nad not been a demand in reconvention. The consent in the submission agreement implied a waiver of all pleadings of that nature, and was a release of all errors in the preliminary stages of the suit. Donovan appeared in the District Court, and successfully resisted a motion for judgment upon the award rendered. But the code does not require that a suit should be successfully prosecuted to operate as an interruption of prescription. (Trop. de Pres., sec. 561; Dunn *v.* Kinney, 11 Rob., 247; Baden *v.* Baden, 4 Ann., 468.")

We see no error in this statement of the law, and consequently affirm the judgment with costs.

LESLIE COMBS, COMPLAINANT AND APPELLANT, *v.* JOHN L. HODGE, ADMINISTRATOR OF ANDREW HODGE, DECEASED, WILLIAM L. HODGE, AND JAMES LOVE.

The pleadings in another suit, where the parties were different, and the petition and answer signed by counsel, cannot be resorted to for admissions of the respective parties.

Where certificates of the public debt of Texas were transferable only by the owner, or his legal representative or attorney, and there is no sufficient evidence of the existence of a power of attorney, a mere endorsement in blank by the owner is not sufficient to justify a purchaser in drawing a conclusion that the holder is entitled to sell or discount it.

The difference between this and negotiable instruments explained, and the authorities examined.

But as the circumstances attending the purchase are not well disclosed in the record, the court will remand the case to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

The chronological history of the case was this:

In 1839, Combs was the proprietor of a large amount of bonds issued by the State of Texas for various sums, which certificates concluded in this way:

"This certificate is transferable by the said Leslie Combs,

or his legal attorney or representative, on the books of the stock commissioner only."

Two of these certificates—viz: No. 5219, for five thousand dollars, and No. 5229, for one thousand dollars—were the subjects of the present suit. No notice will be taken in this report of the other bonds.

In 1840, Combs endorsed these certificates in blank, and placed them in the hands of James Love, of Galveston, Texas, for the purpose, as he alleged, of enabling Love to receive payment, which was then expected, but which was not made.

In 1846, one Josiah Lee brought a suit in the Commercial Court of New Orleans against William L. Hodge, to recover back money which he had paid to Hodge for the purchase of Texas bonds. Hodge took defence upon two grounds, viz: 1. That it was supposed that there was a power to transfer in the hands of a Mr. Love, of Galveston, which plaintiff was bound to refer to. 2. That the blank endorsement of the owner authorized plaintiff to write over it the necessary authority. The court, however, gave judgment for Lee against Hodge.

By subsequent legislation of Congress and of Texas, the bonds became payable at the Treasury of the United States, where payment of them was claimed by J. Ledgear Hodge, a resident of Pennsylvania, administrator with the will annexed of Andrew Hodge, deceased, in whose name the bonds had been deposited at the Treasury. Whereupon Combs filed a bill against J. L. Hodge, the administrator as aforesaid, William L. Hodge, and James Love. An injunction was obtained to stay the payment of the money until the determination of the suit. The record of the suit in New Orleans and copies of letters were attached to the bill as exhibits.

J. L. Hodge, the administrator, answered that he had no personal knowledge of any of the matters stated in the bill.

William L. Hodge, amongst other matters, said that the bonds had been transferred by Love to Andrew Hodge fairly and for their full value. The Circuit Court dismissed the bill, and Combs appealed to this court.

It was argued by *Mr. Bradley* and *Mr. Baxter* for the appellant, and *Mr. Reverdy Johnson, jun.*, and *Mr. Reverdy Johnson, sen.*, for the appellees.

The principal points made by the counsel for the appellant were the following:

I. This is a proceeding in the nature of a bill of interpleader, the Treasury of the United States being the stakeholder. (Clarke *v.* Clarke, 17 How., 321.)

In such a controversy, the parties stand on their respective legal and equitable rights.

II. The appellant is the creditor of Texas, holding the legal title to this scrip, which can pass only in the manner prescribed by the law of Texas, and apparent on the face of the scrip. (Menard *v.* Shaw, 5 Texas Rep., 334.)

The distinction between stocks passing by delivery or assignment, except in a particular mode, and the effect of their assignment in any other mode, is well established. (Union Bank *v.* Laird, 2 Wheat., 251; Zacharie and others *v.* Black and others, 3 How., 513; Glynn *v.* Baker, 13 East., 509; Gongen *v.* Melville, 3 B. and C., 45; 10 E. C. L., 16; Attorney General *v.* Diamond, 1 Cromp. and Jar., 356, 70; Attorney General *v.* Hope, 1 Cromp., Mees., and Ros., 330; Jame *v.* Bowens, 4 Mees. and Wels., 171; Miller *v.* Race, Smith L. C., 250, and notes; Story Con. of L., sec. 383, and notes.)

III. The legal title being in Combs, the appellees have shown no equity in themselves.

IV. Had Love authority to sell?

1. It was argued below that the power was conferred by the endorsement in blank.

2. That such authority is proved by complainant's Exhibit H., in which Love asserts he had a power of attorney.

As to the power implied from the endorsement.

1. There is an express limitation on the face of these bonds upon their transferable character. It is not denied that, as between the original parties, an endorsement in blank, for a fair consideration, followed by delivery, would vest in the purchaser an equitable title, which would, upon satisfactory proof,

enable him to compel the endorser, in a court of equity, to do everything necessary to effect a complete transfer of his interest. He could sue in his own name in equity alone. His title would be equitable. And it may be conceded that he had an assignable property in the bonds. But he could assign no more than his equity. "The stream could not rise higher than the fountain." The purchaser, therefore, could not, as against the original party, stand in any better condition than the first assignee.

These are familiar general principles, and will be found to be fully sustained in the following cases: Turton *v.* Benson, 1 P. Wm.'s, 496; S. C., 2 Vern., 764; Davies *v.* Austin, 1 Ves., jun., 247, and see the cases collected in the note, [Perkins's Ed.,] 1 Bro. Ch., 434; Cator *v.* Burke, and 3 Bro. Ch., 179; Davies *v.* Austin and others, and notes; Scott *v.* Shreeve, 12 Wheat., 605; and also 17 How., 615.

Undoubtedly, these general principles are subject to certain exceptions; but there are none such in this case. It is not pretended that the purchase was from Combs, and it is obvious they understood his authority was requisite to complete the title. They have failed to show any facts giving rise to an equity other than the actual possession of the bond with Combs's name endorsed upon it; and this alone is wholly insufficient, the object for which that was done having been satisfactorily shown.

2. The statement contained in the letter of Love is introduced by the complainant for the purpose of showing the pretences under which it is supposed the defendant sets up title, and to negative such pretension.

The bill is sworn to, and emphatically states and reiterates that complainant never gave any authority, in any form, to Love, to dispose of the bonds.

And it is a violent invasion of the rules of evidence to say, that when a complainant introduces, by way of exhibits, in his bill, the unsworn statements of his defaulting agent, as to transactions alleged to be fraudulent, and sought to be set aside, and under oath negatives them, he shall be held bound by the very falsehoods he seeks to overthrow, and they shall

be taken as proof that his sworn statements are false. The essence of the bill is, that the agent had fraudulently appropriated the bonds to his own use, under the pretence of an authority to sell; and it is to repudiate and discredit this pretended authority that he makes him and his imputed assignee parties defendant, and seeks from them a discovery of the facts. The answer of Love would have been evidence against the complainant. Hodge, upon leave, could have examined him as a witness. Yet he does not answer, and is not examined. The complainant was entitled to his answer under oath; to that extent, it was a bill for a discovery. He was duly summoned, but, being a non-resident, there was no means of compelling his answer. His failure to answer must, so far as he is concerned, be taken as an admission of the allegations of the bill. But if the statement of this letter was true, he could not, and for his own sake would not, have refused, at the instance of an innocent purchaser from him, to have produced the power, and supported it by proof. The pretence in the letter is contradicted in terms, and charged to have been a fraud. To say, then, that it is evidence to prove the authority, is a solecism, and a contradiction in terms of the plainest rules of chancery pleading. If this is out of the case, there is no scintilla of proof to give countenance to the pretence of an authority.

Finally, Combs having the legal title, the whole burden is on the appellees to establish, by satisfactory proof, an equity which will draw to it the legal title. (Judson *v.* Corcoran, 17 How., 612.)

I. That there is evidence that Love had authority from complainant to dispose of these certificates; and if so, there can be no question as to the propriety of the decree.

The ground upon which the judgment rested in the case of "Lee *v.* Hodge," filed as Exhibit E to bill, was, that in that case there was an agreement by defendant for a special power of transfer, which was not obtained; though, had there been no such special agreement, say the court, the blank endorsement standing alone would have weight in the view there

urged, that such blank endorsement gave authority to a holder to write over it the necessary power to transfer.

In the case at bar, the blank endorsement does stand alone, (in the sense of being affected by any special agreement,) and the argument based upon it is strengthened by the avowals of the agent as to his power from Combs, appearing in complainant's Exhibit H to bill, which is also made evidence in the cause by agreement.

II. That the possession of these certificates by Love, with complainant's blank endorsement, constituted him, as to third persons, an agent for the general negotiation of the bonds, and complainant cannot limit his liability by special private instructions to the agent, which are not divulged to a "*bona fide*" purchaser for value.

The blank endorsement on the certificates can mean nothing else than authority to Love to place over it the necessary form of power of attorney. As the certificates call for a transfer in person, or under such a power, the Government of Texas would in no event have paid to Love the amount of the certificates, except upon presentation by him of some such authority; and as it is not pretended that, when these certificates were first placed in Love's hands for the purpose indicated in the bill, there was any separate power of attorney given, the endorsement in blank of complainant's name, where the parties were many hundred miles apart, could import nothing else than authority to fill over the name such power as would authorize Love to surrender to the Government, upon receipt of the sums indicated; and *that* would be, equally as to third parties, innocent "*bona fide*" purchasers, without notice of special instructions, power to receive purchase-money, and transfer to them upon the books of Texas. (1 Parsons on Contracts, 39; 1 Peters, 290, Schinmelpennick *v.* Bayard; 3 Gill, 251, Chesley *v.* Taylor; 9 Howard, 580, Baldwin *v.* Ely; Story on Agency, sec. 73, p. 3, sec. 127; 19 Howard, 322, Commercial Ins. Co. *v.* Union Ins. Co.; 22 Engl. Law and Eq. R., 516, Montague *v.* Perkins; 10 Cush. Mass. R., 373, Androscoggin Bank *v.* Kimball; 22 Wendell, 348, Com. Bank of Buffalo *v.* Kortright; 4 Dow and Ryls, 641, Gorgier *v.* Mieville—16 E. C.

L., 217; Douglass, 633, Peacoke *v.* Rhodes; 1 Bos. and Pull, 648, Collins *v.* Martin.)

III. If Love's possession of the certificates so endorsed be not, as to third persons, authority to dispose generally of the bonds, yet it was sufficient to have induced a person of ordinary precaution to infer such authority; and if, by the fraud of Love, such party was misled into a "*bona fide*" purchase of the bonds for full value, even a court of law, and *a fortiori* a court of equity, will throw the loss upon the principal who put it into the agent's power to commit a fraud on innocent parties. (Story on Agency, sec. 127; 1 Term R., 12, Fitzherbert *v.* Mather; 4 Barn. and Ald.; 1 Wookey *v.* Pole, 6 E. C. L., 323; 22 Eng. Law and Eq., 516, Montague *v.* Perkins.)

IV. Although the face of the certificates calls for a transfer on the books of Texas by Combs, or his attorney or representative, such clause relates only to the legal title; and if equity supports the appellee's claim, or that of any purchaser under similar circumstances, it would decree that Combs transfer the naked legal title as required by the certificate. (3 Howard, 483, Black *v.* Zacharie; 22 Wendell, 348, Com. Bank of Buffalo *v.* Kortright.—*See Chancellor's Opinion.*)

V. But the act of Texas of 1846, (p. 220,) modifies the stringency of the original certificates by authorizing the transfer on the books of the State to be made, not only by the *original holder, his attorney or representative*, but also by his *assignee*—in which position we stand in equity, and can therefore, as against the complainant, in a court of equity, call for a transfer of the bonds.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff filed his bill to establish his claim to two certificates for a portion of the public debt of the Republic of Texas, which had been issued to him in the year 1839, and which were transferable by him, or his attorney, or his representative, only, on the books of the stock commissioner of that State. He avers that these certificates with others were endorsed in blank by him, and sent to the defendant, Love, in Texas, during the year 1840, with authority to receive an an-

ticipated partial payment, and to obtain other certificates of the same description for the residue. That he did not give to his agent any authority to sell them, or to dispose of them for his own use, and has done no act to defeat his own legal title to them. That Love did not collect any part of the debt, and has failed to return the two certificates in question. That for fifteen years he has been unable to discover who was in possession of them, and has but recently ascertained that they were held by one of the defendants under a claim of title from Love.

He attached to his bill a number of letters of Love, containing admissions of his receipt of the certificates, and of his agency for the plaintiff; and subsequently to the conversion by him of these, he wrote to the plaintiff in extenuation of his conduct, affirming that he had a power of attorney and letters from the plaintiff authorizing him to sell. That he would endeavor to replace the stock, or would give other stock of the same description, and insisted that the liberty he had taken was excusable.

The defendant (Hodge) answered to the bill that these certificates were claimed as the property of the decedent, Andrew Hodge. That he purchased them from Love fairly, and for their full value, and with a firm conviction that he was authorized by a power of attorney, and the blank endorsement of the plaintiff, to dispose of them. The cause was heard upon the pleadings and a decree *pro confesso* against Love.

The record in the District Court at New Orleans in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this cause. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of the respective parties. (Boileau *v.* Ruttlin, 2 Ex., 665.) There is no evidence of the existence of a power of attorney from the plaintiff to Love, except that contained in the letter of Love before referred to. If that statement is at all admissible, it is insufficient to establish the fact. The letter was written in 1844, after Love had violated his obligation as a faithful agent, and in reply to reproaches of the plaintiff. In

that letter he promises to restore to the plaintiff these or other certificates. There is no evidence of any fulfilment of this promise. He has failed to produce a power of attorney, or any letters which authorize his sale to his co-defendant. The witnesses of the contract between him and the decedent (Andrew Hodge) have not been examined. These circumstances raise a strong presumption against the verity of his statement, and deprive his letter of any probative force. The title of the defendant therefore depends upon the effect to be given to the endorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a *bona fide* purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; and legislation in Great Britain and some of the States of the Union has extended to the same class of persons a similar protection in other contracts.

But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule. In Ashurst *v.* The Official Manager of the Bank of Australia, 37 L. and Eq. R., 195, Justice Erle says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments, during their currency, delivery

to a *bona fide* holder for value gives a title, even though the transferrer should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only in the sense I have mentioned." When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (Birdeback *v.* Wilkins, 10 Harris, 26; Ames *v.* Drew, 11 Foster, 475; Symonds *v.* Atkinson, 37 L. and Eq., 585; 25 L. and Eq., 318.) Nor can the holder write an assignment or guarantee not authorized by the endorser. (4 Duer, 45; 25 L. and Eq., 19; 6 Harris, 434.) This doctrine has been applied to determine conflicting claims to public securities which were not negotiable on their face, though the subject of frequent transfers.

The suit of Toukin *v.* Fuller (3 Doug., 300) was for four victualling bills drawn by commissioners of the victualling office on their treasurer, in favor of their creditor. These were sent to an agent with a power of attorney, "to receive money and give receipts and discharges," and who pledged them for an advance of money. Lord Mansfield said the only question is, who has the right of property in this bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretence.

Glynn *v.* Baker (13 East., 509) was a suit for bonds of the East India Company, payable to their treasurer, and sold with his endorsement. Le Blanc, Justice, said:

"Here are persons intrusted with the securities of A and B, who part with the securities of A, and, when called on for them, give the securities of B. That difficulty can only be

met by assimilating such securities to cash, which, whether it has an ear-mark set upon it or not, if passed by the person intrusted with it to a *bona fide* holder for valuable consideration, without notice, cannot be recovered by the rightful owner; but how does the similitude hold?"

And Lord Ellenborough said, "any individual might as well make his bond negotiable."

The case of Dunn *v.* Commercial Bank of Buffalo (11 Barb., 580) originated in the refusal of that bank to allow a transfer of stock on the books of the bank, which was transferable by the holder of the certificate or his representative.

The plaintiff had the certificate and a blank assignment, and a blank power of attorney, and claimed to make the transfer. The court denied that certificates of stock in reference to negotiability are placed on the same ground as bills of exchange, and declare that it is incumbent on a party claiming under such a transfer to prove the contract or consideration. In Menard *v.* Shaw, comptroller, (5 Texas R., 334,) the Supreme Court of that State decide that the agency of the payee named in certificates like the present is indispensable to a legal transfer on the books of the State, and that a forced sale was therefore inoperative. The decision of Baldwin *v.* Ely (9 How., 273) does not sanction the claim of the defendants.

The certificates which were the subject of controversy were issued, under an act of Congress, to a person or his assigns.

The ordinary form of assignment was a blank endorsement, and this had been recognised as sufficient at the Treasury of the United States, and in the ordinary traffic in the community.

The defendant proved that he had paid value for them. In the cases cited from Douglas and East, the judges stated that the existence of similar facts might give another aspect to the claims of the defendants in these cases. In the case before us, the certificates were transferable, in terms only, in a single mode.

There was no evidence that a transfer in any other form than that prescribed had ever been recognised.

We have considered this cause upon the assumption that the defendant was a holder for value.

There is no statement in the answer of the consideration paid to Love for these certificates, nor of the time, place, and circumstances, of the contract between him and the defendant's testator. It appears that the plaintiff did not direct their sale or transfer, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love. Upon the case as presented the court is constrained to reverse the decree of the Circuit Court, dismissing the plaintiff's bill. But the case is presented in an unsatisfactory manner.

The transaction between Love and the decedent (Hodge) has not been exhibited to the court, although parties fully cognizant of it are before the court.

We have concluded to remand the cause to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

THE UNITED STATES, APPELLANTS, *v.* MICHAEL C. NYE.

Where there was a petition for land in California, addressed to Micheltorena, the Governor, which was referred by him to his Secretary, Jimeno, and by him to Sutter, and there is no evidence that these papers, with Sutter's certificate, were ever returned to the Governor, or sanctioned by the authorities of the State subsequently, the evidence is not sufficient to support the claim, although sanctioned by what is called Sutter's general title.

Sutter's general title was this:

In December, 1844, Micheltorena issued a general grant to all persons who had made applications upon which a favorable report had been made by Sutter, and directed Sutter to give them a copy of this order, to serve instead of a formal title.

But this power thus conferred upon Sutter was abrogated by the abdication of the Governor, and, in this case, the power was not executed for more than a year after such abdication. The claim is therefore invalid.

THIS was an appeal from the District Court of the United States for the northern district of California.