in the reporter's statement.* The instruction there quoted is a correct exposition of the law, and if it produced a verdict in favor of defendant, the plaintiff had no right to complain.

The plaintiff's original patent limited his claim, very properly, to the particular devices and combination of parts which constituted his improved machine. But as this claim was not broad enough to cover the improvement described in defendant's patent, the plaintiff surrendered his, and had it reissued with a more *expanded claim*. It is for the infringement of this *reissued* patent that the action is brought.

We have had occasion to remark, in a late case,† on this new art of expanding patents for machines into patents for "a mode of operation," a function, a principle, an effect or result, so that by an equivocal use of the term "equivalent," a patentee of an improved machine may suppress all further improvements. It is not necessary again to expose the fallacy of the arguments by which these attempts are sought to be supported, though we cannot hinder their repetition.

LET THE JUDGMENT BE AFFIRMED.

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## HARVEY *v.* TYLER.

1. The court reprehends severely the practice of counsel in excepting to instructions *as a whole*, instead of excepting as they ought, if they except at all, to each instruction *specifically*. Referring to *Rogers* v. *The Marshal* (1 Wallace, 644), &c., it calls attention anew to the penalty which may attend this unprofessional and slatternly mode of bringing instructions below before this court; the penalty, to wit, that the exception to the whole series of propositions may be overruled, no matter how wrong some may be, if any *one* of them all be correct; and when, if counsel had excepted specifically, a different result might have followed.
2. Where a statute gives to county courts authority and jurisdiction to hear and determine *all* cases at common law or in chancery within their respective counties, and "*all such other matters as by particular statute*"

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* *Supra*, p. 325.

† Burr *v.* Duryee, 1 Wallace, 535; see, also, McCormac *v.* Talcott, 20 Howard, 405.

Statement of the case.

might be made cognizable therein, such county courts are courts of general jurisdiction; and when jurisdiction of a matter, such as power to declare a redemption of land from forfeiture for taxes (in regard to which the court could act only "by particular statute") is so given to it,—parties, a subject-matter for consideration, a judgment to be given, &c., being all in view and provided for by the particular statute,—the general rule about the indulgence of presumptions not inconsistent with the record in favor of the jurisdiction, prevails in regard to proceedings under the statute. At any rate, a judgment under it, declaring lands redeemed, cannot be questioned collaterally.

3. Statutes are to be considered as acting prospectively, unless the contrary is declared or implied in them. The 21st and 22d sections of the Virginia statute of 1st April, 1831, "concerning lands returned delinquent for the non-payment of taxes," were not confined to delinquencies *prior* to the passing of that statute.
4. Under the said sections, land is rightly exonerated by the county court of the county in which alone it was always taxed; even though a part of the land lay of later times in another county, a new one, made out of such former county.
5. Under the code of Virginia (ch. 135, § 2), ejectment may be properly brought against persons who have made entries and surveys of any part of the land in controversy, and are setting up claims to it, though not in occupation of it at the time suit is brought.
6. Where parties enter upon land and take possession without title or claim or color of title, such occupation is subservient to the paramount title, not adverse to it.

TYLER brought ejectment against Harvey and others in the District Court of the United States for the Western District of Virginia, to recover one hundred thousand acres of land in what was formerly *Kanawha* County alone, though afterwards partly Kanawha and *partly Mason* County; the last-named county having been created out of the former. The defendants set up that this title had been interrupted by a forfeiture of the land for non-payment of taxes to the commonwealth, and the vesting of it in the President and Directors of the Literary Fund, under a statute of Virginia passed 1st April, 1831, "concerning lands returned delinquent for the non-payment of taxes;" and there was no doubt that this was so unless the forfeiture had been relieved by certain proceedings in the *County Court of Kanawha County*, under two sections,—the 21st and 22d of the same act.

The provisions of these two sections were, in their mate-

rial parts, as follows; and the reader will observe how far they authorize redemption for delinquencies prior to the date of the act of 1st April, 1831; and how far for any term *after* the passage of it.

"§ 21. If any person having title to any tract of land returned delinquent for the non-payment of taxes, and not heretofore vested in the President and Directors of the Literary Fund, and having legal possession thereof, shall prove, by satisfactory evidence, to the court of the county in which such land may lie, before the first day of January, 1833, that prior to the passage of this act he was a *bonâ fide* purchaser of such land so claimed by him; that he has a deed for the same, which was duly recorded before the passage of this act; and that he has paid all the purchase-money therefor, or so much thereof as not to leave in his hands sufficient to satisfy and pay the taxes and damages in arrear and unpaid at the date of his purchase; or that he fairly derives title by, through, or under some person so having purchased and paid the purchase-money, it shall be the duty of the court to render judgment in favor of such person, exonerating the land from all arrears of taxes, and the damages thereon anterior to the date of such purchase, except so much as the balance of the purchase-money remaining unpaid will be sufficient to pay, &c.; but no judgment shall be rendered except in presence of the attorney for the commonwealth, or of some other attorney appointed by the court to defend the interest of the commonwealth. . . . . No judgment in favor of such applicant shall be of any validity, unless it appears on the record that the attorney for the commonwealth, or the attorney appointed as aforesaid, appeared to defend the application.

"§ 22. And if any person having legal possession of and title to any tract of land returned delinquent for non-payment of taxes, and not heretofore vested in the President and Directors of the Literary Fund, shall show, by satisfactory evidence to the court of the county where the said land may lie, at any time before the first day of January, 1833, that the taxes in arrear and due thereon are not in arrear or due, either having been erroneously charged on the books of the commissioner, or having been actually paid, or that in the years for which said land or lot was so returned delinquent, there was sufficient property on

the premises whereon the collector might have made distress, it shall be the duty of the court, under the limitations, injunctions, and conditions contained in the preceding section, to render judgment exonerating such land from the taxes so erroneously charged thereupon."

The records of the County Court of *Kanawha* disclosed next the following entries:

"At a county court held for *Kanawha* County, at the court-house thereof, the 14th day of November, 1831, present David Ruffner, Andrew Donnally, John Slack, and James McFarland, gentlemen, justices, &c.

"*Order.*—This day came Matthias Bruen, having title to one tract or parcel of land containing one hundred thousand acres, lying *partly in the county of Mason* and *partly in the county of Kanawha;* the said tract of one hundred thousand acres being also the same charged in said lists of lands and lots to the Bank of Delaware, John Hollingsworth, and John Shallcross, &c., and returned delinquent in said names for the year 1815. And the said Matthias, having proved by evidence satisfactory to this court that prior to the passage of the act entitled 'An act concerning lands returned delinquent for the non-payment of taxes,' &c., passed April 1, 1831, he was a *bonâ fide* purchaser of said tract, and that he has a deed or deeds which was or were duly recorded in the clerk's office of the County Court of Kanawha County previous to the passage of the aforesaid act; and that he has paid all the purchase-money therefor, having no portion thereof in his hands to satisfy and pay the taxes and damages in arrear and unpaid at the date of his purchase, or any part thereof; and further, that he is in legal possession of the said tract, and was so in possession at the time of the passage of the act before recited.

"Therefore this court, *in the presence of the attorney prosecuting the pleas of the commonwealth in said court, who hath appeared and defended this application, upon full consideration of all the matters and things on either side alleged,* doth render judgment in favor of the said Matthias Bruen, and doth order, adjudge, and decree that the said tract of land above mentioned be released, discharged, and exonerated from all the arrears of taxes and the damages charged or chargeable thereon anterior to the 14th of

April, 1815, the date of the purchase thereof by the said Matthias.

"And the said Matthias Bruen, having further proved by evidence satisfactory to this court that during all the years 1815–'16–'17–'18–'19 and 1820, the years for which the said tract is charged to the said Matthias, and in his name returned delinquent for the non-payment of taxes, there was sufficient property whereon the sheriff or collector might have made distress, and out of which the said taxes for the said several years might have been made and collected. Thereupon this court, *in the presence of the attorney prosecuting the pleas of the commonwealth in the said court, who hath also appeared and defended this application*, upon *full consideration of all the matters and things on either side alleged*, doth further adjudge, order, and decree, that the said tract of land be released, discharged, and exonerated from all the arrears of taxes and the damages charged or chargeable thereon for the said several years 1815–'16–'17–'18–'19, and 1820, whether the same be charged to the said Matthias or to any other person or persons whatsoever; all of which is ordered to be certified according to the act of Assembly in that case made and provided."

An order, dated 12th of November, and similar to this last, exonerated the tract, upon the latter ground, for the years from 1821 *to* 1831, *inclusive.*

THE FIRST POINT in the case was as to the effect of these orders; that is to say, whether, under the statute, they exonerated the land; and this again depended, perhaps, part on the character of this County Court of Kanawha, and to what extent it was or was not a court of general jurisdiction. On this point, it appeared that these county courts derived their powers from a statute of Virginia authorizing them, whose seventh and eighth sections read thus:

"§ 7. The justices of every such court, or any four of them, as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority, and jurisdiction to hear and determine, all cases whatsoever now pending, or which shall hereafter be brought in any of said courts at common law, or in

chancery, within their respective counties and corporations, and all such other matters as by any particular statute is or shall be made cognizable therein.

"§ 8. That said courts shall be holden four times per year for the trial of all presentments, criminal prosecutions, suits at common law and in chancery, where the sum or value in controversy exceeds twenty dollars, or four hundred pounds of tobacco."

It depended, also, in part, perhaps, on another question, connected with the location of the land. As already intimated, the land was situated in what was originally Kanawha County, but out of which another county, Mason, had been, of later times, created. At the time of these proceedings (A. D. 1831) in the County Court of Kanawha, the land had come to lie in part in this new county of *Mason.* It had, however, for the term of thirty-one years,—the term for which the exoneration extended,—been always listed for taxation as one tract, and as being in the County of *Kanawha;* and, as the bill of exceptions showed, had been charged with taxes *nowhere but in that county.* Moreover, the Auditor of the State of Virginia, after these orders of the Kanawha County Court were made, entered an exoneration of taxes as to the *entire* tract.

Upon this whole part of the case, the court below instructed the jury that the two orders "did exonerate the taxes delinquent on the land in controversy for the year 1831, *and* all years *prior* thereto."

THE SECOND POINT—one, also, which arose on the charge of the court—was, as to whether certain parties, *not in possession*, but, nevertheless, made defendants, were properly made so.

The code of Virginia* enacts as follows:

"The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person *exercising ownership* thereon, or

* Chap. 135, § 2.

*claiming title* thereto, or some *interest* therein, at the commencement of the suit."

Under this statute the court, on a request to charge in a particular way, charged in substance, that if some of the defendants had made *entries* and *surveys* of any part of the land in controversy, under which they were *setting up claims to it*, they were properly sued, although not in occupation of it at the time the suit was instituted.

THE THIRD POINT in the case related to adverse possession, and was whether the court had rightly charged in saying, that if the jury found plaintiff's title was the paramount title, and that the defendants entered and took possession *without any title, or claim, or color of title to any part*, that such entry and possession was not adverse to the plaintiff's title, but was subservient thereto.

The case was twice elaborately argued in this court. Below, as here, the suit was contested with determination; and the record which was brought up showed that the defendants had asked for no less than FORTY-SIX different instructions! They ran over twelve pages, and were submitted in three series of requests. The first series, comprising twenty-four propositions of law, the second series twelve, and the third ten; and it rather appeared from the bill of exceptions, that each of these series was prayed for, and the action of the court on them excepted to, as a whole. Three only of the forty-six were granted. The court below granted, also, three of the plaintiffs' requests; in which three, in fact, the substance of all that was argued was comprised.

Verdict and judgment having been given for the plaintiffs, the case was brought here by the other side on error.

*Mr. J. H. Brown, for Harvey, plaintiff in error, and defendant below.*

1. The County Court of Kanawha was a court of inferior jurisdiction; OR, rather—

2. If not so, in general, it had a jurisdiction derived from

statute only in this particular matter; a matter quite alien from the ordinary common law or chancery jurisdiction conferred by the statute creating these county courts. The jurisdiction is limited as to duration of time, as to the class of persons for whose benefit it is intended, as to the subject-matter, and as to the mode of its exercise.

In either case, however,—that is to say, whether the court was constitutionally a court of inferior jurisdiction, or whether the jurisdiction conferred by the act is what is termed a special limited statutory jurisdiction,—every fact essential to authorize the court to make the orders, must appear upon the record which the court makes of its transactions.* *Martin* v. *McKinney*, a leading case in Kentucky,† as to the character of "county courts," is in point, and we cite it the more particularly, since the laws of Virginia and of Kentucky are known to be much identical, the latter State having been created out of the former. The County Court of Mason County there—acting under a statute which gave the court authority to deprive a keeper of a ferry of his license, if he either neglected to furnish the necessary boats, *or* the number of hands required by the court, *or* if the ferry itself became wholly disused and unfrequented for two years —had deprived Martin of his right to keep a ferry over the Ohio; but the judgment of the county court did not state for which of the three causes the court had done what it did, or even that it had done it for any. On motion to set the judgment, for want of such specification in the record, aside, the Court of Appeals says:

"This being a law which authorizes the county court to interfere with and deprive citizens of their rights and property in a summary way, it should appear from the record of their proceedings that they acted within their power and authority, and, therefore, nothing ought to be presumed to support their proceedings. Nor can this case be assimilated to the proceedings

* See Ransom *v.* Williams, *supra*, p. 313.

† Kentucky Decisions, sometimes called Printed Decisions (a rare work, Frankfort, 1805), p. 380.

of a court of unlimited jurisdiction in correcting the acts of ministerial officers, who, in carrying judgments into execution, either wilfully or negligently abuse the process of the court. In the latter case, every presumption is to be indulged in support of the unlimited jurisdiction, because it is derived from the common law. In the former, no such presumption is permitted, because the authority is given by statute, which must be strictly and substantially pursued."

The judgment of the county court was accordingly annulled. The case does, however, but act on the principle declared by the Court of King's Bench, A. D. 1778,* in *Crepps* v. *Durden*, a case made a prominent one in Smith's Leading Cases,† and largely annotated by Hare, J.

Now, as to *first of the decrees or judgments or orders*—by whatever name the release may be called—of the County Court of Kanawha:

It does not aver or show that the land was not, prior to the first day of April, 1831, vested in the President and Directors of the Literary Fund.

It does not aver and show that Matthias Bruen derived title to the land from any of the persons in whose names the land is shown by the release to have been returned delinquent; nor does it aver or show that Bruen claimed the land either mediately or immediately by grant from the commonwealth.

It does not aver or show that Bruen had legal possession of said land.

It does not aver or show that said land had been returned delinquent (as it was) in the names of Jesse Waln and others, or any other person or persons, from 1805 to 1814, inclusive. Therefore, the court had no jurisdiction to release the land for those years, and for the delinquency of those years the land became forfeited, and vested in the commonwealth.

*The second release* is equally defective.

* 17 George III; Cooper, 640.

† 1 Smith's Leading Cases, *816, sixth American edition.

Argument against the redemption.

It does not aver or show that the land was not, prior to the 1st of April, 1831, vested in the President and Directors of the Literary Fund; nor does it show any of the prerequisites necessary to give the court jurisdiction, unless it can be aided by the recital in the first release, which it cannot be.

It does not aver or show that, between the years 1815 and 1820, inclusive, there was property on the land, out of which the sheriff or collector might have made distress for the tax, or that the taxes for which the land was returned delinquent were not in arrear and due, or that they had been paid; and yet these were the only grounds upon which the release was authorized under the second section of the act aforesaid.

It was error to exonerate the land from all the taxes and damages charged or chargeable thereon, whether charged in the name of Bruen, or any other person or persons whatsoever; this was unauthorized by law, and in derogation of the provisions in favor of *bonâ fide* occupants in the same act.

Both the releases aver that the land, at the time of the releases, lay partly in Mason and partly in Kanawha, without showing what parts or proportions lay in the respective counties, and yet the act only authorized the County Court of Kanawha to release so much of said land as was situate in Kanawha County. Releasing the whole land, therefore, in both counties, was contrary to law, and makes the entire judgment void.

Moreover, the whole reading of the 21st and 22d sections shows that they had reference to lands returned delinquent *before* or but up to the year 1831, the date of the act. Now the judgments exonerate them for 1831; that is to say, to 1831 inclusive. These sections, relied on by the plaintiffs, employ the past tense. They are sections of amnesty for the past; having no reference to delinquencies after the date of the act. The main purpose of the act was to secure the *payment* of taxes in arrear. We cannot reasonably suppose that the legislature invited owners *not* to pay, by giving them the right to have their lands released for future time.

2. Though the Virginia code gives a right to sue in ejectment certain persons not in what the common law would

call "possession," it has never been regarded as authorizing suit against parties who had merely made entry and surveys, under which they were about to set up claims. The provision of the code, which, it is to be noted, is in derogation of the common law principle, speaks of persons "*exercising ownership* thereon; or claiming *title* thereto, or some *interest* therein." The instruction goes beyond this.

3. Our third point may be less tenable than the others. Still we think that a person may be in possession, not asserting any title, and yet that such occupancy will not be actually and positively subservient to another title. It may be negative in its operation only; but the court below makes it positive, and positive in favor of a title certainly not in form *admitted.*

*Mr. B. H. Smith, contra.*

Mr. Justice MILLER delivered the opinion of the court.

This case has been twice argued before this court. It involves the title to a hundred thousand acres of land. The oral argument has been able on both sides; but the manner in which the record brings the case before us, is one which we have repeatedly condemned, and which has sometimes precluded us from the consideration of points relied on by counsel as error.

It is a fair inference from the bill of exceptions that each of the three series of instructions refused was prayed and excepted to as a whole. If so, the proceeding was not only a clear violation of a rule of this court; but if any proposition in the series ought to have been rejected, then the court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked separately, ought to have been given. The exception is a general one to the refusing the prayer of the plaintiffs in error, and to the granting the prayer of the defendants in error.*

* Rogers *v.* The Marshal, 1 Wallace, 644; Johnson *v.* Jones, 1 Black, 209; Rule 38 of the Rules of this Court.

However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. This opportunity is not given when pages of instructions are asked in one prayer, and if refused as a whole, are excepted to as a whole. We may rightfully expect of counsel who prepare cases for this court, that they shall pay some attention to the rules which we have framed for their guidance in that preparation; as well as to those principles of law referred to, which are necessary to prevent the prayer that counsel has a right to make to the court for laying down the law to the jury, from being used as a snare to the court, and an instrument for perverting justice. These observations, which are of daily application in this court, are fully justified by a record, which shows forty-six propositions asked of a court at once, as a charge to a jury.

In the present case, while we are relieved from the necessity of examining the forty-three propositions asked by plaintiffs in error (three of the forty-six were granted), we are also relieved from any apprehension that this will work injustice; because the only three propositions asked and granted on the part of defendants in error, and to which by a little liberality we are able to hold the exceptions sufficient, involve all the questions of law which are entitled to consideration, if not all which were argued in the case.

One branch of the controversy—the one of engrossing importance—turns upon the validity of the orders made by the County Court of Kanawha County.

The court below instructed the jury that these orders "did exonerate the taxes delinquent on the land in controversy for the year 1831, and all years prior thereto," and it is the soundness of this instruction which we are first to consider.

Opinion of the court.

The plaintiffs in error contend that these orders are void, and therefore nullities, because the records of them do not show that several matters were proven, which are essential to the right of the party to have his lands thus exonerated.

Ten or twelve of these omissions are urged as applicable to one or the other, or both, these orders; some of which are founded in misconception of what the record contains; some on the absence of averments merely negative, such as the failure to allege that the land had not been vested in the Trustees of the Literary Fund; and all of them, except one or two which will be noticed hereafter, concern matters, which may well be supposed to have been substantiated by proof before the court; if we are at liberty to make any presumptions in favor of the validity of the orders of the court.

This brings us to the issue of law in the case. The plaintiffs in error maintain:

1. That the county court which made these orders is a court of inferior and special jurisdiction, and therefore every fact essential to authorize it to make such orders, must appear upon the record which the court makes of the transaction; or,

2. If the court is not held to be of this inferior and special character, that the statute confers upon it in this class of cases only such special jurisdiction, and that its orders are subject to the same rule in testing their validity.

It is certainly true that there is a class of tribunals, exercising to some extent judicial functions, of which it may be said, in the language of Chief Justice Marshall, that they are "courts of a special and limited jurisdiction, which are created on such principles, that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction."*

The first inquiry, then, on this subject, must be into the character of the County Court of Kanawha County, which rendered these judgments of exoneration.

The powers of these courts in Virginia were originally

* Kempe's Lessee *v.* Kennedy, 5 Cranch, 173.

conferred and prescribed by the act of 1792, and are to be found fully stated in section 7th of the act of 1819.* "The justices of every such court, or any four of them, as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority, and jurisdiction, to hear and determine, all cases whatsoever now pending, or which shall hereafter be brought in any of said courts, at common law or in chancery, within their respective counties and corporations, and all such other matters as by any particular statute is or shall be made cognizable therein." Section 8 provides, that said courts shall be holden four times per year for the trial "of all presentments, criminal prosecutions, suits at common law, and in chancery, where the sum or value in controversy exceeds twenty dollars, or four hundred pounds of tobacco."

It is impossible to come to any other conclusion from this statute, than that the county courts of Virginia were courts of general jurisdiction; and were inferior only in the sense that their judgments might be revised by some appellate tribunal. They were in no sense courts of special jurisdiction, and were unlike county courts in other States,—Kentucky, for example, in reference to which a Kentucky decision has been quoted to us,—which had no common law or chancery jurisdiction, whose principal functions were ministerial, in reference to the roads, bridges, and finances of the county, to which are sometimes added those judicial functions which relate to wills and the administration of the estates of decedents. These all differ widely from the county courts of Virginia, which have all those powers of general jurisdiction usually found in circuit courts, courts of common pleas, courts of chancery, and others of similar character.

In reference to all these the general rule is, that every presumption not inconsistent with the record, is to be indulged in favor of their jurisdiction; and their judgments, however erroneous, cannot be questioned, when introduced

* 1 Revised Code, 246.

collaterally, unless it be shown affirmatively that they had no jurisdiction of the case.*

In regard to the second proposition, it is not so easy to determine in all cases the principle which is to govern.

The jurisdiction which is now exercised by the common law courts in this country, is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but often in derogation of that law.

In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is, that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose. The only difficulty in applying the rule, is to ascertain the question of jurisdiction.

* Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Voorhees *v.* Bank of United States, 10 Peters, 449; Ex parte Watkins, 3 Peters, 193; Grignon *v.* Astor, 2 Howard, 319.

Opinion of the court.

Former adjudications of this court have done much to throw light upon this difficult point, and to settle the rules by which it may be determined. We will notice a few of the most important.

One of the earliest is the case of *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173. Certain acts of the legislature of New Jersey confiscated the property of those who had sided with Great Britain in the war of the Revolution. They conferred the power of ascertaining that fact by inquest instead of by regular indictment, in the inferior court of common pleas of each county. In an action of ejectment, brought in the Circuit Court of the United States by Grace Kempe, the defendants set up a title acquired under proceedings thus authorized. In this court, on error, it was argued that, as to these proceedings, the court must be considered as one of special and limited jurisdiction. But the court, by Chief Justice Marshall, said: "This act" (the statute of New Jersey), "cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction in cases of treason." "In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and if an offence punishable by the law had been in fact committed, the accused was amenable to its jurisdiction, so far as respects her property in New Jersey. The question whether this offence was or was not committed, that is, whether the inquest which was substituted for a verdict on an indictment, did or did not show that the offence had been committed, was a question which the court was competent to decide. The judgment was erroneous, but it was a judgment, and until reversed cannot be disregarded."

In the case of *Voorhees* v. *The Bank of the United States*,* the validity of certain proceedings in attachment were called in question, on the ground that the record of the court of common pleas, in Ohio, in which the proceedings were had,

* 10 Peters, 449.

did not show certain steps which the law required. The defendant in the attachment proceedings was a non-resident; yet his land had been levied on, condemned, and sold, without an affidavit, without notice by publication, without calling him three times, at three different terms of the court, and without waiting twelve months from the return of the writ, before the sale; all of which are specially required in the act regulating the proceedings. Here was a case of special and stringent proceedings *in rem*, in the absence of jurisdiction over the person, where material provisions of the law, for the protection of defendant's rights, were omitted, so far as the record showed. "It is contended," said this court, "by the counsel for plaintiffs in error, that all the requisitions of the law are conditions precedent, which must not only be performed before the power of the court to order a sale, or of the auditors to execute it, can arise, but such performance must appear in the record." This is precisely what is contended for in the case now before us, and the circumstances of this case and of that are remarkably similar in their relation to the principles which we are now discussing. The court said, in reply to this: "The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear upon the record." "We do not think it necessary to examine the record in the attachment suit, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the single question, whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which was added, by the act of 1805, the power to issue writs of attachment, and order a sale of the property attached, on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached." "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly

done, till the contrary appears." "If the defendant's objection can be sustained, it will be on the ground that this judgment is false, and that the order of sale was not executed according to law, because the evidence of its execution is not in the record. The same reason would equally apply to the non-residence of the defendant within the State, the existence of the debt due the plaintiff or any other creditor, which is the basis of the whole proceedings."

In the case of *Thompson* v. *Tolmie*,* a sale of real estate by three orphans of this city was assailed in this court on similar grounds: The court says: "Those proceedings were brought before the court collaterally, and are by no means open to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervisory power of the court to receiving its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only." "If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right and afford no justification; and may be rejected when collaterally drawn in question."

Both these latter cases are cited, reaffirmed, and the doctrine amplified, in *Grignon* v. *Astor*.†

The application of these principles to the case before us will be very obvious upon a slight examination of sections 21 and 22 of the act of 1831, which confers on the county courts the power to exonerate lands from delinquent taxes. We have already seen that they are courts of general jurisdiction. These sections authorize them, when certain facts are proved by the owner of the land, "to render judgment in favor of such person, exonerating the land;" "but no judgment shall be rendered except in the presence of the attorney for the commonwealth, or some other attorney

* 2 Peters, 157.

† 2 Howard, 319.

appointed by the court to defend the interest of the commonwealth. If the application shall fail, judgment shall be rendered against the applicant, and he shall be adjudged to pay costs." Now here are all the usual accompaniments of a judicial proceeding; a court of competent jurisdiction, parties, plaintiff and defendant, namely, the applicant and the State; a subject-matter of consideration, to wit, the exoneration of the land from delinquent taxes, and a judgment of the court, either establishing such exoneration, or that the claim to it is not a rightful claim, and in either case conclusive of that claim. Care is taken that the commonwealth shall be represented by capable counsel; and the only fact required by the act to appear on the record is the presence of such counsel. That the appearance of this fact on the record is made the only one essential to the validity of the judgment, is strong evidence that the other facts, on which the judgment of the court may depend, need not so appear.

The transcripts of the judgments of exoneration produced in this case, show that there were proper parties before the court, that the subject-matter of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes. Can it be required to give validity to these judgments, that the record shall show that every fact was proved, upon which the judgment of the court must be supposed to rest? Such a ruling would overturn every decision made by this court upon that class of cases, from that of *Kempe's Lessee* v. *Kennedy*, already referred to, down to the present time.

It is urged that the 22d section of the act of 1831 was not intended to confer the right of exoneration as to taxes delinquent after the passage of the act.

If this were true, we do not feel sure that, under the principles just considered, it could invalidate the judgment of the court. It would be a mistake as to the law, which would make the judgment erroneous; but would it, therefore, be void? We do not, however, concur in this construction of the act. There is nothing in its language which limits this

relief to past delinquency, and it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect. The powers of the court over this subject, it is true, is limited in point of duration to three years; but that period extends beyond the time when the taxes for the year 1831 would become delinquent, and would, therefore, seem to embrace them, unless expressly excluded. The third section of the act of December 16, 1831, and the second section of the act of March 10, 1832, both recognize and proceed upon this construction of these sections, and remove any doubt which may have existed on that subject.

It was in proof that, at the time these judgments were rendered, a considerable part of this one hundred thousand acre tract lay in other counties which had been created out of the County of Kanawha; and it is said, as to so much of said land, the judgments of the county court of that county were without jurisdiction.

The tract had always been listed for taxation as a unit, in the County of Kanawha, for the entire period of thirty-one years or more, to which the *exoneration* extended. The bill of exceptions states, that the land was uniformly charged with taxes there, and *not elsewhere*. It was these delinquent lists, returned regularly by the Auditor of the State to the county from whence they came, from which the owner desired to be relieved. An application to the court of a county where they did not exist, would have been unavailing. It would be sticking in the bark to say, that a party entitled to relief could not get it in one county because all the land did not lie there; nor in any other county, because no evidence of such delinquency appeared in the tax-lists of the latter to be exonerated. The land in question was charged with taxes nowhere but in Kanawha County, and in that county it was proper that the *exoneration* should be entered.

It is to be remarked of all these objections to the judgments of exoneration, that the parties who made them show no patent, or other title, from the State of Virginia, and are

setting up defects in those judgments, of which neither the State of Virginia, which was a party to the proceedings, nor the Trustees of the Literary Fund, who were entitled if they were invalid, have ever complained, or sought to take advantage. On the contrary, the Auditor of the State of Virginia, its official accounting officer, recognized these judgments as valid, by making entries in his books, to the effect that the taxes were released by them.

We are of opinion, therefore, that the first instruction given at request of plaintiffs was correct.

The second was to the effect that if some of the defendants had made entries and surveys of any part of the land in controversy, under which they were setting up claims to it, they were properly sued, although not in occupation of it at the time the suit was instituted.

The code of Virginia, as well as that of several other States, allows the action of ejectment to be brought against persons claiming title, or interests in the property, although not in possession. It says:* "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit." If then there was a part of the tract claimed by some person, on which there was no occupant, the case existed which the second clause of the section provides for. The policy of this act is obvious. It is that persons out of possession, who set up false claims to land, may by a suit in ejectment, which is the legal and proper mode of trying title, have that claim brought to this test. The act provides that such a judgment is conclusive against all the parties; and thus the purpose of the law to quiet title by a verdict and judgment in such cases, is rendered effectual. The language of the code of New York is identical with that of Virginia on this subject. And the construction we have given to it was held to be the true one, by the Supreme Court of the former State.†

* Chapter 135, § 2.

† Banyer *v.* Empie, 5 Hill, 48.

Opinion of the court.

The third and last instruction given at the instance of plaintiffs, had reference to the question of adverse possession, in its relation to the statute of limitations. Its purport was that if plaintiffs' title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, *without title or claim, or color of title*, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto.

We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the Government, or in some one deriving title from the Government, State, or National. Any one in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title. Such is the rule given as recently as 1854, by the Court of Appeals of Virginia, in the case of *Kincheloe* v. *Tracewells.** The court there says: "An entry by one upon land in possession, actual or constructive of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title."†

We have thus examined the points made by the exceptions to the instructions asked by plaintiffs and given by the court. If there are points made on the instructions prayed by defendants and refused by the court not embraced in those we have discussed, they are of minor importance, and do not affect the merits of the case.

JUDGMENT AFFIRMED.

[See *supra*, p. 210, Florentine *v.* Barton. REP.]

* 11 Grattan, 605.

† Society, &c., *v.* Town of Pawlet, 4 Peters, 504; Ewing *v.* Burnett, 11 Id. 52; Angell on Limitations, § 384, 390