's, which it is not material to refer to more particularly. A great deal of testimony was also taken, for the purpose of showing that Woodworth was not the original inventor of the complainant's machine, which it is also not necessary to recite.

The cause afterwards came to a hearing on the merits, upon the pleadings and proofs, and also upon the rule previously granted against the defendant, to show cause why an attachment should not issue for a violation of the injunction, and, after consideration, the court dissolved the injunction and

dismissed the bill, and discharged the rule to show cause, with costs.

As the opinion of the court refers in general terms to the *714] interest of Woodworth under the assignment, as a justification for his *being joined as a party in the suit, it is proper to set forth the assignment, which was as follows:

Transfer from Woodworth, Administrator, &c., to E. V. Bunn.

"Whereas William Woodworth, now deceased, did, in his lifetime, obtain letters patent, issued under the great seal of the United States, bearing date the 27th day of December, 1828, giving and granting to him, the said Woodworth, his heirs, administrators, and assigns, for and during the term of fourteen years from the date of the said letters patent, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a certain improved method for planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any materials, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings in, or facing, metallic, mineral, or other substances.

"And whereas William W. Woodworth, administrator of said William Woodworth, hath applied and obtained an extension of said letters patent for the term of seven years from and after the expiration of said patent, to wit, the 27th day of December, 1842, pursuant to an act of Congress in such case made and provided, and hath a certificate of said extension annexed to said patent, signed by the Commissioner of Patents, under the great seal of the patent-office of the United States, and dated November 16th, A. D., 1842. And whereas E. V. Bunn of the city of Louisville, in the state of Kentucky, hath fully viewed, examined, and considered for himself the said improvement, and of his own motion hath requested and desired the said William W. Woodworth, administrator of said William Woodworth, deceased, to give a license and permission, in writing, for constructing and using machines on the said improved plan in the city of Louisville aforesaid, including the district of country within ten miles of said city, and in no other city, town, or place in the United States, or the territories thereof, on the conditions hereinafter mentioned; and have offered to pay him the sum of fifteen hundred dollars for such license and consent in writing; with which request and desire the said William W. Woodworth, administrator of William Woodworth, deceased, has agreed to comply.

"Now, know all men by these presents, that the said

W. W. Woodworth, administrator of William Woodworth, deceased, in consideration of the said sum of fifteeen hundred dollars, secured to be paid to him, the said William W. Woodworth, administrator of William Woodworth, deceased, doth hereby give his full consent and permission in writing, and license to the said E. V. Bunn, and to his executors, administrators, and assigns, to construct and use, during the said extension of the aforesaid patent, ten planing machines on the improved plan aforesaid, within the city of Louisville, *and including the district of country within ten [*715 miles of said city, and in no other city, town, or place within the United States or the territories thereof; and also, within said limits, to dispose of the plank or other things dressed and prepared in the said machines; and he doth also hereby authorize and empower the said E. V. Bunn, and his executors, administrators, and assigns, in the name of said Woodworth, administrator aforesaid, or in his own name, to commence and prosecute to final judgment any suit or suits against any person or persons who shall construct or use the said improvements within the said limits, contrary to the true meaning and intent of the aforesaid letters patent, and the extension thereof, and the laws in such case made and provided; and to receive for his own benefit, and at his own proper costs and charges, any penalty or penalties which he may recover. And in consideration of the premises, it is hereby covenanted and agreed, by and between the said William W. Woodworth, administrator of William Woodworth, deceased, his executors, administrators, and assigns of the one part, and the said E. V. Bunn, his executors, administrators, and assigns of the other part, as follows, viz.:—

"1st. That the said William W. Woodworth, administrator of William Woodworth, deceased, his executors or administrators, during the terms aforesaid, shall not, nor with themselves, construct, or use, nor give their license, consent, and permission to any other person than the said E. V. Bunn to construct or use, the improved planing-machine, aforesaid, within the said city of Louisville, or within the district of country within ten miles of said city.

"2d. That the said E. V. Bunn, his executors, administrators, and assigns, shall not nor will, during the times aforesaid, construct or use more than ten machines as aforesaid within the limits above mentioned, nor construct or use any such machines, nor sell and dispose of any plank or other thing dressed and prepared in such machine, anywhere else within the United States and the territories thereof; it being declared to be the true intent and meaning of these presents that not

more than ten planing-machines in the whole shall be constructed and used by virtue of the license, consent, and permission herein given.

"3d. It is understood and agreed that the said William W. Woodworth has entered and filed at the patent office, at Washington, a disclaimer of that part of said patent for the planing-machine which claims the reduction of materials, boards, and plank to an equal width and thickness by circular saws; and a lien is retained and renewed on this assignment for the security of the payment of the fifteen hundred dollars,—the consideration and purchase-money to be paid to said Woodworth.

"Signed, sealed, and delivered, this 21st day of June, 1843.

W. W. WOODWORTH, [L. S.]
Administrator of W. Woodworth, deceased."

*716] *"The words 'to him in hand paid by the said' were erased, and the word 'ten' and the words 'in the name of said Woodworth, administrator aforesaid, or in his own name,' were interlined before the execution of the foregoing instrument in presence of D. E. Sickles."

The cause was argued by *Mr. Latrobe* and *Mr. Staples*, for the complainants, Woodworth and Bunn, and by *Mr. Bibb*, for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

The objection taken, that the administrator could not apply for an extension of the patent granted to Woodworth, his intestate, under the eighteenth section of the patent law, has been disposed of in the previous case of *Wilson* v. *Rousseau et al.*, and need not be further noticed.

Another objection taken to the right of the complainants to maintain the suit is, that Woodworth was not the first and original inventor of the planing-machine, against the using of which the defendant was enjoined.

Without going into the proofs in the case, which are very voluminous, it will be sufficient to state, that after fully considering all the evidence produced bearing upon the question, the court is satisfied that the weight of it is decidedly against the objection, and in favor of the allegation in the bill, that Woodworth was the original inventor of the machine.

It is objected, also, that the specifications accompanying the patent were not sufficiently full and explicit, so as to enable a mechanic of ordinary skill to build a machine. The court is not satisfied, according to the proof in the case, that the objec-

tion is well founded, and it cannot be relied on as affording sufficient ground for the dismissal of the bill.

A further objection was taken, that W. W. Woodworth, one of the complainants, was improperly joined with E. V. Bunn, the assignee of the exclusive right in Louisville and ten miles around it. The court is of opinion, that the interest of Woodworth in the assignment, as appears from the record, is sufficient to justify his being made a party jointly with the assignee.

Some other objections were taken to the maintenance of the suit on the argument, which it is not material to notice particularly; they have all been considered, and in the judgment of the court afford no sufficient ground for the dismissal of the bill and the dissolving of the injunction.

We think the court erred, and that the decree dismissing the bill, as to the defendant James Wilson, and dissolving the injunction, should be reversed, and that a perpetual injunction should issue.

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