Legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection. (Andrews *v.* Russell, 7 Black., 475; 8 Ind., 27.)

Upon a review of the whole case, it is the opinion of the court that the contract between these parties was made without fraud or surprise; that there is no illegality in the cause, or consideration; that the priority of payment has not been released or defeated; and that the relief sought is within the competency of a court of equity to allow.

Decree affirmed.

ALTON R. EASTON, PLAINTIFF IN ERROR, *v.* THOMAS L. SALISBURY.

Between May, 1829, and July, 1832, there was an interval in the acts of Congress reserving lands from sale which were claimed under Spanish concessions in Louisiana; and during this interval, an entry or patent for any of these lands would have been valid.

But a patent issued in 1827, whilst the reservation was in force, was void, and the patent did not become operative *proprio vigore* during the interval between 1829 and 1832.

The confirmation of the concession in 1836, therefore, gave a good title to the claimant under the concession.

Moreover, the New Madrid warrant, not being located within one year from the 26th of April, 1822, was void.

THIS case was brought up from the Supreme Court of Missouri by a writ of error issued under the 25th section of the judiciary act.

It was a petition in the nature of an ejectment brought by Easton against Salisbury in the St. Louis Court of Common Pleas, to recover the lots described in the opinion of the court. The Court of Common Pleas gave judgment for the defendant, and this judgment was affirmed by the Supreme Court.

The plaintiff claimed under a New Madrid patent issued in 1827, and the defendant under a Spanish concession which was confirmed in 1836. The Supreme Court of Missouri

were of opinion that the New Madrid patent was absolutely void when issued, and that it did not become operative in the interval between May, 1829, and July, 1832.

The case was argued in this court by *Mr. Gibson* and *Mr. Gamble* for the plaintiff in error, and by *Mr. Ewing* for the defendant.

The counsel for the plaintiff in error contended that the question involved in this case was not ruled or raised in Mills *v.* Stoddard, or Stoddard *v.* Chambers, and that Easton had a right to perfect his title in the interval between 1829 and 1832.

The two points were thus stated:

I. The title under which the plaintiff claims was good against the United States. (Les Bois *v.* Brammell, 4 How., 449; Stoddard *v.* Chambers, 2 How., 284; Mills *v.* Stoddard, 8 How., 364; Menard's Heirs *v.* Massy, 8 How., 310; Delauriere *v.* Emerson, 15 How., 525; Hoofnagle *v.* Anderson, 7 Wheaton.)

The survey made by the surveyor general, its return by him to the recorder of land titles, the issuing of a patent certificate by that officer, and of a patent by the President of the United States, were all acts done by the proper officers of the United States; and the question is now for the first time raised in this court, as to the effect of these acts as *against the United States.*

This question was not only not decided in Mills *v.* Stoddard, or Stoddard *v.* Chambers, but the point was not involved in those cases, nor raised by the counsel. On the contrary, in Chambers *v.* Stoddard, (2 How., 295,) the plaintiff's counsel, Messrs. Lawlers and Ewing, say: "If the question were now between the United States and locator, there might, perhaps, be some grounds for a liberal construction. It might be contended, that the surveyor general, who filed the location and surveyed it, being an officer and agent of the United States, his act as against his principal ought, if possible, to be binding.'

And the inquiry in that case was, as stated by this court, "whether the defendant (Chambers) had any title, *as against the plaintiffs.*"

II. The land was subject to be disposed of by the Government during the existence of the bar, from 1829 to 1832, to any person, or in any manner, and was then open to entry or location.

And the plaintiff had the right, during this time, to perfect his title. But had the plaintiff applied for a patent during the bar, (and this court say a patent issued then would have incontestably passed the title,) he would have been properly answered by the officers of the Government, that two patents could never issue by the Government for the same land under the same title, and to the same person; and that, as his patent passed any title the Government might have, a second patent could add no strength to his claim.

Suppose the plaintiff, relying on his patent, had purchased Bell's claim in 1827, and, having then both titles, had failed or neglected to have it confirmed under the act of 1836; would it not have been a sheer outrage to permit the United States to deprive him of this land, and at the same time to continue to claim the land in New Madrid, in lieu of which this was granted? And yet, such is the legitimate result of the principle which the defendant seeks to establish.

The counsel for the defendant contended that the Supreme Court of Missouri had taken the proper view of the point, that the patent of 1827 was absolutely void; and that, by the act of Congress of April 26, 1822, this warrant was void, being unlocated on the 26th of April, 1823.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Missouri.

The parties agreed as to the facts in this case, in order that the points of law might be ruled by the court.

On the 9th of July, 1811, there were confirmed to James Smith, by the commissioners for the adjustment of titles to land in the Territory of Missouri, lots nine and ten, (9 and 10,) containing two arpens of land, in the village of Little Prairie, in the county of New Madrid, State of Missouri. Afterwards

these lots, while still owned by said Smith, were materially injured by earthquakes, and proof thereof was made before the recorder of land titles at St. Louis, on the 16th of November, 1815; whereupon, there was issued by said recorder, to said James Smith, a certificate of new location, (commonly called a New Madrid certificate,) numbered 159. On the 22d of October, 1816, said Smith and wife conveyed to Rufus Easton the said two arpens in Little Prairie, and assigned to him the right to locate other lands under said certificate in lieu of the land so injured, and also conveyed to said Easton the land that might be located by means of said certificate. On the 16th of November, 1816, Easton gave notice to the surveyor general of said Territory of Missouri of the location of said certificate on a tract of land about two miles west of the city of St. Louis, and demanded a survey thereof. In March, 1818, a survey was made, by direction of the surveyor general, in pursuance of said selection, and was duly returned and approved by said surveyor general; said survey is numbered 2,491, and the land thereby designated embraces the land in controversy, and is within St. Louis township, in St. Louis county, Missouri. By virtue of the premises, Easton held said land, claiming the same until 1826, when he conveyed the same to William Russell. On the 28th day of May, 1827, the United States issued a patent on said location for said land to James Smith or his legal representatives. On the 19th of January, 1839, William assigned and conveyed all his interest in said land to J. G. Easton, who, on the 18th of March, 1845, conveyed and assigned the same to plaintiff. Defendant is in possession of the land described in the petition, and the same is within the boundaries indicated by said survey and patent.

On the 20th of January, 1800, a concession was made by the Spanish Lieutenant Governor, to one Mordécai Bell, of three hundred and fifty arpens of land, including the premises in controversy. The representatives of Mordecai Bell, on the 29th of June, 1808, presented the claim for said land, together with a descriptive plat of survey thereof, to the board of commissioners for the adjustment of land titles in the Territory of Missouri. The documents showing said claim, and the deriv-

active title from Mordecai Bell, were duly recorded in 1808 by the recorder of land titles for the Territory of Missouri. And on the 4th day of July, 1836, the United States confirmed said claim, according to said plat of survey, to the legal representatives of M. Bell; a survey of said confirmation was made by authority of the United States in ——, and is numbered 3,026. Said survey embraces the land in dispute; and all the title of the confirmee, by the act of 1836, is in the defendant. The survey numbered 2,491, and also the patent dated 28th of May, 1827, are in due form of law; but defendant does not admit the authority of the officers of the United States to make the one or issue the other, nor that the same were made or issued under any law. It is admitted that the land in controversy is worth more than two thousand dollars; that if the court should be of opinion that the plaintiff is entitled to recover, it is agreed that the damages shall be fixed at one cent, and the monthly value of the premises at one dollar. Either party is at liberty to turn this case into a bill of exceptions, and thereon prosecute a writ of error, or take an appeal to the Supreme Court of the State of Missouri, or of the United States. It is admitted that survey No. 3,026 was made under the authority of the United States, but the plaintiff may dispute the power of the United States as regards both the confirmation of 1836 and the survey No. 3,026.

It is admitted that the plaintiff had, at the commencement of this suit, all the title that was invested in said James Smith, or his representatives, by the New Madrid location and patent above mentioned.

It will be observed that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and the 28th of May, 1827, the United States issued a patent to James Smith, or his legal representatives.

From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that time

they ceased, until renewed by the act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right during this time to perfect his title."

The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of Stoddard *v.* Chambers, (2 How., 318,) it is said, "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested.

Nothing was done to give Easton's title validity, from the cessation of the reservation, in 1829, until its revival, in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented, having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might have been procured, or a new one instituted, it is not necessary to inquire. No such attempt was made.

But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 15th of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point: all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836. Bell made the conveyance to Mackey, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured, by way of estoppel, to the grantee, and those who claim by deed under him. (Stoddard *v.* Chambers, 2 How., 317.)

There was no period from the entry and patent of the New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmee, or to the New Madrid title asserted against it, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.

JULIAN MCCARTY AND JOHN WYNN, ADMINISTRATORS OF ENOCH MCCARTY, DECEASED, PLAINTIFFS IN ERROR, *v.* GUERNSEY Y. ROOTS, ERASTUS P. COE, AND JOHN H. AYDELOTTE.

Where an accommodation bill of exchange was paid by one of the endorsers, and there was no special agreement that they should be bound to pay in equal proportions as co-sureties, the endorser who took it up had a right to assign it as collateral security for a pre-existing debt; and the assignee can maintain a suit against the original payee, who was also an endorser.

The endorser who took up the bill was a trustee; but the plea was defective in not averring that there remained sufficient funds in the trust estate to pay this bill after discharging the trust.

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

It was a suit brought by Roots, Coe, & Aydelotte, citizens of Ohio, against Enoch McCarty, a citizen of Indiana.

It was upon a bill of exchange drawn by Tyner & Childers, upon Richard Tyner, of New York, in favor of Enoch McCarty, for $4,500. Tyner accepted the bill, and McCarty endorsed it to George Holland, who endorsed it to Ezekiel Tyner, who endorsed it to Roots, Coe, & Aydelotte. It was alleged that Holland took it up when past due at the Richmond Bank, and that Holland delivered the bill to the plaintiffs as collateral security for a pre-existing debt of Richard Tyner.

The nature of the pleas is set forth in the opinion of the court, and the following reference to them will be sufficient: