not apply to a judgment rendered in the Court of Appeals for the territory of Florida. The right to appeal from that court is regulated by the act of May 26, 1824. And that act limits the appellate power of this court to cases in which the amount in controversy exceeds one thousand dollars.

This case must therefore be dismissed for want of jurisdiction.

Orders.

THE UNITED STATES *v.* CARR AND PECK, CLAIMANTS OF SIXTEEN BOXES OF HAVANA SUGAR, &C.

*10] This cause came on to be heard on the transcript of the record *from the Court of Appeals for the territory of Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Court of Appeals in this case be, and the same is hereby, affirmed.

THE UNITED STATES *v.* CARR AND PECK, CLAIMANTS OF TEN BOXES, &C., OF RAISINS.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the territory of Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

HARRIET V. LADD, BY HER NEXT FRIEND, MONTGOMERY D. CORSE, COMPLAINANT AND APPELLANT, *v.* JOSEPH B. LADD, JOHN H. LADD, THE FARMERS' BANK OF ALEXANDRIA, JOHN HOOFF, BENONI WHEAT, AND JOHN J. WHEAT, THE TWO LAST TRADING UNDER THE FIRM OF BENONI WHEAT AND SON, DEFENDANTS.

Where a married woman has power, under a marriage settlement, to dispose of property settled upon her, by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practised upon her, but alleges no specific mode or act by which this undue marital influence was exerted, and the facts disclosed in the testimony go very far to contradict the allegation, the charge cannot be sustained.

Every feme covert is presumed, under such a settlement, to be, to some extent, a free agent.

Where the marriage settlement recited that the woman was possessed of a considerable real and personal estate, which it was agreed should be settled to her sole and separate use with power to dispose of the same by appoint-

ment or devise, and then directed that the trustee should permit her to have, receive, take, and enjoy all the interest, rents, and profits of the property to her own use, or to that of such persons as she might from time to time appoint during the coverture, or to such persons as she, by her last will and testament, might devise or will the same to, and in default of such appointment or devise, then the estate and premises aforesaid to go to those who might be entitled thereto by legal distribution,—this deed enabled her to convey the whole fee, under the power, and not merely the annual interest, rents, and profits.

The word "interest" in such settlement, held to be the equivalent of "estate."

Where the marriage settlement gave her the power of appointment to the use of such persons as she might from time to time appoint, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been *sealed* and *delivered*, this was a sufficient execution of the power, although the witnesses did not attest the fact of her *signing* it. This could be proved *aliunde*.

The authorities upon this point examined.

*THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of equity. [*11

The facts of the case were these:

On the 20th of October, 1824, a marriage being about to take place between Joseph B. Ladd and Harriet V. Nicoll, both of the town of Alexandria, the following marriage settlement was executed by those parties:

"This indenture tripartite, made this twentieth day of October, in the year of our Lord eighteen hundred and twenty-four, between Joseph B. Ladd, of the town of Alexandria, of the first part, Harriet V. Nicoll, of the town aforesaid of the second part, and John H. Ladd, of the town aforesaid, of the third part. Whereas, a marriage is shortly to be had and solemnized, between the said Joseph B. Ladd and Harriet V. Nicoll; and whereas, the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed between her and the said Joseph B. Ladd should be settled to her sole and separate use, with power to dispose of the same, by appointment or devise; and whereas, the said Joseph B. Ladd has agreed to add to the property of the said Harriet V. Nicoll one hundred and sixty-two shares of the Alexandria and Washington Turnpike Company, and the premises hereinafter described, now occupied by Dr. Vowell, which is likewise to be settled in manner aforesaid, with this understanding, that in case the said Harriet V. Nicoll should, after the intended marriage had, happen to survive the said Joseph B. Ladd, she shall not have or claim any part of the real or personal estate whereof the said Joseph B. Ladd should die seized or possessed, or entitled to, at any time during the coverture between them, by virtue of

her dower, or title of dower at common law, or by virtue of her being administratrix, or entitled to the administration of the goods and chattels, rights and credits, of the said Joseph B. Ladd, or in any other manner whatever. Now, this indenture witnesseth, that in pursuance of the agreement aforesaid, and of the sum of five dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Joseph B. Ladd hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, sell and convey, unto the said John H. Ladd, his heirs and assigns for ever, a house and lot situated upon the north side of King street, and to the westward of Pitt street, in the said town of Alexandria, and bounded as follows, to wit:—Beginning upon King street, *12] four feet to the eastward of the centre *of the square formed by Pitt and St. Asaph streets, and running thence eastwardly with King street, and bounding thereon twenty-three feet nine inches, be the same more or less; thence northwardly with a line parallel to Pitt and St. Asaph streets, one hundred and nineteen feet; thence westwardly and parallel to King street, the length of the first line; thence southwardly with a straight line to the beginning;—also one hundred and sixty-two shares of Alexandria and Washington Turnpike Company; and the said Harriet V. Nicoll, in consideration of the agreement aforesaid, and of the sum of five dollars to her in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said John H. Ladd, his heirs and assigns for ever, the following property, to wit:—All that property situated on the east side of Union street, long known by the name of Conway's Wharf, with the warehouses, dwelling-houses, docks, and appurtenances thereto belonging, as it was devised by the late Richard Conway to Joseph Conway, deceased, from whom it descended to the said Harriet V. Nicoll;—also, one lot of ground on the west side of Union street, purchased by the said Joseph Conway of Thomas Conway, by indenture, now of record, in the county of Alexandria; also, all right, title, interest, claim, or demand of the said Harriet V. Nicoll, under the will of her late husband, William H. Nicoll, of Northumberland county, Virginia, or that may have descended to her from her father, Joseph Conway, deceased, or from her mother, or from any other person. To have and to hold all and singular the property hereby conveyed unto him, the said John H. Ladd, his heirs, executors, administra-

tors, and assigns, to his and their only use for ever; upon such trusts, and for such uses, intents, and purposes, as are hereinafter mentioned; that is to say, in trust, for the use of the respective parties who have conveyed the same until the solemnization of the intended marriage, and from and after its solemnization, then upon the trust that the said John H. Ladd, his heirs, executors, and administrators, shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy, all the interest, rents, and profits of the property hereby conveyed to and for her own use and benefit, or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, or to such person or *persons as she, [*13
by her last will and testament in writing, to be by her signed, sealed, published, and declared, in the presence of the like number of witnesses, may devise or will the same to; and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution; it being the intent of the parties that none of the property hereby conveyed shall be at the disposal of, or subject to, the control, debts, or engagements of the said Joseph B. Ladd.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first before written.

"JOSEPH B. LADD, [SEAL.]
HARRIET V. NICOLL, [SEAL.]
JOHN H. LADD. [SEAL.]"

On the 1st of November, 1824, Joseph B. Ladd, in conformity with the above agreement, transferred to John H. Ladd, the trustee, one hundred and sixty-three shares in the Washington and Alexandria Turnpike Company, being one share more than he had stipulated to transfer.

On the 2d of January, 1827, Harriet V. Ladd, by writing under her hand and seal, executed in the presence of three witnesses, and reciting that it was in pursuance and in execution of the power reserved to her in her marriage settlement, directed the trustee to transfer and assign to John Hooff, cashier of the Farmers' Bank of Alexandria, one hundred and sixty-two shares of the aforesaid turnpike company, "for ever thereafter to be and inure to the benefit of the said John Hooff."

On the same day, the trustee made the transfer, as directed.

In October, 1827, the following proceedings took place at

the Farmers' Bank of Alexandria, and appear upon the minutes of the Directors.

"It is proposed to lend Joseph B. Ladd upon his note, indorsed by John H. Ladd, the sum of $7,000, provided the board shall be satisfied that the real security he may offer shall be good security for that sum ;—decided in the affirmative."

"*Oct.* 9, 1827.—The loan provisionally granted to Joseph B. Ladd on the 1st instant, being under consideration, a deed of trust to John Hooff, trustee, signed by John H. Ladd and Harriet V. Ladd, and dated the 9th day of October, 1827, containing a description of the property intended to be conveyed as collateral security for the said loan, having been laid before the board, read, and considered, and upon the question, Shall the said property be deemed good security for the said loan of $7,000? the vote was in the affirmative.

*14] * "Resolved, therefore, that the loan of $7,000 be made to the said Joseph B. Ladd, upon the conditions contained in the said deed; and upon the further consideration, that the said Joseph B. Ladd cause the property contained in the deed to be regularly insured, and the policies assigned over to the trustee, John Hooff; upon this resolution John C. Vowell, Reuben Johnston, John H. Ladd, and Samuel Messersmith, voted in the affirmative; in the negative, Rd. M. Scott."

The deed referred to in the above proceedings, reciting the marriage settlement, conveyed to Hooff all that part of the wharf called Conway's Wharf, lying on the east side of Union street, in the said town of Alexandria, as the same was devised by the late Richard Conway to the said Joseph Conway, the father of the said Harriet, with all buildings, &c., being the property described in, and conveyed by, the marriage settlement, and then proceeded thus :—" And whereas the Farmers' Bank of Alexandria has agreed to loan to the said Joseph B. Ladd the sum of seven thousand dollars, or such part of that sum as he may require, on his notes, to be indorsed by the said John H. Ladd, and discounted at said bank, and to be renewed from time to time, under the indorsement of the said John H. Ladd, or of such other person or persons as the board of directors of said bank may from time to time approve of, according to the usages of said bank, on the following terms and conditions: that is to say, that the said loans and discounts, or interest to become due thereon, shall be secured by an effectual lien on the premises before described; that on the said notes being regularly renewed, and kept up, and on the said interest or discounts being punctually paid on such renewals, and on one thousand dollars of the principal being paid within two

years from the date hereof, the said Joseph B. Ladd shall be allowed the further term of one year, that is to say, three years from the date hereof, for the payment of the residue of said loan; and if within the said third year the said Joseph B. Ladd, his executors or administrators, shall pay to the said bank the further sum of two thousand dollars, and shall pay and discharge the interest or discounts on the said notes as they shall be renewed, then that the time of the payment of the residue of said loan shall be extended one year further, that is to say, for the term of four years from the date hereof, he, the said Joseph, his executors or administrators, paying the interest or discounts on the said notes as they shall be renewed during the said fourth year; and if, within the said fourth year, the said Joseph shall pay the further sum of two thousand dollars of the principal of said debt, then that the time of the payment of the residue *of the said [*15 debt shall be extended one year further, that is to say, for the term of five years from the date hereof; the said Joseph, his executors or administrators, paying the discount or interest on the notes offered for renewal as the same shall be discounted."

The deed then directed, that, if the payments mentioned above were not made, Hooff was to sell the property, "provided, however, that the same shall produce enough to pay and satisfy the whole amount of said loan which shall not be paid, with all discounts and interest which shall be due thereon, and all reasonable charges and expenses of sale." It contained also this important declaration and condition:—"And the said Harriet V. Ladd, in execution of the power of appointment to her reserved as aforesaid, does hereby direct and appoint the premises herein described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited."

This deed was signed and sealed by the parties thereto, with a memorandum underwritten in these words, in the usual place of attestation:—"Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles W. Muncaster, Jonathan Field,"—and bore the certificate of the clerk that it was proved as to John H. and Harriet V. Ladd, by three of the witnesses, acknowledged by the trustee, Hooff, and ordered to be recorded.

On the 13th of April, 1829, Hooff re-transferred to John H. Ladd, the trustee, the one hundred and sixty-two shares of turnpike stock, which the trustee had transferred to him on the 2d of January, 1827.

On the 30th of April, 1829, Harriet V. Ladd directed the

trustee to transfer these shares to Sarah Ladd, which was accordingly done on the same day.

On the 21st of November, 1829, Sarah Ladd transferred eighty shares of this stock to the bank, and on the 6th of December following, the remaining eighty-two shares to Sarah Easton Ladd.

On the 16th of December, 1839, the following proceedings took place at the bank:

"*Farmers' Bank of Alexandria, December 16th*, 1839.

"The president and cashier, having made arrangements for further security on the debt of Joseph B. Ladd to this bank, having laid the same before the board, it is ordered to be recorded as follows, viz.:—The Farmers' Bank of Alexandria, *16] having this day received from Mrs. Sarah Ladd a transfer of eighty *shares of stock in the Washington and Alexandria Turnpike Company, as further security for the payment of Jos. B. Ladd's note, amount six thousand dollars, due the said bank and unpaid, with an understanding the stock is not to be sold in less than two years from this date, and then to be applied towards the payment of said note of six thousand dollars, but the said Mrs. Sarah Ladd may direct the payment of the proceeds of said stock at any time previous to the expiration of said term of two years at her pleasure, and then to be applied towards the payment of said note of Joseph B. Ladd, amount six thousand dollars.

(Signed,) JOHN C. VOWELL, *President.*"

"*Alexandria, November* 21, 1839.

"Amended by introducing a clause that the bank shall not proceed against the property in deed of trust, Conway's Wharf, until two years from this date, and then stock to be sold, without Mrs. Sarah Ladd should prefer to pay for the stock at the par value.

"A copy. JOHN HOOFF, *Cashier.*"

On the 27th of July, 1842, Hooff advertised the real property conveyed to him for sale, and sold it on the 7th of September, for $4,175, to Benoni Wheat and John J. Wheat. Two days before the sale, Hooff by writing consulted Mrs. Ladd respecting the terms of sale, and the parcels in which the property should be sold, and received from her the writing returned indorsed in these words:—"I agree to the above arrangement.—Harriet V. Ladd."

In Feburary, 1843, Harriet V. Ladd, by her next friend, Montgomery D. Corse, filed her bill in the Circuit Court

against her husband, the trustee, the bank, Hooff, and the Wheats.

The bill, after meeting the marriage settlement and the marriage, alleges that under said contract she had no power to convey or dispose of the property settled on her by way of anticipation or otherwise. Nor had she power to appoint the use of the income rents, &c., to any person, for the debts or benefit of her said husband.

That she was induced by the marital influence of her husband, and with the knowledge and connivance of the said bank, to sign a deed of trust to John Hooff, to secure a debt of her husband indorsed by her trustee, which deed is witnessed by four persons in manner and form as shown by the exhibit of it.

That no power is given to the trustee to convey the property, nor could she authorize him, and that said deed of trust is *null and void, and was obtained by marital [*17 influence and coercion, while living with her husband, and her husband did not join in said deed, nor was she separately examined to ascertain if she freely executed it, &c., nor was authorized to execute said deed, without all the forms were complied with.

That she is falsely made in said deed to say that she had previously appointed under her power, when in fact she never had, and that her husband and trustee were acting for their own personal interest.

That said Hooff and said bank have caused the wharf lot to be sold to Benoni Wheat, who holds the same in possession as his property, and refuses to let your oratrix have the same.

That the said bank holds the shares of turnpike stock included in the settlement, as security for the money loaned to her husband.

That she was induced by marital influence to execute an instrument dated 30th April, 1829, as will be shown, directing her trustee to transfer 162 shares of turnpike stock to Mrs. Sarah Ladd, to secure $4,000 loaned by her (as guardian to Sarah Easton Ladd) to your orator's husband, and when the same should be paid to be re-transferred to the use of your orator.

That a settlement having taken place by which Sarah Easton Ladd received 82 shares in full of her claim, the remaining 80 shares were on the 21st of November, 1829, transferred by Sarah Ladd to said bank, without any authority, and they were then the property of your oratrix, and not of Sarah Ladd, as the bank well knew.

That all the said writings, transfers, and doings in the prem-

ises were illegal, and in fraud of her rights secured to her by said marriage contract;—that all the aforesaid actings and doings in the premises, and every act and doing connected with the same, by the aforesaid Joseph B. Ladd, John H. Ladd, John Hooff, Benoni Wheat, and the said Farmers' Bank of Alexandria, were in violation of her rights, and done to defraud her of that property and those rights secured to her or intended so to be by the marriage contract aforesaid.

That the said deed to Hooff, and the pretended assignment of the turnpike stock, ought to be declared null and void as to your oratrix, and she ought to be restored to her property and rights, and quieted against all said parties, and that the dividends on said shares received by said bank for at least four years ought to be paid to her.

The bill then states the desertion of complainant by her husband.

*18] *That the part of the property sold has not paid the debt, and it will take the residue of her property to pay it. It prays that the deed of indenture may be surrendered and cancelled, and that complainant may be quieted against all the defendants in her enjoyment of her said property; that the bank may assign the shares of turnpike stock, or in default pay the value thereof and all dividends received thereon; and it concludes with a prayer for general relief.

In June and July, 1843, Hooff, the Wheats, and the bank filed their answers. The husband and trustee did not answer the bill. This answer denied the complainant's construction of the marriage settlement, insisted upon the competency and regularity of the appointment, and of all the proceedings had in pursuance thereof, averred that the property could be applied to the payment of the debt due to the bank with her consent; that she was *quoad* the property a feme sole; that the loan was made to Joseph B. Ladd on his notes, indorsed by the trustee, and upon the security of the deed of trust; that the greater part of the money was expended upon the improvement of the property which belonged to her; that the complainant was privy and assented to the sale, and set forth the facts connected with the transfer of the turnpike stock, and denied all fraud or undue influence in bringing about any of the transactions between the parties.

To all these several answers there was a general replication and issue; and a commission was issued to take testimony, under which the facts above stated, and those hereinafter adverted to, were established in proof.

On the 6th of October, 1845, the cause came on for hearing,

when the Circuit Court dismissed the bill, with costs. The complainant appealed to this court.

The cause was argued by *Mr. May* and *Mr. Brent*, for the appellant, and *Mr. Francis L. Smith* and *Mr. Jones*, for the appellees.

The points raised by the counsel respectively are thus stated upon their briefs.

For the appellant.

1st. What is the construction and effect of the marriage settlement, and what powers did it confer or restrain?

2d. Have its terms and power been duly executed, so as to make a valid appointment or execution thereof?

3d. Will equity aid the defective execution?

4th. Has the complainant by her own acts precluded herself from the relief prayed, in respect to the property withheld from her?

*5th. Has she not a clear right to the shares of turnpike stock? [*19

6th. Is she not entitled to be quieted in the unsold property, at least to have the deed as to that cancelled?

1st Question.—We contend that the marriage settlement gave her no sweeping power to alienate the property, but only from time to time during coverture to appoint the uses of the income, &c.

In support of this we cannot do better than review Kent's learned opinion, in 3 Johns. (N. Y.) Ch., 87 (see pp. 97, 100, 102–104, 112, and in pages 113 and 114); he concludes that she can only convey as authorized in marriage settlement, and that a power over the income, &c., does not authorize a deed of the whole by anticipation. See on this 2 Kent Com., 166, *n.*

2d Question.—But conceding that she had power to sell and dispose, has she exercised it according to the formula prescribed?

Her marriage settlement requires her appointment to be by an instrument under hand and seal, attested by three credible witnesses.

The appointment relied on by our adversaries as to the real estate is the deed to Hooff.

This deed is defective:—

1st. That it is attested by but two witnesses as to Mrs. Ladd.

2. That the attesting clause only attests the sealing and delivering.

And, first, Mrs. Ladd's execution required three witnesses. See *Hopkins* v. *Myall*, 2 Russ. & M., 86; 1 Id., 535.

Next, the attesting clause is defective. See 1 Roper, pt. 2, 1946, 1947; *Waterman* v. *Smith*, 9 Sim., 629; 3 Mau. & Sel., 512.

This last authority equally destroys the execution of the transfer of the turnpike stock, whether you refer to her first appointment, 2d January, 1827; or her last appointment, 30th April, 1829, under which the bank claims 80 shares.

It is true that the attesting clause as to this stock says simply "witness," which would imply only one witness, and is therefore defective.

But take it as if it were "witnesses" or "witnessed," then parol proof is not admissible to explain how it was witnessed, because the power requires that the seal and signature should be attested. 1 Roper, pt. 2, pp. 197, 198; 9 Sim., 629, and note; 3 Mau. & Sel., 512.

But no parol proof was introduced here to explain how it was executed. 2 Grat. (Va.), 439.

*20] *Then all these appointments are void and defective in forms as required.

3d Question.—Will equity aid these appointments, under the circumstances?

The witnesses required are placed as guards, and their number cannot be aided in equity. *Hopkins* v. *Myall*, 2 Russ. & Mylne, 86; 1 Id., 535.

The counsel here cited and commented on a number of cases. 2 Jac. & W., 425; 1 Myl. & C., 105, 111; 6 Wend. (N. Y.), 9; 20 Law Lib., 74, 75; 3 Russ., 565; 6 Bligh, N. S., 120; 3 Ohio, 529; 7 Beav., 551; 8 Wheat, 229; 1 Pet., 338; 12 Id., 375; 16 Ves., 116; 3 Johns. (N. Y.) Ch., 97–113; 2 Meriv., 483; 8 Leigh (Va.), 21; 2 Russ. & M., 86; 1 Id., 535.

4th Question.—Is Mrs. Ladd equitably estopped from claiming her rights in this property?

It is said that it would be a fraud in her now to claim as against the purchasers.

What are the facts?

First, we objected to Hooff as a witness.

By agreement, Hooff is to be considered as having been examined under an order of court, but the question as to his competency is reserved.

We allege that Hooff is an incompetent witness, because the legal title was passed to him by the original trustee, John H. Ladd, in violation of his trust, and that the legal title being still in Hooff, the decree, if in our favor, would be for

a reconveyance to our trustee, or some other trustee, with costs as against Hooff.

But even conceding Hooff's competency, then his evidence consists of his answer and deposition, per our agreement.

He proves by way of estoppel,—

1st. That he always understood, and verily believes, that a large portion of the loan to Ladd was used in improving the wharf property claimed by complainant.

Answer to this, first, that he does not state it of his own knowledge; secondly, that if he did, it proves no fraud in complainant.

2d. That after an order of the bank directing a sale, the complainant applied for and obtained an extension of the credit payments at the sale.

3d. That, at Mrs. Ladd's request, the bank ordered the property sold should be laid off by certain specified boundaries before the sale, upon the supposition that by such division it would command a large sum, and that in accordance with a previous *understanding, on the 5th of [*21 September, 1842 (two days before the sale), the complainant wrote her approval on Exhibit No. 2.

Answer.—By the deed of trust to Hooff, one month's notice was to be given of the place, time, and terms of sale.

And by the advertisement, the wharf was to be sold, subject to no easement or encumbrance,—and the dwelling and storehouse to be sold at the same time.

All this was advertised to be done on the 7th of September.

But two days before the sale, Hooff and Mrs. Ladd agree, by the paper No. 2, to divide the property and sell the wharf, subject to a right of the dwelling and warehouse to land on the wharf.

Is not this a material change in the terms advertised?

Unquestionably, by the deed of trust these new terms ought to have been advertised one month, which was not done.

But it will be said that Mrs. Ladd agreed to vary the terms, and have the sale without any advertisement of the new terms.

Even if she was competent so to agree, there is no proof that she had ever read the advertisement, or knew what day the sale was to take place.

Nor does it follow, that, when she agreed on the 5th of September to vary the terms of sale as advertised, she had any reason to believe that Hooff would not re-advertise the property on the modified terms of sale.

Then here is a sale made on one set of terms advertised, and another set of terms announced at the sale, for Hooff says he sold on the terms as altered on the 5th of September, and

nothing done by Mrs. Ladd to waive the one month's advertisement of the new terms.

For her meeting Hooff on the day of sale (not time of sale, which was 12 o'clock per the advertisement), on the premises and conversing with him, and suggesting that addition (which, however, does not appear in the record) to the description of the property "then about" to be offered for sale, would not prove that Mrs. Ladd waived the due notice, unless it was proved that she knew the sale was then to take place.

Then it is clear that Hooff advertised the wharf clear of encumbrances, and sold it subject to an encumbrance as avowed at the time of sale, and there is nothing to prove that Mrs. Ladd agreed to waive the advertisement, as required in her deed of trust.

Was that a fair and legal sale?

And have the purchasers any standing in equity?

If a trustee sells in violation of the injunctions in his deed of
*22] trust, the legal title passes at law, but in equity the *cestui que trust* has relief against the purchaser who has bought with constructive notice of the breach of trust, or non-compliance with the conditions. *Taylor* v. *King*, 6 Munf. (Va.), 366; 4 Cranch., 403; and 4 Munf. (Va.), 421; *Greenleaf* v. *Queen*, 1 Pet., 138, 145.

But do the circumstances thus detailed, namely, Mrs. Ladd's application to extend the credit payments, her request to divide the property for sale, and her conversing with the trustee Hooff on the premises on the day of sale,—do all these circumstances amount to fraud in bar of her equity?

We contend not.

Because fraud consists in the "*suppressio veri* or *suggestio falsi*."

And there is no suppression by Mrs. Ladd of the fact that she had restricted her power by her marriage settlement. On the contrary, it is plainly recited in the deed to Hooff, who knew it well, and his purchasers were equally bound to know the recitals in the deed to their vendor. See 2 Tucker's Bl. Com., 439, 442.

Finally, if we have succeeded in demonstrating that this married woman had no power to convey except *modo et forma*, then we deny that her fraud can confer such a power on her.

For when a feme covert had no power to convey by anticipation, it was held that her fraud could not operate so as to give such a power. *Jackson* v. *Hobhouse*, 2 Meriv., 488.

Then, if the settlement is relied on as conferring a power to appoint away this real estate, we have shown,—

1st. That it does not authorize such sweeping deposition.

2d. That what it does authorize has not been formally appointed or attempted to be.

3d. That as against this feme covert, under all the cases and all the circumstances, equity would not cure the defective execution.

And if there was a resulting separate equitable estate in Mrs. Ladd, with no power to alienate it in any mode, we have shown, first, that the express power to appoint during coverture negatives all other powers; secondly, that in Virginia separate real estate can only be disposed of by deed, &c., with privy examination.

The next subject-matter is the turnpike stock. We show that the bank holds 80 shares, admitted to be part of the settled stock. We have already shown that it is defectively appointed. And if so, there is no pretence of fraud here, as touching the real estate.

It is true the Virginia decisions say that a simple settlement *of personal estate to separate use involves [*23 the *jus disponendi*, but that means where no special mode of disposition is expressed. See 3 Rand. (Va.), 377, 381, 392; 9 Leigh (Va.), 206, 207–221.

In such cases, all the authorities concur, that the forms are restraints. Inasmuch, then, as the bank holds the legal title charged with our equity in these shares, we have a right to a decree, divesting them of the tortious title thus acquired, and an account of the back dividends.

And we also have a right to have a decree for the unsold portion of the property, under the prayers for special and general relief, and to an injunction against a sale of that and a reconveyance in trust.

If, then, we have rights in any or all this property, we have a right to have all these conveyances cancelled in equity. 1 Story Eq., 9, 10, 12.

As Mrs. Ladd's title is but an equitable one, she must enforce her rights in chancery, as she has no remedy at law.

Part of the brief on behalf of the defendants was as follows.

The bill charges force and fraud,—the undue exercise of marital power, &c., &c., as the inducements that forced the complainant against her will, into the execution of the deed in trust to Hooff, subjecting a portion of her separate estate as collateral security, &c., &c.

All these charges are met and conclusively repelled in the answers of the defendants,—and are so left without a particle of evidence to countenance them; and positively discredited by every circumstance in the case.

The complainant's case is then left to rest upon certain technical objections to the said deed in trust, for supposed departures from limitations imposed by the settlement on her, the complainant's, own rights in her own separate estate.

The following objections to that instrument are insisted on.

Objection 1. Attestation defective, in not specifying the act of signing as one of the acts attested.

Answer 1. The attestation, coupled, as it ought to be, with the conclusion of the deed, stating its execution under the hands and seals of the parties, is a sufficient attestation to the signing.

Answer 2. No distinct attestation to the signature necessary.

Against the reason and authority of the adjudications which, within the last thirty-six years seem to have upheld the objection, contrary to all the best of precedent opinions, and to have overruled our answers to it, see Sugden on Powers, 6th ed., ch. 6, § 4, pp. 234–325, and the authorities there reviewed and *criticised; *Pollock* v. *Glassell*, 2 Gratt. (Va.), 440, and the authorities there cited and reviewed, &c., &c.; *Langhorne* v. *Hobson*, 4 Leigh (Va.), 224; *Tod* v. *Baylor*, Id., 498; *Parks* v. *Hewlett*, 9 Leigh, 511; *Hume* v. *Hord*, 5 Gratt. (Va.), 374; *Lessee of Fosdick* v. *Risk*, 15 Ohio, 84; Lord Mansfield's opinion in *Wright* v. *Wakeford*, reported in the Appendix, No. 6, to Sugd. on Pow., ed. 1823.

*24]

Answer 3. Even if the marriage settlement directed the writing to be signed, and the signature to be distinctly attested, that direction is not restrictive, and in no sort avoids the deed.

1st. Because the words of the settlement, if they call for Mrs. Ladd's signature, and for the attestation of three witnesses to her signature, are merely directory, and do not necessarily exclude any other form of alienation competent to an ordinary proprietor and bargainer.

2d. Because Mrs. Ladd was in the nature of a feme sole, whose *jus disponendi* is not restricted to the mode of alienation or appointment directed in the settlement; the settlement not purporting to negative every other mode. 1 Fonbl., ch. 2, § 6, pp. 96–101, notes *n*, *o*, *p*, *q*, and the authorities there cited; *Ewing* v. *Smith*, 3 Desaus. (S. C.), 417, and the authorities there cited and commented on; *Jaques* v. *Methodist Episc. Church*, 17 Johns. (N. Y.), 548, and the authorities there cited and explained; Sugd. on Pow., 6th ed., ch. 4, § 1, from p. 208 to the end of the section, the authorities there cited; 1 Serg. & R. (Pa.), 275; Clancy on Husb. & W. (ed. 1837), ch. 5 and 6; *Newlin* v. *Newlin*, 1 Serg. & R. (Pa.), 279; Story Eq. Jur. (ed. 1846), § 1390, and authorities there

referred to; *Field* v. *Sowle*, 4 Russ., 112; *Gardner* v. *Gardner*, 22 Wend. (N. Y.), 526; *Dallam* v. *Wampole*, 1 Pet. C. C., 116; *Vizonneau* v. *Pegram*, 2 Leigh (Va.), 183; Atherly on Mar. Set., 335; *Lee et al.* v. *Bank U. S.*, 9 Leigh (Va.), 200; manuscript case of *Woodson* v. *Perkins*.

Objection 2. The sealing and delivery of the deed by Mrs. Ladd is attested by only two witnesses, whereas the settlement called for three.

Answer 1. The objection rests on a mistake of fact; it is attested by three witnesses.

Answer 2. As a deed executed by her in her capacity of a feme sole as to her separate estate, and not restricted to the particular form of alienation directed by the settlement, no written attestation of witnesses appended to the deed was called for by the act of Assembly regulating conveyances; it is enough if the deed be proved to be her act by three witnesses before the proper court; and it is so proved.

*They need not be subscribing witnesses. Act of Assembly regulating conveyances; *Turner* v. *Stip*, 1 Wash. (Va.), 319; *Long* v. *Ramsay*, 1 Serg. & R. (Pa.), 72. [*25

Objection 3. That Mrs. Ladd ought to have been privily examined, pursuant to the Virginia act of Assembly.

Answer 1. It follows from the competency of Mrs. Ladd as a feme sole *sui juris*, in respect of her separate estate (as established by the authorities above cited), that to call for her privy examination as a feme covert would be contradictory and absurd.

Answer 2. That her acts disposing of her separate estate are effectual without privy examination, has been expressly and well settled, by authority. *Peacock* v. *Monk*, 2 Ves. Sr., 191; *Wright* v. *Cadogan*, 6 Bro. P. C., 486; *Barnes's Lessee* v. *Irwin*, 2 Dall., 199; *Doe* v. *Staple*, 2 T. R., 695; *Bradish* v. *Gibbs*, 3 Johns. (N. Y.) Ch., 523; Powell on Contr., 67; *Compton* v. *Collison*, 1 H. Bl., 334; *Rippon* v. *Dawding*, Ambler, 565; 1 Tuck. Bl., 115.

Objection 4. That Mrs. Ladd's *jus disponendi*, or power of appointment, was restricted to the annual interest, rents, and profits, and did not extend to the land itself.

Answer 1. The settlement extends, plainly and expressly, both to the land and to the rents and profits.

Answer 2. The land itself passed, *ex vi terminorum*, under the terms "all the interest, rents, and profits."

Devise of "issues and profits" of land, all one with a devise of the land itself. *Parker* v. *Plummer*, Cro. Eliz., 190.

So a devise of the "occupation and profits" of a house and park is a devise of the very house and park. *Paramour* v

Yardley, Plowd., 2d point, argued pages 541–543, decided p. 546.

No difference whether a devise of the land itself, or of the use, occupation, or profits of the land. Manning's case, 8 Co., 187.

"Rents and profits" means not annual rents and profits, but the estate itself. *Bootel* v. *Blundel*, 1 Meriv., 213, 232, 233; *Allan* v. *Backhouse*, 2 Ves. & B., 65.

Grant by deed of the "profits" of land to one and his heirs passes the whole land. Co. Lit., 4 *b*; 4 Com. Dig., *Grant*, E. 5; Clancy on Husband and Wife, ch. 6, pp. from 295 to 303, and cases there cited; *Barford* v. *Street*, 16 Ves., 135; *Jaques* v. *Methodist Episcopal Church*, 17 Johns. (N. Y.), 548, and cases there cited; Roper on Husband and Wife, 136, and cases there collected. The expression "from time to time," will not prevent the wife from making a sweeping appointment. *Pybus* v. **Smith*, 3 Bro. Ch. C., 346; 2 Story, Eq. Jur., §§ 1393–1395; Virginia Rev. Co. (ed. 1803), p. 159, § 12.

*26]

But supposing the execution of the power of appointment defective in strictly legal requisites, a court of equity would leave her to her strictly legal remedy, and not help her to an unconscionable advantage; but, on the contrary, would actively interpose to relieve the purchaser or mortgagee, and compel the feme covert or infant to do equity.

Under the circumstances of this case, it would be against conscience, and fraudulent, for the complainant to take advantage of the alleged defects in the deed.

And married women, as well as infants, are barred by their own frauds.

It is a fraud to object to the sale or mortgage of their property, after it has been consummated with their assent, express or implied.

Their assent is implied, if they stand by and see their property disposed of, without instantly asserting their right, and notifying the party interested.

Any knowledge of the act whereby their rights are affected, is a "standing by," if they have opportunity to assert their right, &c., and covinously neglect it.

Littleton, § 678; Co. Lit., 357 *a*, 357 *b*, and 35 *a*. Feme covert's rights are choked and suffocated by her silent acquiescence, even though her covin be united with that of her husband.

Savage v. *Foster*, 9 Mod., 35, 37; 1 Rob. (La.), 244. Married women are as much bound as their husbands to be honest;—equally necessary for them to come with clean

hands into a court of equity. *Braxton* v. *Lee's Heirs*, 4 Hen. & M. (Va.), 376–383; *Engle* v. *Burns*, 5 Call (Va.), 463; *Evans* v. *Bicknell*, 6 Ves., 174–193; *Morrison* v. *Morrison*, 2 Dana (Ky.), 16.

Even were the deed in trust to Hooff defective, a court of equity would lend its aid in favor of a creditor. 1 Story, Eq. Jur., §§ 95, 96, 97, 169, 170, and cases there cited. A feme covert may bind her separate property, for her own or husband's debts, and will be held to a specific performance of her contract. 2 Story, Eq. Jur., §§ 1399, 1399 *a*, 1340, and cases there cited; *Hulme* v. *Tenant*, 1 Bro. C. C., 14, and notes; *Owen* v. *Dickerson*, 1 Craig & P., 46; *Allan* v. *Papworth*, 1 Ves. Sr., 163; 3 Johns. (N. Y.) Ch., 144.

The complainant is estopped, by her deed in trust to Hooff, from now attempting to claim the property. *Shaw* v. *Clements*, 1 Call (Va.), 381, top p.; *Danforth* v. *Murray*, 12 Johns. (N. Y.), 201; *Stevens* v. *Stevens*, 13 Id. (N. Y.), 316; *Jackson* v. *Bull*, 1 Johns. (N. Y.) Cas., 90; *Jackson* v. *Hoffman*, 9 Conn., 271; Heth, Cocke and Wife, 1 Rawle (Pa.), 344.

As to the right of the bank to hold road stock, *Jervis* v. *Rogers*, 13 Mass., 105; S. C., 15 Id., 389; *Union Bank of Georgetown* v. *Laird*, 2 Wheat., 390; *Elder* v. *Rouse*, 15 Wend. (N. Y.), 208; *Chesslyn* v. *Smith*, 8 Ves., 183.

Mr. Justice DANIEL delivered the opinion of the court.

The important legal questions arising upon this record, and on which the decision of the cause must depend, appear to be these:—

1st. The nature and extent of the estate embraced within the power reserved to the feme by the marriage settlement; viz., whether that power comprised as well real as personal estate, or was limited to interest, rents, and profits merely, and by name.

2d. The mode of appointment indicated by the marriage contract, and whether this mode has been shown to have been either strictly or substantially and fairly complied with in the requisites of signing, sealing, and attestation.

Before proceeding to a particular examination of the questions above stated, it may be proper to premise some observations with respect to the charges in the bill; and first, of undue marital influence, and secondly, of fraud as means employed in accomplishing the wrongs to which the complainant alleges she has been subjected, and against which she has sought relief. With regard to the first of these alleged means, it must be remarked, that no certain or specific mode or act, neither coercion, allurement, nor willful misrepresenta-

tion or falsehood, is charged, by which the free will, the judgment, or the inclination of the complainant has been restrained or misled. Every feme covert is presumed, under a settlement like the one in the present case, to be to some extent a free agent; and she must or ought to be presumed to entertain dispositions of kindness towards her husband. But if, in the indulgence of such dispositions, she should make an unlucky or unprofitable appointment, it would be carrying the principle of protection to an extreme destructive of every conception of free agency, to determine that these untoward results were in themselves proofs of undue marital influence. The husband does not answer the bill in this case, and there is no direct evidence introduced to sustain this charge as to him; but some of the facts in the testimony go very far to
*28] contradict this allegation,—as, for instance, the conduct of the feme, manifested and repeated *long after the separation from her husband had at any rate exempted her from any influence his presence and immediate agency might have been supposed to exert. This same conduct of the feme, her positive coöperation in the arrangements for the sale of the property, and her acquiescence in that sale until after the title had been made to the purchaser, furnish such presumption of the absence of fraud in the transactions complained of, which, if it is not absolutely conclusive, certainly calls for contravening evidence of a direct and powerful character,—evidence of force sufficient to overthrow and set aside the complainant's own acts and declarations. But independently of the facts and circumstances just adverted to, the positive denial of fraud in every answer in the cause, and the absence of any proof to sustain it, should alone be taken as a complete refutation of the charge.

We will now particularly consider the nature and extent of the estate reserved to the complainant by the marriage settlement, and which was embraced within her power to appoint, by a just construction of that instrument. It is alleged in the bill, that this estate was limited to interest, as synonymous with income, rents, and profits, *eo nomine*, and did not extend to the fee of the real estate, nor to the principal of the stock settled to the uses of the marriage. By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative, by giving effect to some clauses to the exclusion of others. Expounded by this rule, let us see what will be the character of the estate here limited to

the wife, and what the extent of her power to appoint in relation thereto.

The deed of settlement begins by reciting, "that, whereas the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed should be settled to her sole and separate use, with power to dispose of the same by appointment or devise." The deed then sets forth the estate, real and personal, conveyed by it, and enumerates the trusts created thereby, and amongst them the one involved in this controversy, and differently interpreted by the parties thereto, as follows, viz.: that the trustee "shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy all the interest, rents and profits of the property hereby conveyed, to and for her own use and benefit; or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall from time to time during the coverture, by writing, appoint, &c., or to such person or *persons as [*29 she by her last will and testament, &c., may devise or will the same to; and in default of such appointment and devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution."

Let it be here remarked, that the object of the deed is declared to be the settlement of the whole of the estate, real and personal, upon the married woman, with power to dispose of the whole of it, either by appointment or devise. It will not be denied that this investment of, and authority over, the whole estate, so explicitly declared, might not have been modified or even revoked by subsequent provisions of the same instrument; but certainly they should be made to yield only to declarations equally explicit, or to such as are absolutely contradictory to and irreconcilable with them. Can it be correctly affirmed of the subsequent and specific designation of the trusts in this deed, that they are either plainly contradictory, or irreconcilable with the purposes of the settlement previously and so explicitly declared? May not the term interest, contained in that enumeration, considered in its relative collocation to the terms rents and profits, be understood as equivalent with the word estate, especially when the terms rents and profits may be correctly taken to cover interest understood as mere revenue, and still more especially when we keep in view the previous purpose set forth in the deed,—that of settling on the feme, and subjecting to her disposition by deed or will, the whole of her estate, real and personal? Certainly there is nothing in the term interest incompatible with the meaning of the terms estate or property, for in an

ordinary as well as in a technical acceptation, interest may imply both estate and property. But there is another illustration of this matter which would seem to put it beyond farther doubt, that the power of appointment in question cannot by any rational construction be restricted to interest understood as revenue or money, or to rents and profits *eis nominibus*. Let it be again remarked, that, by the preceding part of the marriage contract, all the estate, real and personal, was settled to the feme, with power to appoint the whole, without exception, by deed or will. Then, after the words which it is insisted for the complainant restricted her power, we have, at the conclusion of the deed, these words:—"and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution." Now the construction which would restrict her power to interest, rents, and profits, would seem as if intended to make the fee or inheritance dependent upon
*30] the contingency of an appointment of these mere chattel interests by the feme;—if *she fail to appoint these, which alone it is insisted she had power to appoint, then, as a condition or consequence, "the estate and premises aforesaid" to go to those who may be entitled thereto by distribution. Let it be supposed that, being thus restricted, she does appoint these chattel interests; what then becomes of the inheritance or fee? The feme cannot, according to the argument, control or appoint it either by deed or will; this, it is said, is beyond her power. Does it not in this aspect of the case descend, or become subject to distribution, precisely as it was to do as the condition of non-appointment? So that, whether she appoints or not, the fee or inheritance goes precisely the same way. This construction renders the provisions of the marriage contract useless and unmeaning. It contemplates on the part of the wife an action wholly nugatory as to the ultimate disposition of the fee, which it places entirely beyond her control either by deed or by will, and leaves it to pass according to the law of inheritance whether she be active or quiescent. This confusion and obscurity in the construction of the contract is removed by taking the context,—by connecting the first clear and positive declaration of its objects, viz., the settlement on the feme of all her real and personal estate, and the power in her to appoint the same by deed or will, with the concluding provision of that contract, which declares that, in default of appointment or devise, "then all the estate and premises aforesaid," covering the whole deed; not the interest on money, not the dividends on stocks, nor profits of any kind, but the whole estate conveyed and settled, shall go to

those who may be entitled thereto by legal distribution. This construction gives consistency and meaning to the entire contract, and satisfies us that the power of appointment reserved to the wife was coextensive with the whole estate and subjects of the settlement.

It remains next to be considered whether the mode of appointment prescribed or indicated by the marriage contract, whether the power be construed in an extended or restricted sense, has been strictly or fairly and substantially complied with. On behalf of the appellant it is insisted, that, in the deed of the 9th day of October, 1827, from John H. Ladd, the trustee in the marriage settlement, and Harriet V. Ladd, to John Hooff, as trustee for the Farmers' Bank of Alexandria, regarding that deed as an appointment by Mrs. Ladd, under a competent power, still in its execution there has been such a departure from the mode prescribed for the exercise of the power by Mrs. Ladd, as renders her act wholly inoperative and void. The marriage contract, after securing the property *settled to the use of the wife, proceeds thus:—"or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses." The deed to Hooff, it will be seen, after reciting that John H. Ladd, the trustee in the marriage contract, in execution of the trusts expressed and declared in the marriage contract, and for a pecuniary consideration, does grant, bargain, and sell to Hooff; and, after farther recital that "the said Harriet V. Ladd, in execution of the power of appointment to her reserved in the settlement, does hereby direct and appoint the premises hereinbefore described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited," concludes in the following language:—"In witness whereof, the said John H. Ladd, Harriet V. Ladd, and John Hooff, have hereunto set their hands and seals the day and year first before written." Then, after the names and seals of the parties, are written, in the usual place of attestation, these words:—"Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles Muncaster, Jonathan Field."

[*31]

Upon this state of facts, it has been contended that the execution of the power was defective and null, inasmuch as the power could be executed only by an instrument under the *hand and seal* of the married woman, and that the attestation of the witnesses shows simply *a sealing and delivery* of the deed of appointment, and shows nothing in relation *to the*

signing by the parties. Some objection was made in the argument, founded upon the relative position of the names of the attesting witnesses, as tending to produce uncertainty as to which of the parties the witnesses meant to testify; but this objection, whether or not under other circumstances it might have been of any importance, was obviated by an exhibition in court of the original deed, which it was admitted was the document before the court below in the trial of this cause. In considering this objection to the defective attestation of the instrument of appointment, it is to be observed that the complainant, by her bill, does not impeach the deed on any such ground; on the contrary, she expressly alleges that this deed was *signed* and executed by all the parties thereto, and witnessed by the four persons whose names appear thereon. Such being the state of facts, it may very properly be questioned whether a party admitting and averring the execution of an instrument, and impeaching only its fairness
*32] or its legal operation, exhibiting nothing in the state *of the pleadings requiring his adversary to establish the *execution* of such instrument, can, even in the court of original cognizance, be permitted to deny or question at the trial the existence or execution of the document against his own averment or admission. Such a proceeding would be a surprise in the court below; but it would be still more so if, after the trial, and without even an exception indorsed upon the document, it could be objected to before an appellate tribunal. There is no exception taken to the form or attestation of this deed of appointment found in the record before us. But was there not proof of the full execution of this power, inclusive of signing, according to approved legal intendment? One of the earliest cases, perhaps the earliest, going directly to sustain the exception here urged to the execution of the power, is that of *Wright* v. *Wakeford*, 17 Ves., 454. In that case, as in the one before us, the contract creating the power directed the appointment to be made by writing or writings *under hand and seal;* and in that case as in this, the memorandum of attestation was in the words "sealed and delivered," omitting to assert in terms the signature by the maker. Lord Eldon forbore to decide whether this certificate or memorandum embraced the signing as well as the sealing and delivery of the instrument, and sent the case to the Common Pleas, who certified (three of the justices, Heath, Lawrence, and Chambre, concurring against the opinion of Mansfield, C. J.), that in their opinion the power had not been well pursued.

After *Wright* v. *Wakeford*, followed the cases of *Doe d.*

Mansfield v. *Peach*, 2 Mau. & Sel., 576; *Wright* v. *Barlow*, 3 Id., 512; *Doe d. Hotchkiss* v. *Pearce*, 6 Taunt., 402. These cases rest upon *Wright* v. *Wakeford*, and some, if not all, of them refer to it expressly as their foundation. But, even contemporaneously with the cases just mentioned, it will be perceived that the courts have in some instances sought to free themselves from these literal trammels of *Wright* v. *Wakeford*, as too narrow to comprise the principles of justice and common sense; for as early as 7 Taunt., 355, in the case of *Moodie* v. *Reed*, which was sent from the Chancery, the will was attested in this general phrase, "witness, &c.," by two witnesses. In the testimonium clause the testatrix says, "These bequests are *signed* by me." Gibbs, C. J., said that this was clearly a good attestation of the signing. Still later, it has been ruled in several cases where the power required a will signed and *published* in presence of three witnesses, that the attestation was good expressing the will to have been signed and *delivered*. The *evident disposition of the courts being to adopt the reason and substance of the transaction, they have, as matter of construction, determined that delivery was publication. See 4 Sim., 558; 5 Id., 118. [*33

But whatever doubt may heretofore have overhung and perplexed this matter, that doubt, so far as the reasonings of the English bench should shed light upon the judicial mind of our country, ought to be cleared away. This effect, we think, should be produced by the arguments in the House of Lords of the assembled judges in the case of *Burdett* v. *Spilsbury*, reported in 6 Mann. & G., beginning at p. 386. In this case, presenting, as of course, an exhibition of great ability and learning, the execution and attestation of appointments under powers are the subjects considered. The cases from *Wright* v. *Wakeford* down, involving any important principle, are reviewed, and these subjects placed upon the basis of common sense. It is true that the facts in the case of *Burdett* v. *Spilsbury* were not precisely those of *Wright* v. *Wakeford*, the attestation clause in the latter being special and that in the former case not special; yet in the examination of the latter case, and of those which have followed and been rested upon it, their doctrines are discussed and by a majority of the judges disapproved, several of the judges who conceived themselves constrained to support *Wright* v. *Wakeford*, upon the maxim *stare decisis*, expressing their regret at the obligation supposed to be binding upon them, and declaring that, were the case *res integra*, they should certainly reject its doctrines. The extended views of the judges in *Burdett* v. *Spilsbury* cannot be given consistently with the limits of this opinion, yet some

of their illustrations of the principles they maintain may properly be adverted to. And it will be perceived that the substance and meaning of those principles are comprised in the following positions:—

1st. That the terms and modes prescribed in settlements for the execution of powers should be followed in reason and substance, so as to insure the purposes and objects contemplated by such settlements, and so as to prevent them from being sacrificed to mere literal severity of construction.

2d. That the memorandum of attestation to a deed or will, whether that memorandum be general or special, is not conclusive as to the ceremony of the execution of the instrument to which such memorandum is annexed, but may be explained by the testimony of the witnesses themselves, or by reference to the testimonium clause of the instrument, as showing the facts and circumstances set forth in that clause, and which the witnesses were called on to attest.

*34] *Thus in the case of *Burdett* v. *Spilsbury*, p. 392, Wightman, Justice, says,—"The power requires that the instrument shall be signed, sealed, and published by the testatrix in the presence of three witnesses, and that they *shall attest* the instrument. No form of attestation would for the first thirty years have dispensed with the necessity of calling one of the subscribing witnesses, if any were alive, to prove that the formalities required by the power had been complied with; but after thirty years, the case would rest upon the presumption arising from the production of the instrument itself. In the present case, the instrument shows a general attestation of it by three witnesses, without any statement of the particular facts they attested: but they must be understood to have attested something; and to ascertain what that is, there is no principle of law, nor any authority of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information as to that which it is to be presumed the witness did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says, I do publish and declare this to be my last will and testament. In witness whereof I have set my hand and seal to this my last will and testament,—and then follows a signature and seal purporting to be those of the testatrix. But supposing such a special form of attestation as that contended for had been adopted, it would not have varied the character of the evidence derived from the *terms of the instrument*, and the general attestation of the witnesses. It would but have raised a presumption for the jury that they did witness that which is stated in the attestation, subject to any

doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not."

In the same case, Williams, Justice, says,—"Now the language of the power (as has been already mentioned) is, by her last will and testament, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses. All this is found to have been done, and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favor of it, nor wholly excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with. And here it seems very important to attend particularly to the document itself. The will first contains the whole testamentary part; every disposition of the property is first fully made, and the will is therefore as to that, its principal object, complete. The rest regards the manner of *the execution. It is thus:— [*35 I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal. The testatrix signed this part twice, once after the above words, and again where her seal is affixed, and directly opposite to the latter is the word *witness*, and immediately under it are the names of the witnesses; and the question is whether it is to be understood that they attested, or, in other words, were witnesses to any thing; and if so, how much? And first it is to be asked, for what purpose was this testimonium clause (as it has been called) introduced, or rather added? Certainly not to explain or to qualify the will, or any part of it. To its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and that only. Why are we to suppose that the testatrix was ignorant of the terms, upon which alone her dispositions could be available? This, the language of the clause shows she did understand. The clause, therefore, having this object, we come to consider the purpose for which the witnesses are introduced, and I confess I cannot conceive it possible to understand the meaning of their presence, except to witness something. If it be said, and with truth, that the witnesses cannot be presumed to be cognizant of the contents of the will, because that is contrary to experience, it is surely contrary to the same experience to suppose, that, when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were performed, but that they saw nothing of them, and that, too, when the very language of the testimonium (I declare, &c.) imports that the testatrix

was making the declaration, not to the winds, but to persons to whom she might address herself,—who were there to see and hear. If, then, the witnesses must be understood to have attested something, I can see no possible reason for stopping short of the conclusion, that they attested everything which by the clause purports to have been done, that is, signing, sealing, and publication." Again by the same Justice, p. 433: "Now, in *Wright* v. *Wakeford*, the power required the consent of A and B, testified by writing or writings under their hands and seals, attested by two or more credible witnesses. The attestation clause is sealed and delivered by the within-named A and B, in the presence of C. B. and G. B. Here the ceremony of signing was omitted in an attestation which professed to give an account of what had been done, and there was not, as in the present case, a testimonium clause."

*36] In speaking of *Wright* v. *Wakeford*, Gurney, Baron, remarks,—* "It is impossible to mention the names of Lord Eldon and the three other judges of the Common Pleas, Heath, Lawrence, and Chambre, otherwise than in terms of great respect. Nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice. It has disappointed the just expectations of sellers and devisors, and involved the courts in great difficulties." So, too, Lord Brougham, p. 466:—"I hardly know a case which has excited, at different times, more remark than *Wright* v. *Wakeford*. It has been again and again questioned, it has again and again been criticised, by the learned judges. It cannot, therefore, be said to have been at any time a case that commanded anything like the entire concurrence of Westminster Hall."

The reasoning of Tindal, C. J., in *Burdett* v. *Spilsbury*, applies with great force and clearness to the question before us. "If," says this judge, "the word 'witness' is taken abstractedly by itself, as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it must be taken to be witnesses to all that was actually done at the time, which is found by the special verdict to be all that was required to be done. Or, if the word *witness* is to be construed with reference to the statement immediately preceding it at the end of the will, then the word *witness* necessarily implies that the testatrix did in their presence declare the instrument to be her will, and that she did in their presence put her hand and seal thereto, that is, in the language of the settlement, that she *signed, sealed, and published it* in the presence of these three witnesses. To this construction an objection was taken at your

Lordship's bar, which has also been relied upon by some of the learned judges who delivered their opinions before me; viz., that it proceeds upon the supposition, that the whole instrument may legally be read together to explain the meaning of the word *witness*, and that it supposes the witnesses are conusant of the contents of the instrument, neither of which can be supposed. But I cannot feel the force of this objection. There has been, from the earliest time at which deeds were known, a marked and acknowledged distinction between the operative part of the deed itself, and the *testimonium clause* (as it is called) at the end of the deed. The essential part of the deed is that part, and that only, which contains the grant. The clause at the end is introduced, not as constituting any part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may be held to be *confined to the knowledge of the parties, namely, the [*37 grantor and grantee, the testimonium clause is expressly introduced into it for the use of the public and the witness to the deed. It is well known that a similar clause was constantly inserted in old deeds and charters, at the close thereof, beginning with the words *hiis testibus*, and thence generally called the *hiis testibus* clause, in which the names of the persons present, who heard the deed read by the clerk, were written, not by themselves, but by the clerk who prepared the deed. Spelman in his Glossary, p. 228, traces out the variations in the form of the clause, at different periods of our history; and Madox in the Defrutation prefixed to his *Formulare Anglicanum*, goes more fully into the matter, and in the work itself gives numerous instances which it is impossible to read without being satisfied that the sense requires that the witnesses, whose names are inserted in the *hiis testibus* clause, must of necessity have known the words preceding it, or in fact they would have witnessed nothing at all. Take for example among many, that numbered 312,—And that this my gift, grant, and confirmation may remain firm for ever, I have confirmed this present charter with the impression of my seal, *hiis testibus*, &c. Who can doubt for a moment that these witnesses either actually read, or heard read over to them, the words of the deed immediately preceding their names, and that the introduction of the preceding clause had no other object or purpose? And this practice continued down to the reign of Henry VIII., as appears by the authority of Lord Cocke, who states the practice then began of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom of, or indorsed

upon, it. But that the clause *in cujus rei testimonium*, so long as it was found at the close of the deed itself, never formed part of the deed itself, is evident from Shepard's Touchstone, where he says:—'A deed is good, albeit these words in the close thereof, *in cujus rei testimonium sigillum meum apposui*, be omitted,'—citing authorities which show that it is no more in fact than what it imports to be, the very attestation of the deed which has preceded it. There is therefore no reason why the word *witness*, written immediately after this testimonium clause, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the testimonium clause." Again it is said by the same judge, p. 459,—"So far from its being a rule of law that you may not, in the attestation of a deed, look back to that which is found at the close of the deed itself, that, on the con-
*38] trary, in most of the cases which have been relied on by *the defendant in error, express reference has been made to the close of the deed itself."

A quotation from the opinion of Lord Campbell will close these extracts from the opinions in *Burdett* v. *Spilsbury*, protracted, perhaps, beyond what even this interesting case will warrant. His Lordship says, p. 467,—"My Lords, in this case the only question is, whether the will was attested by three credible witnesses." He proceeds, p. 468,—"My Lords, independently of authority, I cannot doubt that for a moment. The only objection that can be made is this, that the will upon the face of it does not contain any process verbal or history of the transaction. But the power imposes no such condition,—it does not say a will, signed, sealed, and published in the presence of three witnesses and attested by them, *and a will containing a history of the solemnity*,—there are no such words in the power." Again, p. 469,—"If it were necessary, my Lords, I think the testimonium clause here might be resorted to, both upon principle and authority." These reasonings of the English judges, going to show that, upon principle, and independently of recent statutory provisions, the memorandum of attestation, so far from being conclusive upon the facts of *signing*, *sealing*, and publishing or delivering an instrument, may itself be controlled, either by the examination of the witnesses themselves, or by reference to the testimonium clause of such instruments, are fully sustained, and even more than sustained, by the authority of the supreme court of that state from whose jurisprudence and policy this controversy might be supposed in some degree to take its complexion. If, therefore, the most express adjudication of the Court of Appeals of Virginia can govern this

case, it seems at once disembarrassed of the objections alleged to the execution of the power created by the marriage contract.

The recent decision in the case of *Pollock and wife* v. *Glassel*, reported in 2 Gratt. (Va.), 439, would seem to be decisive of the questions now before us, that case having clearly ruled as the law of Virginia with regard to a deed, that, although the distinctive character of the instrument is to be determined by its intrinsic evidence, the question is still open whether it be the deed of the *party*, and that must be decided by evidence *aliunde*. If by plea of *non est factum*, or other proper denial, the fact that the paper was sealed by the party be put in issue, then it must be proved by competent and satisfactory testimony. In Virginia, by long usage, which has received the sanction of a statute, a scroll is used by way of a seal. The decisions have required that the substitution of the scroll for a *seal shall be recognized on the face of the deed, but in no case has it been held that, in the absence of [*39 such recognition, evidence is inadmissible to prove that in fact the scroll was affixed to the instrument with intent that it should stand in place of a seal. In the case above referred to, it is said by the court,—"Here the question occurs in a court of probate, whose province it is to examine the subscribing witnesses, and, if their testimony is satisfactory, to establish and perpetuate the due execution of the instrument. Upon what principle or authority are the subscribing witnesses to be estopped, because of some informality in the paper, from proving the fact, that it was sealed by the testatrix, or, what is the same thing, that she adopted the scroll affixed to it by way of seal?—In the much stronger case of a deed, there could be no such estoppel in a court of probate." In the same case the court say, through *Baldwin*, Justice,—"It will be seen that the statute requires the will to be *attested* by the witnesses, but does not prescribe what, nor that any, facts shall be stated in their attestation. I think it plain, that the legislature meant nothing more, than that the instrument itself should be attested, in order to identify the witnesses and designate who are to prove its execution. The object was not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence, and selected for the purpose. The subscription of their names denotes that they were present at and prepared to prove the due execution of the instrument so attested, and nothing more. The attestation is the act of the witnesses, and it was not intended to confide to them the duty of stamping their testimony upon the paper; which would avail nothing as evi-

dence, however perfect, and which ought to create no estoppel, however imperfect. This view of the statutory provision is in effect sustained by the English decisions." Again, page 465, it is said by the same judge,—"I think it clear that the subscription of the witnesses is substantially the attestation contemplated by the statute; and it is sufficient if the purpose be indicated by the briefest memorandum, or merely by a fair presumption arising from the local position of their signatures upon the paper; and whether a memorandum of attestation be general or special, it may be denied or contradicted by the subscribing witnesses, in the whole or in part, and of course is open to explanation if in any way ambiguous." The court then proceed to review the case of *Wright* v. *Wakeford*, and the cases of *Doe* v. *Peach*, *Wright* v. *Barlow*, and *Moodie* v. *Reid*, rejecting them as authority in the state of Virginia as to the form and influence *of the memorandum of attestation, and concurring with the doctrines declared by the majority of the judges in *Burdett* v. *Spilsbury*.

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An objection has been made to the sale under the deed of trust, based upon the fact, that the portion of the property actually sold did not equal in value the whole amount of the debt due to the bank, which it is insisted should have been the case, according to the proviso in that deed. We do not see the force of this objection, inasmuch as, by the express terms of the deed, authority was given the trustee or the bank to sell the property in separate parcels, as either might deem it necessary or advisable; and it would have been impracticable before an experiment to ascertain *a priori* how much of the property would be requisite for the satisfaction of the debt, and thus a literal adherence to the proviso would lead either to the preventing a sale altogether, or to the sacrifice of the whole estate, whether there should have been a necessity for it or not. Moreover, the sale by parcel in this case was selected upon a calculation of advantage to the feme, and with her express approbation, with a view of saving to her, if practicable, a portion of the property.

Upon full consideration of the facts and the law of this case, the court are of the opinion, that the marriage contract gave power to the feme covert to appoint the entire estate and property embraced within it; that the provisions and conditions of that contract have been complied with in the execution of the power thereby created and reserved; that therefore the decree of the Circuit Court, dismissing the bill of the appellant, the complainant below, ought to be affirmed, and it is hereby accordingly affirmed.

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 Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*The United States, Plaintiffs, *v.* Thomas Staats, Junior. [*41

Where an act of Congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony," &c.—it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent."[1]

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[1] Followed. *People* v. *Colton*, 2 Utah T., 458.

An indictment for a statutory offence, which avers the offence as the statute defines it, is sufficient. All the circumstances which constitute the definition of the offence, as given in the statute, must be stated, but no others are required. *Phelps* v. *People*, 72 N. Y., 334, 349; *affirming* 6 Hun, 401.

It is not essential, in an indictment for a statutory offence, to employ the precise words of the statute; it is sufficient to state all the facts constituting the offence, so as to bring the accused precisely within the statutory provisions. *Eckhardt* v. *People*, 83 N. Y., 462; *affirming* 22 Hun, 525.

Where the indictment follows the precise words of the statute, neither the word "unlawful" or any other word showing a wrongful intent need be added. *United States* v. *Thompson*, 6 McLean, 56. Thus an indictment for setting fire to a ship at sea, which offence is made a felony by a statute, need not allege that the act was done *feloniously*. *United States* v. *McAvoy*, 4 Blatchf., 418; so of an indictment under a statute punishing assaults with dangerous weapons. *United States* v. *Lunt*, 1 Sprague, 311; *Same* v. *Herbert*, 5 Cranch, C. C., 87.

An indictment under Bat. (N. C.) Rev. ch. 32, for malicious mischief (killing domestic animals) must allege that the act was wilfully and unlawfully done, notwithstanding those words are not contained in the statutory definition of the offence. *State* v. *Simmons*, 73 N. C., 269; *State* v. *Hill*, 79 Id., 656; *State* v. *Parker*, 81 Id., 548. So, also, an indictment under a statute punishing the changing a record, must allege the intent, although the statute be silent upon that subject. *Harrington* v. *State*, 54 Miss., 490. And an indictment charging one as a common night-walker, must aver an unlawful motive or purpose. *Thomas* v. *State*, 55 Ala., 260.

Where the statute reads: "If any person shall mingle any poison" &c., the indictment need not allege that