within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.

The judgment of the Circuit Court must therefore be reversed, for want of jurisdiction.

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 Michigan, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that this cause be, and the same is hereby, reversed, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to dismiss the bill of complaint for the want of jurisdiction.

---

*JACOB LE ROY, PLAINTIFF IN ERROR, *v.* WILLIAM BEARD. [*451

By the laws of Wisconsin, where the contract in question was made, a scroll or any device by way of seal has the same effect as an actual seal. But in New York it is otherwise, and an action brought in New York upon such an instrument must be an action appropriate to unsealed instruments.

Therefore, where a deed was executed with a scroll in Wisconsin, which contained a covenant of seizin, and an action was brought in New York for a breach of this, it was properly an action of assumpsit, and not covenant.[1]

It was not necessary in the declaration to allege an eviction, because the covenant was broken as soon as made.

Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, &c., as sufficiently in all respects as we ourselves could do personally in the premises," these expressions, aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, must be construed as giving to the agent the power to enter into a covenant of seizin.[2]

Some of the general rules stated for the construction of powers.

---

[1] CITED. *Pritchard* v. *Norton*, 16 Otto, 133.

[2] CITED. *Very* v. *Levy*, 13 How., 359. Such a power authorizes the attorney to enter into a covenant of general warranty. *Taggert* v. *Stanberry*, 2 McLean, 543.

A power which authorizes the agent to "sell or lease" &c., empowers him to complete a sale by making a deed of conveyance. *Hemstreet* v. *Burdick*, 9 Ill., 444.

A power "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and, generally, to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or to bind myself, as he may

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

The facts of the case were these:

On the 31st of August, 1836, Jacob Le Roy and Charlotte D. Le Roy, citizens of the state of New York, executed the following power of attorney:—

"Know all men by these presents, that we, Jacob Le Roy and Charlotte D. Le Roy, his wife, of the town of Le Roy, in the county of Genessee, and state of New York, have constituted and appointed, and by these presents do constitute and appoint, Elisha Starr, of the same place, our true and lawful attorney, for the purposes following, to wit: In the name of the said Jacob Le Roy, and for his use and benefit, to expend and invest certain moneys for that purpose herewith placed by him in the hands of the said Starr, in the purchase of lands and real estate in some of the Western states and territories of the United States, at the discretion of the said Starr, and to take the certificates, titles, deeds, or other evidences of such purchases, to and in the name of the said Jacob Le Roy; and also, for and in the names of the said Jacob Le Roy and Charlotte D. Le Roy, to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr with the money herewith furnished him, or any other lands or real estate heretofore purchased in
*452] the said states or territories, by the said Starr or Suffrencis Dewy, for the *said Jacob Le Roy, and now owned by him, or any lands which may have been bought with the avails of the lands so purchased as aforesaid, or for which the same may have been exchanged, to such person or persons, for such consideration, and on such terms, in all respects, as the said Starr shall deem most advantageous; and for us, and in our names, to execute to the purchaser or purchasers thereof, the assignments, contracts, or deeds of conveyance necessary for the full and perfect transfer of all of our respective right, title, and interest, dower and right of dower, as sufficiently, in all respects, as we ourselves could do personally in the premises; and generally, as the agent and attorney of the said Jacob Le Roy, to purchase lands or real estate with the money now furnished him, and to sell, re-sell, and exchange the same, or any lands heretofore purchased by him for the

deem proper," &c., does not empower the attorney to sell and convey real estate. *Hunter* v. *Sacramento Beet Sugar Co.*, 7 Sawy., 498.

A power to dispose of the "proceeds" of a sale of land, authorizes the agent to sell the land. *Boyd* v. *Satterwhite*, 10 So. Car., 45.

said Jacob Le Roy, or any lands or real estate that he may acquire in consideration of the sale or exchange of the same, to such persons, and on such terms, in all respects, as he may deem most eligible; and to do all acts legally necessary for the perfect transfer to such persons of the title of the same; we hereby ratifying and confirming whatsoever our said attorney shall do in the premises, by virtue of these presents, until the 1st day of July next, 1837; from and after which day, these presents, and the powers conferred thereby, shall cease, and be null and void.

"Sealed with our seals, and dated this 31st day of August, 1836.

"JACOB LE ROY, [L. S.]
CHARLOTTE D. LE ROY. [L. S.]

"In presence of—"

This power was regularly acknowledged.

On the 7th of November, 1836, Starr executed the deed which was the subject of the present controversy, viz.:—

"This indenture, made this 7th day of November, in the year of our Lord 1836, between Jacob Le Roy and Charlotte D. Le Roy, wife of said Jacob, both of Le Roy, Genesee county, state of New York, by Elisha Starr, now of Milwaukee, in the territory of Wisconsin, their lawful attorney, parties of the first part; and William Beard, of Newtown, Fairfield county, and state of Connecticut, party of the second part, witnesseth: that the said party of the first part, for and in consideration of one thousand eight hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm, unto the said party of the *second [*453 part, and to his heirs and assigns, for ever, one certain piece or parcel of land, situated in the town of Milwaukee, and territory of Wisconsin, viz.: One equal undivided acre of land, in fifty-seven and sixty hundredths acres, said fifty-seven and sixty hundredth acres being in township lot number three of the southeast fractional quarter of section number thirty-two in said township seven, north of range twenty-two east, it being part of the same tract of land conveyed to us by Levi C. Turner, of Cooperstown, Otsego county, state of New York, as per his deed, bearing date the 28th day of April, 1836; together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertain-

ing, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, to their sole and only proper use, benefit, and behoof, for ever. And the said parties of the first part, by their attorney as aforesaid, for their heirs, executors, and administrators, do covenant, grant, bargain, and agree, to and with the said party of the second part, and his heirs and assigns, that, at the time of the ensealing and delivering these presents, we are well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid. And that the same are free and clear of all encumbrances, of what kind and nature soever. And that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will for ever warrant and defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written. "JACOB LE ROY, [L. S.]

By Elisha Starr, his Attorney.

"CHARLOTTE D. LE ROY, [L. S.]

By Elisha Starr, her Attorney.

"Sealed and delivered in presence of

HANS CROCKER,

DAVID V. B. BALDWIN."

*454] *This deed was regularly acknowledged and recorded in Wisconsin.

There were three persons, viz., Nichols, Baldwin, and Beard, engaged in making purchases from Starr, each upon his own account, and the following letters were read upon the trial. They are inserted because the opinion of the court lays some stress upon the actions of the parties.

"*Newtown, August* 28, 1838.

"JACOB LE ROY, ESQ.:—

"Dear Sir,—I take the liberty of forwarding to you the

following information, by advices lately received from my attorney at Milwaukie. I learn that the title of the property I purchased of you in Milwaukie, in November, 1836, has failed, in consequence of the Indian title not being extinguished when the property was floated. I further learn that the receiver or land-officer has been directed to refund the purchase-money to the original purchaser, and that the subject has been before the Solicitor of the Treasury, and he has directed that the property belongs to the government, and that an appeal was taken from his decision to the Secretary of the Treasury, who confirmed the decision.

"If so, you are doubtless aware that, upon your covenants of warranty, you are liable to refund to me the purchase-money, which I shall expect you to do, together with the interest on the same. If a deed of release or quitclaim will be of any service to you, you can have one when the money is refunded.

"I shall be happy to hear from you on the receipt of this, and any proposition you may have to make regarding the premises will be duly considered.

"Your obedient servant,

(Signed,) THEOPHILUS NICHOLS."

"*Le Roy*, 2*d September*, 1838.

"Dear Sir,—I received last evening yours of the 28th, and the contents surprised me not a little, that I, who held large possessions in Milwaukie, and in constant communication with that place, should receive the first intelligence of so great a misfortune from you. I received a letter three days ago from that place, but not a word is said about any trouble, and I have therefore come to the conclusion your agent has been hoaxed; the whole statement carries on the face of it an absurdity. Admitting that any thing had occurred as you state, have not the United States received the same amount *there from their land as they have elsewhere? [*455 Do you imagine that Congress would allow innocent persons to suffer in a case of that kind? I have written to Milwaukie by this day's mail to ascertain if there is any difficulty, and in the interim would beg you to keep easy in mind, for you may rest assured that your title will never be disturbed.

"Respectfully, yours, truly,

(Signed,) JACOB LE ROY."

"*New York*, 12*th June*, 1839.

"THEOPHILUS NICHOLS, ESQ.:—

"Sir,—Your letter of the 1st instant was returned to me

this day from Le Roy. In reply I state, that the title to the lands purchased from me is derived from the United States, and I know of no mode by which a sale can be rescinded by any officer of the government after it has been once consummated. If any error has been committed, of which I have no information upon which reliance ought to be placed in transactions of business, the government will no doubt correct it. Besides, as my grantor is liable to me if there is any defect of title, I can make no voluntary settlement without increasing the difficulties. There were many purchasers at the public sales of the lands of which those I sold are a part, who have sold out, and it cannot be possible, if there is any substantial legal defect in the sale, that the question will not soon receive the adjudication of some sufficient legal tribunal, when I shall always be willing to fulfil any legal claims which I may be under to you or your friends.

"With respect, yours, &c.,

"JACOB LE ROY."

"*New York*, *5th February*, 1841.

"Dear Sir:—Yours, addressed to me at Le Roy, came to hand in due course, being returned to this place. In reply to your remarks I have only to say, that so soon as the highest tribunals of our country shall decide that my title to the land sold you is defective, I shall be ready to settle with you on just principles; but until then I must decline all negotiations. You say that the title is bad. Perhaps you are not aware that an act passed the Senate of the United States at its last session, unanimously confirming the sale, and was only lost in the House for want of time. I am in great hopes that relief will be obtained this session; but at any rate a long time cannot now elapse before justice will be done us; for a more
*456] righteous claim there cannot be. My situation is the same as yours. *Until such decision is made, I cannot make claim from those from whom I purchased.

"With great respect, yours, truly,

"JACOB LE ROY.

"WILLIAM BEARD, ESQ., *Newtown*."

On the 24th of June, 1841, Beard, a citizen of the state of Connecticut, brought his action in the Circuit Court of New York against Le Roy. It was an action of assumpsit, containing the ordinary money counts, and also two special counts stating the purchase and sale, the covenant of seizin, and an averment that the grantor was not so seized, whereby he became liable to repay the $1800.

The defendant pleaded the general issue to the money counts, and a special plea that he had a good title to the premises described in the declaration. To this plea there was a general replication.

In April, 1846, the case came up for trial.

The counsel for the plaintiff offered in evidence the power of attorney, the deposition of Starr, the oral evidence of Nichols, the letters above recited, and some other evidence not material to be mentioned.

The counsel for the plaintiff then offered to read in evidence the deed or instrument of conveyance executed by the defendant, by Elisha Starr, his attorney, to the plaintiff, with a scroll and the word "Seal" written therein, opposite the name of the defendant, as subscribed in execution thereof, without any wafer, wax, or other tenacious substance being affixed thereto; referred to in, and proved by, the said depositions. The counsel for the defendant objected to the reading of the covenants contained in said deed so offered, on the ground that the power of attorney from the defendant to Starr did not authorize Starr to enter into such covenants on behalf of the defendant.

The court overruled the objection, and the defendant's counsel excepted.

The counsel for the plaintiff then offered numerous papers from the General Land Office, to show that the title of Le Roy was not good in the premises conveyed.

The counsel for the defendant then offered to read in evidence, on his part, from a book purporting to be a printed copy of the laws enacted by the Legislature of the Territory of Wisconsin, "an act of the said Legislature in relation to seals."

The counsel for the plaintiff objected to the evidence so offered, on the ground that the same was not authenticated in *such manner as to entitle the same to be read [*457
in evidence; and the court overruled the objection; and to the decision thereupon, the counsel for the plaintiff excepted.

The counsel for the defendant then read in evidence from said printed book as follows:—

"SEC. 5. That any instrument, to which the person making the same shall affix any device by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

The counsel for the defendant then prayed the court to instruct the jury, among other things, that no action can be sustained against the defendant in this suit, because the power of attorney executed by the defendant to Elisha Starr, did not authorize Elisha Starr to warrant the title of the defendant

to any lands which might be sold by him under said power of attorney.

The counsel for the plaintiff then prayed the court to give its instruction to the jury upon the construction of the power of attorney executed by the defendant to Elisha Starr, so given in evidence at this stage of the cause, as, in the event of such construction being against the existence of such authority in said attorney under said power, the said plaintiff had further evidence to give of the representations of the said agent to the said plaintiff at the time of, and made as a part of, the transaction.

The court reserved for the present their opinion upon the question, for the purpose of hearing the further evidence of the plaintiff, so as to enable him to bring out the whole case, and perhaps thereby save another trial.

The counsel for the plaintiff then offered to prove that, at the time of negotiating the sale of, and of selling, the land described in said deed to the plaintiff, the said Elisha Starr fraudulently represented to the plaintiff that he, the said Elisha Starr, was authorized by the defendant to warrant the defendant's title to the premises therein described, and withheld from the plaintiff any view of the power of attorney in question; and that the plaintiff refused to make the purchase, or take any conveyance of such lands, without such warranty on the part of the defendant.

The counsel for the defendant objected to the evidence so offered as incompetent and inadmissible, and the court sustained the objection, and excluded the testimony; and the counsel for the plaintiff excepted to the decision.

The counsel for the plaintiff next offered to prove, that, at the time of the negotiation of the said sale between Starr and *the plaintiff, and as a part of the transaction, the said Elisha Starr, as the agent of the defendant, also fraudulently represented to the plaintiff that the defendant had a good and valid title to the land described in the said deed, and that the plaintiff was deceived thereby.

*458]

The counsel for the defendant objected to the evidence so offered, and the court overruled the objection, and to the decision thereon the counsel for the defendant excepted.

The counsel for the plaintiff recalled Theophilus Nichols, who further testified, that he was present at the negotiations and bargain between the plaintiff and Elisha Starr, as the agent of the defendant, as to the sale of the acre of land described in said deed; that Mr. Starr stated that the title to the land was good, and there could not be a question about it, because the defendant had the government title; that it had

been sold by the government about a year previous to that time. That Linus Thompson and others had floated off George Walker, who had first settled on it, and claimed a preëmption right, but who had got no patent; that the defendant's title was direct from the government, and there was no question about it. Mr. Starr proposed to give to the plaintiff a quit-claim deed, and said it was just as well, as the title came from the government. The plaintiff said he would not accept it; that he would not take the land unless he had covenants of warranty; and Mr. Starr then gave the plaintiff the deed read in evidence in this case. No title papers were produced by Starr, or exhibited to the plaintiff. It was stated in the body of the deed executed by Starr, from whom the defendant had purchased, but he did not exhibit to the plaintiff any papers of any kind. Plaintiff, and Mr. Baldwin, and witness, all staid together at the public house kept by Starr. They all went to Milwaukie together for the same purpose; staid together, purchased together, and left together. The plaintiff did not make any examination of the title that witness knows of. Witness purchased an acre of the defendant of the same title, at the same time, and under the same representations; and witness did not make any examination of title, but relied upon the representations of Mr. Starr. They all left Milwaukie on the 10th of November, 1836, three days after they made the purchase.

The counsel for the plaintiff then recalled David V. B. Baldwin, who further testified, that he had heard the testimony just given by Mr. Nichols, and concurred with him as to the representations made by Mr. Starr, and the acts done by the parties in making such purchase; that he was present and acting with the others in the transaction; that no examination of the title *was made by him, nor by either of the [*459 others, to his knowledge.

The counsel for the plaintiff next read in evidence, from the same volume of the statutes of Wisconsin above referred to, an act of the Legislature of the Territory of Wisconsin, entitled "An act in relation to fraudulent conveyances of lands and the conveyance thereof," the sixth section of said title, in the words and figures following, to wit:—

"SEC. 6. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting,

assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

The proofs in the cause were here closed.

The counsel for the defendant prayed the court to instruct the jury,—

First. That the plaintiff had not proved the failure of the defendant's title to the lands in question, because he had not shown that the defendant had not acquired a title from the French settlers, or other source than the government of the United States.

Second. That if it be shown that the defendant claimed title under the government of the United States, the plaintiff has not shown that the title of the defendant to said lands has been legally declared to be invalid. That the certificate of the register of the land office at Green Bay gave a title to the lands, and the only power vested in the officers of the government at Washington was to see that two patents were not issued for the same land.

Third. That by the acts of Congress granting rights of preemption to actual settlers, Linus Thompson had a right to float upon the land in question; and that the decision of the Secretary of the Treasury annulling the certificate of the register was contrary to law, and void. That under the Chicago treaty the lands in question were public lands at the date of the passage of the said act.

Fourth. That the deed of defendant in evidence in this cause is a sealed instrument by the law of the Territory of Wisconsin, and is to be treated and regarded as a sealed instrument in the state of New York, because of its character at the place where it was made; and that the present action being assumpsit, such cannot be maintained upon said deed.

*460] *Fifth. That no action will lie upon this deed upon a failure of the title to the lands therein described, without express covenants of warranty; there being no valid warranty against the defendant, the plaintiff is not entitled to recover.

Sixth. That the plaintiff is not entitled to recover in this form of action, if a fraud be proved in the cause, but should have brought an action on the case for deceit.

The counsel for the plaintiff then prayed the said court to instruct the jury, that the action of assumpsit is properly brought in this court upon the promises of the defendant contained in said deed, if any promises are made therein which are binding or obligatory upon the defendant.

The court so instructed the jury, and to such instruction the counsel for the defendant excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the deed in question being without seal, by the laws of the state of New York, and a deed to convey lands in the territory of Wisconsin not being required by the laws of that territory to have any seal, or any device by way of seal, affixed thereto, it is competent for the plaintiff to prove a ratification of the defendant, by parol, of the act of Starr as his attorney, in warranting such title.

The court refused so to instruct the jury, and thereupon instructed the jury that, by the laws of the territory of Wisconsin, the said deed is an instrument under seal, that it is a covenant by the laws of that territory, and this court must so regard it, and give it the same effect here that it would have in the territory of Wisconsin; that being a covenant by the laws of that territory, there can be no ratification or confirmation of the act of the agent, Starr, by the defendant, which will be binding upon the defendant, unless made by an instrument executed by him under seal.

The counsel for the plaintiff then prayed the said court to submit to the jury, upon the facts in evidence, the question, whether the defendant, with full knowledge that his agent, Elisha Starr, had assumed in his name to warrant, and had warranted, the title to the land in question to the plaintiff, had ratified the act of the said agent in making such warranty.

The court refused to submit the said question of ratification to the jury upon the evidence in the case, and to such refusal of the said court the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the agent of the defendant having undertaken to convey a title to the plaintiff, and the defendant having *given the agent authority so to do, [*461 if the jury believe the defendant had no title to the premises described in said deed, at the time of the execution and delivery thereof, then the consideration for which the plaintiff paid his money to the defendant has failed, and the plaintiff is entitled to recover.

The court refused so to instruct the jury, and to such refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that if the defendant's agent made a representation to the plaintiff, as to the title of the defendant to the land described in said deed, which was untrue, and which was material to, and was relied upon by, the plaintiff, so that the plaintiff was actually deceived as to the subject he was acquiring by his bargain, the plaintiff is entitled to recover,

whether there was moral fraud or not on the part of the agent in making such representations.

The court refused so to instruct the jury, and to the said refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then requested the said court to submit to the jury, upon the evidence in the case, the question, whether Elisha Starr, by fraudulent representations, induced the plaintiff to believe that the defendant had title to the land described in said deed when the defendant had no such title, and upon such belief became the purchaser thereof.

The court refused to submit such question to the jury, on the ground that the evidence so introduced on the part of the said plaintiff did not go far enough to raise the question of fraud on the part of the agent of the defendant, and decided that the plaintiff must give evidence of knowledge on the part of the agent, at the time of making such representations, that the representations so made were untrue.

To which refusal and decision the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to submit the question to the jury, upon the evidence in the case, whether the agent of the defendant, at the time of making the representations so made by him to the plaintiff, had not knowledge that the representations so made by him were untrue.

The court refused to submit the said question to the jury, on the ground that no evidence had been given, on the part of the plaintiff, to authorize the submission thereof.

To which refusal of the said court the counsel for the plaintiff then and there excepted.

The court instructed the jury in respect to the question reserved in the course of the trial, that the power of attorney, *upon a true construction of its terms and conditions, conferred upon the agent authority to give a deed of the land with covenant of warranty, to which the counsel for the defendant then and there excepted.

*462]

The jury thereupon, under the charge of the court, rendered a verdict for the plaintiff of $2,862.25 damages, and six cents costs.

Upon these several exceptions, the case came up to this court.

It was argued by *Mr. Blunt* and *Mr. Webster*, for the plaintiff in error, and *Mr. Seeley* and *Mr. Baldwin*, for the defendant in error.

The counsel for the plaintiff in error made the following points:—

1st. That the action of assumpsit does not lie in this case. If the deed were binding on the plaintiff in error, the action should have been on the covenants. Chit. Pl., 131, 134, 111, 112, 116; 3 Johns. (N. Y.), 509; 4 Cranch, 239; Story on Conflict of Laws, 475; 2 Cai. (N. Y.), 362; 5 Johns. (N. Y.), 239; 4 Cow. (N. Y.), 508, 530; 7 Cranch, 115; 3 Wheat., 212; 2 Co. Litt., 365 *a*.

2d. The judge erred in instructing the jury, that the power of attorney did authorize Elisha Starr to execute a deed with special covenants. *Frost* v. *Raymond*, 2 Cai. (N. Y.) Cas., 188; *Nixon* v. *Hyserott*, 5 Johns. (N. Y.), 58; 12 Id., 436; 13 Id., 359; *Gibson* v. *Colt*, 7 Id., 390; 2 Johns. (N. Y.) Ch., 519.

3d. The judge admitted evidence to prove failure of title objected to by the defendant below, which was incompetent.

4th. The judge assumed that, upon the evidence, the defendant below had no title.

5th. The counts in the declaration are bad. 5 Johns. (N. Y.), 120; 7 Id., 259, 376; 13 Id., 236.

The points made by the counsel for the defendant in error were the following:—

I. Upon the facts in evidence, it is clear that the title failed.

II. The form of action, being in assumpsit, was right: an action of covenant could not have been sustained in the state of New York.

The first count is special, founded on the instrument of conveyance. The second is also special, but more general, and the third contains the common money counts.

The instrument of conveyance executed by Le Roy's agent, has the form and language of a deed with covenants, but has no seal, a scroll being used in place of a seal.

[*463 *The form of the remedy depends on the *lex fori*.

In *Warren* v. *Lynch*, 5 Johns. (N. Y.), 329 (1810), the Supreme Court held, that "a scrawl with the pen, of L. S., at the end of the name, was not a seal. A seal is an impression on wax or wafer, or some other tenacious substance capable of being impressed." It was admitted in that case, that the note declared on, having been executed in Virginia, with such scrawl, and the initials L. S. at the end of the maker's name, had, by the laws of Virginia, "all the efficacy of an instrument sealed with a wafer or wax." Kent, Ch. J., delivering the opinion of the court, says,—"By the laws of that state, it was a sealed instrument or deed."—"A scrawl with a pen is not a seal;" and it was accordingly held that in the state of

New York, assumpsit was the proper form of action. The same rule has prevailed, without any exception, to the present time. *Van Santwood et al.* v. *Sandford*, 12 Johns. (N. Y.), 198; 4 Cow. (N. Y.), 508; 2 Hill (N. Y.), 228; 3 Id., 493; 1 Den. (N. Y.), 376: 4 Kent Com., 451.

The rule that the form of action, or remedy, depends on the *lex fori*, is everywhere recognized as universal. In *United States Bank* v. *Donally*, 8 Pet., 362, the court says:—"The form of the remedy depends on the *lex fori*, and though an action of covenant will lie on an unsealed instrument in one state, it will not in another state, where covenant can be brought only on a contract under seal." See, also, Story Confl. of L., 470, 475; *De la Vega* v. *Vianna*, 1 Barn. & Ad., 284; *Trimbey* v. *Vignier*, 1 Bing. N. C., 151, per Tindal, Ch. J.; 10 Barn. & C., 903.

III. The power of attorney from Le Roy gave sufficient authority to Starr, as his agent, to covenant for the title of the premises.

(The counsel then entered into an analysis of the power, and examined each paragraph of it.)

4 Co., 81; 10 Wend. (N. Y.), 250; 1 J. J. Marsh. (Ky.), 292; 1 Brod. & B., 319; 2 Sugd. on Vend., 110 (Amer. ed.), 104; 2 Johns. (N. Y.), 595; Co. Litt., § 733, *n.*; 1 Chit. Gen. Pr., 312, 313; 2 Pa., 304; 4 Cruise Dig., 357.

IV. Le Roy cannot disavow in part the contract of his agent, and at the same time retain the money paid by Beard upon the faith of that contract.

V. Assuming that the covenants were not authorized, independently of the preceding views, Beard was deceived by the false representations of Le Roy's agent, and is entitled to recover back the purchase-money in the present action.

VI. The stipulations contained in the instrument of conveyance have been ratified by Le Roy.

*464] *VII. If the attorney mistook his powers to covenant for the title, but undertook to covenant and conveyed no title, Beard is entitled to recover on the count for money had and received, on the ground of a total failure of consideration. He did not get that for which he stipulated and paid his money.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an action of assumpsit for money had and received; and also counting specially, that, on the 17th of November, 1836, the original defendant, Le Roy, in consideration of $1,800 then paid to him by the original plaintiff, Beard, caused to be made to the latter, at Milwaukie, Wisconsin, a convey-

ance, signed by Le Roy and his wife, Charlotte. This conveyance was of a certain lot of land situated in Milwaukie, and contained covenants that they were seized in fee of the lot, and had good right to convey the same. Whereas it was averred, that, in truth, they were not so seized, nor authorized to convey the premises, and that thereby Le Roy became liable to repay the $1800.

Under several instructions given by the Circuit Court for the Southern District of New York, where the suit was instituted, the jury found a verdict for the original plaintiff, on which judgment was rendered in his favor, and which the defendant now seeks to reverse by writ of error. Among those instructions, which were excepted to by the defendant, and are at this time to be considered, was, first, that "the action of assumpsit is properly brought in this court, upon the promises of the defendant contained in the deed, if any promises are made therein which are binding or obligatory on the defendant."

The conveyance in this case was made in the state of Wisconsin, and a scrawl or ink seal was affixed to it, rather than a seal of wax or wafer. By the law of that state, it is provided, that "any instrument, to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

But in the state of New York it has been repeatedly held (as in *Warren* v. *Lynch*, 5 Johns. (N. Y.), 329,) that, by its laws, such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practiced on an unsealed instrument in the state where the suit is instituted, and the latter must therefore be assumpsit. 12 Johns. (N. Y.), 198; 2 Hill, (N. Y.), 544, 228; 3 Id., 493; 1 Den. (N. Y.), 376; 5 Johns. (N. Y.), 329; *Andrews et al.* v. *Herriott*, 4 Cow. (N. Y.), 508, overruling *Meredith* v. *Hinsdale*; 4 Kent, 451; 8 Pet., 362; Story Confl. of *L., 47; 2 Cai. (N. Y.), 362. A like doctrine prevails in some other states. 3 Gill & J. (Md.), 234; [*465 *Douglas et al.* v. *Oldham*, 6 N. H., 150.

It becomes our duty, then, to consider the instruction given here, in an action brought in the Circuit Court in New York, as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the state of New York, and one of the counts was special on the promise contained in the covenant. We hold this, too, without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the

law of Wisconsin, as the *lex loci contractus*, must govern.[1] *Robinson* v. *Campbell*, 3 Wheat., 212.

It is further objected here, that an eviction by elder and better title should have been averred in the declaration before a recovery can be had for a breach of warranty.

But such averment is necessary only when the breach is of a covenant for quiet enjoyment, &c. 14 Johns. (N. Y.), 48. Because, in a breach of the covenant of seizin, it is broken at the time of the conveyance if at all, and no eviction need be alleged. 4 Cranch, 421; 4 Kent Com., 474, note.

Here it virtually appears that the original defendant was not seized. Little attempt is made to show that he was; and the title, so far as disclosed in the evidence, could not have been in him or his grantors.

It is likewise contended, that if a covenant legally existed in this case, and was broken, assumpsit lies to recover back the money. That form of action seems at times justified on general principles, beside the rule that in New York the remedy must be assumpsit on an instrument like this. 9 Mees. & W., 54; 4 Man. & G., 11; 5 Ad. & Ell., 433; 6 East, 241. To this the chief objection urged is, that neither assumpsit nor covenant will lie, in case no covenant whatever was made or broken. 3 Bos. & P., 170; 2 Johns. (N. Y.), Ch., 515; 4 Kent Com., 474; 3 Ves., 235.

But as the facts here do not require a decision on this last point, none is given.

The next instruction to which the original defendant objected, and which is the chief and most difficult one that can properly be considered by us, under the present bill of exceptions, is, that the power of attorney by Le Roy and his wife to Starr, their agent, was broad enough to confer upon him "authority to give a deed of the land with covenant of warranty."

This power of attorney is given *in extenso* in the statement
*466] of the case. It appears from its contents, that Le Roy, after *authorizing Starr to invest certain moneys in lands and real estate in some of the Western states and territories of the United States, at the discretion of the said Starr, empowered him "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." Again, he was authorized to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right

[1] CITED. *Pritchard* v. *Norton*, 16 Otto, 133.

title," &c., "as sufficiently in all respects as we ourselves could do personally in the premises," "and generally, as the agent and attorney of the said Jacob Le Roy," to "sell on such terms in all respects as he may deem most eligible."

It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument, (4 Moo., 448,) aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question.

That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, first, from its leaving the *terms* of the sale to be in all respects as Starr shall deem most advantageous. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. *Rogers* v. *Kneeland*, 10 Wend. (N. Y.), 219. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchaser.

To strengthen this view, the agent was also enabled to execute conveyances to transfer the title "as sufficiently in all respects as we ourselves could do personally in the premises." And it is manifest, that inserting certain covenants which would run with the land might transfer the title in some events more perfectly than it would pass without them; and that, if present "personally," he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that any thing so censurable as this was contemplated.

*Again, his authority to sell, "on such terms in all respects as he may deem most eligible," might well be [*467
meant to extend to a term or condition to make covenants of seizin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price.

Now all these expressions, united in the same instrument, would *primâ facie*, in common acceptation, seem designed to convey full powers to make covenants like these. And although

a grant of powers is sometimes to be construed strictly, (Com. Dig., *Poiar*, B. 1 and c. 6; 1 Bl. R., 283), yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid. *Nind* v. *Marshall*, 1 Brod. & B., 319; 10 Wend. (N. Y.), 219, 252. This he must refund when the title fails, or be accessory to what seems fraudulent. 1 J. J. Marsh. (Ky.), 292. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself. *Solly* v. *Forbes*, 4 Moo., 448. Le Roy resided in New York, and Starr was to act as his attorney in buying and selling lands in the "Western states and territories," and this very sale was as remote as Milwaukie, in Wisconsin. For aught which appears, Le Roy, Beard, and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying.

The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of the *Lessee of Clarke* v. *Courtney*, 5 Pet., 349, Justice Story says,—"This is the common course of conveyances;" and that in them "covenants of title are usually inserted." See also 6 Hill (N. Y.), 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine, that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal.

It is true, that some of these cases relate to personal estate, and some perhaps should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage; and consequently may not
*468] be decisive by analogy to the present case. 3 T. R., 757; **Helyear* v. *Hawke*, 5 Esp. Cas., 72, *n.*; *Pickering* v. *Bush*, 15 East, 45; 2 Camp., N. P., 555; 6 Hill (N. Y.), 338; 4 T. R., 177.

So of some cases which relate to the quality, and not the title, of the property. *Andrews* v. *Kneeland*, 6 Cow. (N. Y.), 354; *The Monte Allegre*, 9 Wheat., 648; 6 Hill (N. Y.), 338.

But where a power to sell or convey is given in writing and not aided, as here, by language conferring a wide discre-

tion; it still must be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent. 10 Wend. (N. Y.), 218; *Howard* v. *Baillie*, 2 H. Bl., 618; Story on Agency, p. 58; *Dawson* v. *Lawley*, 5 Esp. Cas., 65; *Ekins* v. *Maclish*, Amb., 186; Salk., 283; *Jeffrey* v. *Bigelow*, 13 Wend. (N. Y.), 527; 6 Cow. (N. Y.), 359. Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill (N. Y.), 338; 2 Pick. (Mass.), 345; Bell on Com. L., 410; 2 Kent Com., 618; *Vanada* v. *Hopkins*, 1 J. J. Marsh. (Ky.), 287; *Sandford* v. *Handy*, 23 Wend. (N. Y.), 268. We have already shown, that, under all the circumstances, a covenant of warranty here was not only usual, but appropriate and reasonable.

Again, "all powers conferred must be construed with a view to the design and object of them." 1 J. J. Marsh. (Ky.), 287. Here that design was manifestly in the discretion of the agent, to sell as he might deem most advantageous. Again, if a construction be in some doubt, not only may usage be resorted to for explanation, (Story on Agency, p. 73; 5 T. R., 564,) but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent. *Lomax* v. *Cartwright*, 3 Wash. C. C., 151; 2 Id., 133; 4 Id., 551; 6 Cow. (N. Y.), 358, in *Andrews* v. *Kneeland*. Because the person who deals with the agent is required like him to look to the instrument to see the extent of the power (7 Barn. & C., 278; 1 Pet., 290); and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms. 2 Barn. & Ald., 143, in *Baring* v. *Corrie*; 1 Pet., 290; *Courcier* v. *Ritter*, 4 Wash. C. C., 551; 23 Wend. (N. Y.), 268.

In the next place, the acts of the parties themselves tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts, it is competent to consider in order to remove doubt. 17 Pick. (Mass.), 222; 1 Metc. (Mass.), 378; Paley on Agency, 198; *Mechanics' Bank of Alexandria* v. **Bank of Columbia*, 5 Wheat., [*469 326; and Bac. Abr. *Covenant*, F.; 5 T. R., 564; 1 Greenl. on Ev., § 293.

The agent's acts on this subject are strong. He construed the instrument as if empowering him to make the warranty, and made it accordingly. He was to gain nothing for himself

by such a course, if wrong, and does not appear to have done it collusively with any body. 2 Bro. Ch., 638.

The principal, too, when asked for redress, and when corresponding on the subject, does not appear to have set up as a defence, that he did not intend, by this instrument, to authorize a conveyance with warranty. On the contrary, for some time he conducted himself towards both the agent and the plaintiff, as if he had meant covenants should be made. 14 Johns. (N. Y.), 238; *All Saints Church* v. *Lovett*, 1 Hall (N. Y.), 191.

Finally, the decided cases on this question, though in some respects contradictory, present conclusions as favorable to this construction, as do the peculiar language used in the power and the weight of analogy. See 23 Wend. (N. Y.), 260, 267, 268; *Nelson* v. *Cowring*, 6 Hill (N. Y.), 336; *Vanada* v. *Hopkins's Ad.*, 1 J. J. Marsh. (Ky.), 293; 13 Wend. (N. Y.), 521, *Semble*.

Some earlier cases were contra. *Nixon* v. *Hyserott*, 5 Johns. (N. Y.), 58; *Van Eps* v. *Schenectady*, 12 Id., 436; and *Ketchum* v. *Evertson*, 13 Id., 365; 7 Id., 390.

But in these the power was merely to give a deed of a certain piece of property, and could be construed as it was, without directly impugning our views here. Whereas, in the present case, the power was manifestly broader in terms and design. *Wilson* v. *Troup*, 2 Cow. (N. Y.), 195; 6 Id., 357.

The earlier cases in New York, bearing on this subject, are also considered by its own courts as overruled by the later ones. Bronson, J., in 6 Hill (N. Y.), 336.

It may be proper to add, that the general conclusions to which we have arrived are more satisfactory to us, if not more right, because they accord with what appears to be the justice of the case, which is, that the plaintiff should not keep money which would probably not have been obtained except by these very covenants, and which it must be inequitable, therefore, to retain and at the same time avoid the covenants.

The judgment below is affirmed.

Mr. Justice McLEAN dissented.

Order.

This cause came on to be heard on the transcript of the
*470] record from the Circuit Court of the United States for the Southern *District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per centum per annum.