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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN FEBRUARY TERM 1805, AND FEBRUARY TERM 1806.

BY WILLIAM CRANCH,

CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.
CIC. DE LEGIBUS, DIAL. 1.

VOL. III.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

PRESENT AT THE FEBRUARY TERM, 1806.

Hon. JOHN MARSHALL,	Chief Justice.
" WILLIAM CUSHING,	Associate Justices.
" WILLIAM PATERSON,	
" BUSHROD WASHINGTON,	
" WILLIAM JOHNSON,	

Judge CHASE was absent the whole term, on account of ill health ; and Judge CUSHING was prevented, by indisposition, from attending until the 19th of February.

On the 12th of February 1806, the Hon. JOHN BRECKENRIDGE was sworn as Attorney-General of the United States, in the place of the Hon LEVI LINCOLN, resigned.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

B

	*PAGE
Barry, Manella *v.*	415
Bell, Hopkirk *v.*	454
Brooke, Peyton *v.*	92
Buddicum *v.* Kirk	293
Burford, Ex parte	448
Butts, Hodgson *v.*	140

C

Caldcleugh, Gordon *v.*	268
Codman *v.* Wilson	193
Cooke *v.* Graham	229
Curtiss, Strawbridge *v.*	267

D

Dixon *v.* Ramsay	319
Dobynes *v.* United States	241
Douglass, Huidekoper *v.*	1
Douglass *v.* McAllister	298

E

Eve, Hannay *v.*	242

F

Faw *v.* Roberdeau	174
Field *v.* Milton	514

G

	*PAGE
Gadsby, Levy *v.*	180
Gordon *v.* Caldcleugh	268
Graham, Cooke *v.*	229
Grundy, United States *v.*	337

H

Hallet *v.* Jenks	210
Hannay *v.* Eve	242
Harris *v.* Johnston	311
Heth, United States *v.*	399
Hodgson *v.* Butts	140
Hooe, United States *v.*	73
Hopkirk *v.* Bell	454
Huidekoper *v.* Douglass	1

J

Jackson, Winchester *v.*	515
Jenks, Hallet *v.*	210
Johnston, Harris *v.*	311

K

Kirk, Buddicum *v.*	293
Knox, Sands *v.*	499
Knox *v.* Summers	496

L

Lambert *v.* Paine	97

*PAGE

Law, Ray *v*..... 179
Lawrason *v*. Mason..... 492
Levy *v*. Gadsby..... 180

M

McAllister, Douglass *v*..... 298
McFerran *v*. Taylor..... 270
Maley *v*. Shattuck..... 458
Manella *v*. Barry..... 415
Marine Ins. Co. *v*. Tucker..... 357
Mason, Lawrason *v*..... 492
Milledge, Milligan *v*..... 220
Milligan *v*. Milledge..... 220
Milton, Field *v*..... 514
Montalet *v*. Murray..... 249
More, United States *v*..... 159
Murray, Montalet *v*..... 249

N

Negro London, Scott *v*..... 324

P

Paine, Lambert *v*..... 97
Peyton *v*. Brooke..... 92

R

Ramsay, Dixon *v*..... 319
Randolph *v*. Ware..... 503
Ray *v*. Law..... 179
Roberdeau, Faw *v*..... 174

S

Sands *v*. Knox..... 449

*PAGE

Scott *v*. Negro London..... 324
Shattuck, Maley *v*..... 458
Silsby *v*. Young..... 249
Simms *v*. Slacum..... 300
Slacum, Simms *v*..... 300
Speed, Wilson *v*..... 283
Strawbridge *v*. Curtiss..... 267
Summers, Knox *v*..... 496

T

Taylor, McFerran *v*..... 270
Tucker, Marine Ins. Co. *v*..... 357

U

United States, Dobynes *v*..... 241
United States *v*. Grundy..... 337
United States *v*. Heth..... 339
United States *v*. Hooe..... 73
United States *v*. More..... 159

W

Ware, Randolph *v*..... 503
Wilson *v*. Codman..... 193
Wilson *v*. Marine Ins. Co..... 187
Wilson *v*. Speed..... 283
Winchester *v*. Jackson..... 515
Wise *v*. Withers..... 331
Withers, Wise *v*..... 331

Y

Young, Silsby *v*..... 249

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

A

		*PAGE
Adams *v.* Savage	6 Mod. 134	198, 322
Aguilar *v.* Rodgers	7 T. R. 421	374
Attorney-General *v.* Freeman	Hardr. 101	360

B

Bailis *v.* Gale	2 Ves. 48	112
Balfour *v.* Meade	1 Wash. C. C. 18	45
Barry *v.* Edgeworth	2 P. Wms. 523	111
Beachcroft *v.* Beachcroft	2 Vern. 690	118
Beatson *v.* Haworth	6 T. R. 531	370, 378
Bempde *v.* Johnstone	3 Ves. Jr. 200	320
Bernard *v.* Saul	1 Str. 498	184
Betsey, The	1 Rob. 18	480
Betty Cathcart, The	1 Rob. 184	377
Blenkinson *v.* Iles	2 Ld. Raym. 1544	497
Bowes *v.* Blackett	Cowp. 235	102
Bowman *v.* Milbanke	1 Lev. 130	118
Bridgewater *v.* Bolton	1 Salk. 236	110
Bright *v.* Eynon	1 Burr. 395	304
Bristow *v.* Wright	2 Doug. 665	199
Bruce *v.* Bruce	2 Bos. & Pul. 229, 230	320
Burrows *v.* Jemino	2 Str. 498	184

C

Calder *v.* Bull	3 Dall. 386	399
Calvin's Case	7 Co. 2	104, 105, 106, 123
Carter *v.* Boehm	3 Burr. 1909	377
Carter *v.* Royal Ex. Assurance Co.	2 Str. 1249	388
Chapman *v.* Turner	1 Atk. 54	226

		*PAGE
Charming Betsy, The	2 Cr. 64	483, 502
Chester *v.* Painter	2 P. Wms. 335	103, 111, 116
Chinnery *v.* Blackburne	1 H. Bl. 117	146
Christie *v.* Secretan	8 T. R. 198	377
Clarke *v.* Bazadone	1 Cr. 212	170
Clarke *v.* Young	1 Cr. 181	315
Cole *v.* Rawlinson	1 Salk. 234	120
Cooke *v.* Oxley	3 T. R. 653	494
Cowslad *v.* Cely	Prec. in Ch. 83	227

D

Darwent *v.* Walton	2 Atk. 510	227
Delaney *v.* Stoddert	1 T. R. 22	381
Denn *v.* Gaskin	Cowp. 659	112
Doe *v.* Burt	1 T. R. 701	191
Doe *v.* Jones	4 T. R. 308	107, 117
Duchess of Kingston's Case	1 East P. C. 468	323

E

Englefield's Case	Moore 325	109

F

Faikney *v.* Reynous	4 Burr. 2069	183
Fenwick *v.* Sears	1 Cr. 259	320, 321
Field *v.* Biddle	2 Dall. 171	191
Fletcher *v.* Smiton	2 T. R. 656	103, 112
Floyer *v.* Edwards	Cowp. 115	183
Foster *v.* Wilmer	2 Str. 1249	378, 393, 398
Frogmorton *v.* Wright	3 Wils. 418	103, 112

G

Georgia *v.* Brailsford	3 Dall. 1	457
Gibson *v.* Fristoe	1 Call 74, 81	184
Goodwin *v.* Goodwin	1 Ves. 228	118
Goss *v.* Withers	2 Burr. 683	374
Gregory *v.* Setter	1 Dall. 193	191

H

Hall *v.* Gurney	Co. Bank. L. 337	148
Hamilton *v.* Eaton	Mart. (N. C.) 1	457
Hamilton *v.* Mendez	2 Burr. 1198	374
Hamilton *v.* Russell	1 Cr. 309	89, 148
Henshaw *v.* Marine Insurance Co.	2 Caines 274	378, 385, 390
Hilliard *v.* Cox	1 Ld. Raym. 562	322
Hodges *v.* Middleton	2 Doug. 434	112
Hogan *v.* Jackson	Cowp. 306	112
Hole *v.* Finch	2 Wils. 394	221

*PAGE

Holman *v.* Borough.....2 Salk. 658.....203, 231
Hunter *v.* Potts.....4 T. R. 184..... 320

I

Ibbotson *v.* Beckwith.....Cas. temp. Talb. 159.....111, 113

J

Jackson *v.* Vernon.....1 H. Bl. 114..... 146
Jones *v.* Ashurst.....Skin. 357.....359, 365
Jordain *v.* Lashbrooke.....7 T. R. 601..... 286
Jordan *v.* Jordan.....Esp. N. P. 105, 106..... 494

K

Kearslake *v.* Morgan.....5 T. R. 513..... 315
Kewley *v.* Ryan.....2 H. Bl. 343.....372, 381, 385
King *v.* May.....1 Doug. 193..... 203
Knight *v.* Duplessis.....2 Ves. 362..... 109

L

Lechmere *v.* Thorowgood.....3 Mod. 236..... 361
Loveacres *v.* Blight.....Cowp. 355.....102, 112

M

McMaster *v.* Shoolbred.....1 Dall. 173..... 191
McMinn *v.* Owen.....2 Esp. 237..... 374
Marbury *v.* Madison.....1 Cr. 139..... 168
Markant *v.* Twisden.....1 Eq. Cas. Ab. 211..... 118
Marsh *v.* Evans.....1 P. Wms. 668..... 254
Middlewood *v.* Blakes.....7 T. R. 162.....373, 381, 390, 397
Mills *v.* Fletcher.....1 Doug. 219.....376, 380
Moore *v.* Denn.....2 Bos. & Pul. 247..... 118
Morris *v.* Neighman.....4 Dall. 209..... 38
Moses *v.* Macferlan.....2 Burr. 1009..... 346
Murdoch *v.* Potts.....Park Ins. 299..... 390
Murry *v.* Wyse.....2 Vern. 564..... 111

O

Orr *v.* Kaines.....2 Ves. 193..... 255
Owenson *v.* Morse.....7 T. R. 64..... 316

P

Page's Case.....5 Co. 52..... 109
Page *v.* Pendleton.....Wythe 127..... 457
Perry *v.* Jackson.....4 T. R. 516..... 177
Petrie *v.* Hannay.....3 T. R. 418..... 183
Pringle *v.* Hartley.....3 Atk. 195.....374, 380
Puckford *v.* Maxwell.....6 T. R. 53..... 315

*PAGE

R

Rhodes *v.* Barnes.....1 Burr. 9..... 296
Right *v.* Sidebotham.....2 Doug. 759.....102, 112
Roberts *v.* Arthur.....2 Salk. 497..... 201
Roberts *v.* Withered.....5 Mod. 193.....340, 346, 359, 361
Ross *v.* Norvell.....1 Wash. 15..... 191
Rudgard's Case.....2 Vent. 22..... 458
Ryall *v.* Rolle.....1 Wils. 260..... 148
Ryall *v.* Rowles.....1 Ves. 361..... 144

S

Scott *v.* Hornsby.....1 Call 41..... 95
Shaw *v.* Bull.....12 Mod. 594..... 118
Shelton *v.* Barbour.....2 Wash. 64..... 191
Smith *v.* Harman.....6 Mod. 142..... 198
Spendlove *v.* Aldrich.....2 Ld. Raym. 1320..... 255
State of Georgia *v.* Brailsford.....3 Dall. 1..... 457
Stevens *v.* Cole.....Co. Bank. L. 339..... 148
Stitt *v.* Wardell.....2 Esp. 610.....372, 378, 381
Story *v.* Strettell.....1 Dall. 11..... 374
Stot *v.* Vaughan.....Marsh. Ins. 232..... 372
Strithorst *v.* Græme.....3 Wils. 145..... 176

T

Tanner *v.* Morse.....Cas. temp. Talb. 284..... 118
Tanner *v.* Wyse.....3 P. Wms. 295..... 118
Tate *v.* Wellings.....3 T. R. 538..... 184
Telfair *v.* Stead.....2 Cr. 407..... 227
Thellusson *v.* Fletcher.....1 Esp. 73..... 376
Timewell *v.* Perkins.....2 Atk. 103..... 117
Tuffnel *v.* Page.....2 Atk. 37..... 135
Twyne's Case.....3 Co. 81.....80, 89, 365

U

United States *v.* Fisher.....2 Cr. 358..... 82
United States *v.* Hamilton.....3 Dall. 17..... 449
United States *v.* King.....Wall. C. C. 13..... 88
United States *v.* La Vengeance...3 Dall. 301.....92, 174

W

Walcot *v.* Hall.....3 Vin. Sup. 432..... 257
Walton *v.* Shelly.....1 T. R. 296..... 286
Ware *v.* Hylton.....3 Dall. 199..... 457
Way *v.* Modigliani.....2 T. R. 30.....370, 378, 381, 389
Wilkins *v.* Despard.....5 T. R. 112..... 341
Williams *v.* Smith.....2 Caines 8..... 381
Wilson *v.* Mason.....1 Cr. 66..... 287

		*PAGE
Wilson *v.* Robinson	2 Lev. 91	110
Winch *v.* Keely	1 T. R. 619	202
Wooldridge *v.* Boydell	1 Doug. 16	370, 378, 381, 389
Worseley *v.* Demattos	1 Burr. 474	84
Wymark's Case	5 Co. 74	201

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1805.

HUIDEKOPER'S Lessee *v.* DOUGLASS. (*a*)

Land titles in Pennsylvania.—Holland Land Company.

Under the act of Pennsylvania, of 3d April 1792, for the sale of the vacant lands, &c., the grantee, by warrant, of a tract of land, lying north and west of the rivers Ohio and Allegheny, and Conewango creek, who by force of arms of the enemies of the United States, was prevented from settling and improving the said land, for the space of two years from the date of his warrant, but during that time, persisted in his endeavors to make such settlement and improvement, is excused from making such actual settlement as is described in the ninth section of the act, and the warrant vests in such grantee a fee-simple.

THIS was a case certified from the Circuit Court of the United States, for the district of Pennsylvania, in which the opinions of the judges of that court were opposed.

The action was an ejectment to try the title of the "Holland Company" to a very large tract of land in Pennsylvania, lying north and west of the rivers Ohio and Allegheny, and Conewango creek, purchased of that state, under the act of assembly of the 3d of April 1792 (3 Dall. Laws 209), which act is as follows, viz :

An act for the sale of the vacant lands within this commonwealth.

Whereas, the most valuable lands within the commonwealth, included within the purchase made from the native Indians, in the year 1768, have been taken up, located and appropriated *for the use of divers purchasers, at prices heretofore established by law, and those which remain unsold and unsettled, being inferior in quality or situation, cannot be sold at the same prices : And whereas, the prices fixed by law for other lands [*2

(*a*) Present, MARSHALL, Ch. J., CUSHING, PATERSON, WASHINGTON and JOHNSON, Justices.

belonging to the commonwealth are found to be so high as to discourage actual settlers from purchasing and improving the same :

§ 1. That from and after the passing of this act, the price of all the vacant lands within the limits of the purchase made of the Indians in the year 1768, and all preceding purchases, excepting always such lands as have been previously settled upon or improved, shall be reduced to the sum of fifty shillings for every hundred acres ; and the price of vacant lands within the limits of the purchase made of the Indians, in the year 1784, and lying east of Allegheny river and Conewango creek, shall be reduced to the sum of five pounds for every hundred acres thereof ; and the same shall and may be granted to any person or persons applying for the same, at the price aforesaid, in the manner and form accustomed under the laws heretofore enacted and now in force.

§ 2. That from and after the passing of this act, all other lands belonging to this commonwealth, and within the jurisdiction thereof, and laying north and west of the rivers Ohio and Allegheny, and Conewango creek, excepting such parts thereof as heretofore have been, or hereafter shall be, appropriated to any public or charitable use, shall be and are hereby offered for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of seven pounds, ten shillings, for every hundred acres thereof, with an allowance of six per centum for roads and highways, to be located, surveyed and secured to such purchasers in the manner hereinafter mentioned.

*3] *§ 3. That upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation, within the limits aforesaid, to the secretary of the land-office, which application shall contain a particular description of the lands applied for, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding four hundred acres, requiring the surveyor-general to cause the same to be surveyed for the use of the grantee, his heirs and assigns for ever, and make return thereof to the surveyor-general's office, within the term of six months next following, the grantee paying the purchase-money, and all the usual fees of the land-office.

§ 4. That the surveyor-general shall, with the approbation of the governor, divide the lands thus offered for sale, into proper and convenient districts, in such manner as he may think expedient, so that the boundaries of each district, either natural or artificial, may be known, and appoint one deputy-surveyor for each district, who shall give bond and security, as is customary with other deputy-surveyors in this commonwealth, and shall reside within, or as near as possible, to his respective district ; and every such deputy-surveyor shall, within sixty days next after his appointment, certify to the surveyor-general, the county, township and place, where such deputy-surveyor shall keep his office open, for the purpose of receiving warrants, in order that all persons who may apply for lands as aforesaid, may be duly informed thereof ; and every deputy-surveyor who shall receive any such warrant, shall make fair and clear entries thereof in a book, to be provided by him for that purpose, distinguishing therein the name of the person therein mentioned, the quantity of land, date thereof, and the day on which such deputy-surveyor shall receive the same, which book shall be open, at all seasonable hours, to every applicant, who shall be entitled to copies of any

entries therein, to be certified as such, and signed by the deputy-surveyor, the party paying one-quarter of a dollar therefor.

*§ 5. That the deputy-surveyor shall, at the reasonable request and proper cost and charges of the respective grantees, in such warrants named, proceed to survey the lands in such warrants described, as nearly as may be, according to the respective priorities of their warrants; provided, that they shall not, by virtue of any warrant, survey any tract of land, that may have been actually settled and improved, prior to the date of the entry of such warrant with the deputy-surveyor of the district, except for the owner of such settlement and improvement; and having perfected such surveys, shall enter the same in a book, to be kept by the deputy-surveyor, and to be called the survey-book; and the same book shall remain in his office, liable to be inspected by any person whatsoever who shall demand to see the same, upon the payment of eleven pence for every search; and the deputy-surveyor shall cause copies of any such survey to be made out and delivered to any person, upon the payment of one-quarter of a dollar for each copy. [*4

§ 6. That in making any survey by any deputy-surveyor, he shall not go out of his proper district to perform the same, and that every survey made by any deputy-surveyor, without his proper district, shall be void and of non effect. And the surveyor-general and his deputies, are hereby severally directed and enjoined to survey, or cause to be surveyed, the full amount of land contained and mentioned in any warrant, in one entire tract, if the same can be found, in such manner and form, as that such tract shall not contain in front on any navigable river or lake, more than one-half of the length or depth of such tract, and to conform the lines of every survey, in such manner as to form the figure or plot thereof, as nearly as circumstances will admit, to an oblong, whose length shall not be greater than twice the breadth thereof; and in case any such survey should be found to contain a greater quantity of land than is mentioned in the warrant on which it shall be made, so that such excess be not more than one-tenth of the number of acres mentioned in such warrant, besides the usual allowance for roads and highways, the return thereof shall, nevertheless, be *admitted under the warrant, provided, the party procuring such return to be made, shall forthwith pay to the receiver-general of the land-office, the price or value of such excess or overplus land, at the same rate at which he paid for the land mentioned in the warrant. [*5

§ 7. That every deputy-surveyor, to be appointed by virtue of this act, shall, within the month of February in the next year, make and return into the office of the surveyor-general, plots of every survey which he shall have made in pursuance of any warrant, connected together in one general draft, so far as they may be contiguous to each other, with the courses and distances of each line, the quantity of land contained in each survey, and the name of the person for whom the same was surveyed; and every succeeding year, he shall make a like return of the surveys made in the year preceding.

§ 8. That the deputy-surveyor of the proper district shall, upon the application of any person who has made an actual settlement and improvement on lands, lying north and west of the rivers Ohio and Allegheny and Conewango creek, and upon such person paying the legal fees, survey and

mark out the lines of the tract of land to which such person may, by conforming to the provisions of this act, become entitled by virtue of such settlement and improvement: provided, that he shall not survey more than four hundred acres for such person, and shall, in making such survey, conform himself to all the other regulations by this act prescribed.

§ 9. That no warrant or survey, to be issued or made in pursuance of this act, for lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating, at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of

*6] man, and *residing, or causing a family to reside thereon, for the space of five years next following his first settling of the same, if he or she shall so long live; and that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth, to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so often as defaults shall be made, for the time and in the manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this act: Provided always, nevertheless, that *if any such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued.*

§ 10. That the lands actually settled and improved according to the provisions of this act, to whosesoever possession they may descend or come, shall be and remain liable and chargeable for the payment of the consideration or purchase-money at the rate aforesaid, for every hundred acres, and the interest thereon, accruing from the dates of such improvements; and if such actual settler, not being hindered as aforesaid, by death, or the enemies of the United States, shall neglect to apply for a warrant, for the space of ten years after the time of passing this act, it shall and may be lawful to and for this commonwealth to grant the same lands, or any part thereof, to other, by warrants, reciting such defaults; and the grantees, complying with the regulations of this act, shall have, hold and enjoy the same, to them, their heirs and assigns; but no warrant shall be issued in pursuance of this act, until the purchase-money shall be paid to the receiver-general of the land-office.

*7] § 11. That when any *caveat* is determined by the *board of property, in manner heretofore used in this commonwealth, the patent shall, nevertheless, be stayed for the term of six months, within which time, the party against whom the determination of the board is, may enter his suit at common law, but not afterwards; and the party in whose favor the determination of the board is, shall be deemed and taken to be in possession, to all the intents and purposes of trying the title, although the other party

should be in actual possession, which supposed possession, shall, nevertheless, have no effect upon the title ; at the end of which term of six months aforesaid, if no suit is entered, a patent shall issue, according to the determination of the board, upon the applicant producing a certificate of the prothonotary of the proper county, that no suit is commenced, or if a suit is entered, a patent shall, at the determination of such suit, issue, in common form, to that party in whom the title is found by law ; and in both cases, the patent shall be and remain a full and perfect title to the lands, against all parties and privies to the said *caveat* or suit ; saving, nevertheless, to infants, *femes covert*, persons beyond sea, *non compotes mentes*, and others under disabilities, their respective rights, until twelve months after such disabilities are removed.

§ 12. That no direct taxes shall be levied, assessed or collected, for the use of this commonwealth, upon or from any of the lands or tenements lying north or west of the purchase made of the Indians, in the year 1768, or the personal estate found thereupon, for the full space or term of ten years, from and after the passing of this act.

§ 13. That the following tracts of land shall be reserved for the use of the commonwealth, that is to say, at Presqu' Isle, formed by Lake Erie, the island or peninsula which forms the harbor, and a tract extending eight miles along the shore of the lake, and three miles in breadth, so as to include the tract already surveyed by virtue of a resolution of the general assembly, and the whole of the harbor formed by the said Presqu' Isle, at the mouth of Harbor creek, which empties into the *Lake Erie, and along the shore of the lake, on both sides of said creeek, two thousand acres. [*8

§ 14. That all the lands within the triangle on Lake Erie, purchased from the United States, shall be taken and deemed, and they are hereby declared to be, within the limits of the county of Allegheny.

§ 15. That it shall and may be lawful to and for the holder and holders of any unsatisfied warrant or warrants, heretofore issued for lands, agreeably to the 7th section of the act, entitled " an act to alter and amend an act of assembly, entitled an act for opening the land office, for granting and disposing of the unappropriated lands within this state," passed on the 21st day of December, in the year 1784, to locate the quantity of land for which such unsatisfied warrant and warrants was and were granted, in any district of vacant and unappropriated land within this commonwealth ; provided, the owner or owners of such unsatisfied warrants shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Allegheny river and Conewango creek, are made subject by this act, the said recited act, or any other act or acts of the general assembly, to the contrary thereof in anywise notwithstanding.

The points upon which the opinions of the judges of the court below were opposed, were certified to be as follows, viz :

1. Whether, under the act of the legislature of Pennsylvania, passed on the 3d day of April, 1792, *entitled " an act for the sale of the vacant lands within this commonwealth," the grantee, by warrant of a tract [*9 of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing

thereon from the 10th day of April 1793, the date of the said warrant, until the 1st day of January 1796, but who, during the said period, persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee?

2d. Whether a warrant for a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, granted in the year 1793, under and by virtue of the act of the legislature of Pennsylvania, entitled "an act for the sale of the vacant lands within this commonwealth," to a person who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the date of the said warrant until the 1st day of January 1796, but who during the said period, persisted in his endeavors to make such settlement and residence, vests any, and if any, what title, in or to the said land, unless the said grantee shall, after the said prevention ceases, commence, and within the space of two years thereafter, clear, fence and cultivate at least two acres for every hundred acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling the same, the said grantee being yet in full life?

3d. Whether a grantee in such a warrant as aforesaid, who has failed to make such settlement as the enacting clause of the said 9th section requires, and who is not within the benefit of the proviso, has thereby forfeited his
*10] right and title to the said land, until the commonwealth has *taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the possession of said land, in ejectment against a person, who, at any time after two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land, and has ever since been in possession of the same?

Dallas, for the plaintiff, contended for three general propositions.

1. That a warrantee (meaning thereby a person claiming under a warrant from the commonwealth) who has been prevented, by force of arms of the enemies of the United States, from improving, settling and residing on the land, but has persisted in his endeavors to do so, during two years from the date of his warrant, is forever and totally released, by the operation of the proviso, from the obligation of making the improvement, settlement and residence described in the enacting clause of the 9th section of the law.

2. If not for ever and totally excused, under the specified circumstances, yet the warrant vests in such warrantee and his heirs, a title to the land under one of three aspects: 1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavors to accomplish an improvement, settlement and residence, although his endeavors should not be successful: 2d. Provided he accomplishes the settlement and improvement, within two years, and the residence within five years, after the prevention by hostilities ceased: 3d. Provided he has accomplished the improvement, settlement and residence, at any time before the commonwealth has taken advantage of the forfeiture.

3. The inceptive title of the warrantee gives a right of possession, which

can only be defeated by an act of the commonwealth, taking advantage of a forfeiture for non-compliance with the terms of the grant.

I. In order to understand the act of 1792, it will be necessary to take a view of the situation of the state of *Pennsylvania at that period. [*11
Her finances were embarrassed, and an Indian war existed on her frontiers. Hence, she had two great objects in view, the protection of those frontiers, and the accession of wealth to her treasury. To accomplish the first, no means were so sure as to establish on the frontiers a firm, hardy and vigilant population, bound by their dearest interests to watch and repel the predatory incursions of the Indians. And to attain the second, no means presented themselves so obviously as the sale of the vacant lands.

Although the war was raging, at the time when the act passed, yet negotiations were pending, and peace was expected. The general provisions of the act, therefore, especially those which relate to settlement and residence, are predicated upon a state of peace, while the legislature also took care to provide for a state of war.

The extent of that provision is the principal subject of litigation. Without resorting to the words, but considering the law as a contract, what are the motives and ideas which may be reasonably ascribed to the parties?

1st. As to the state. 1. The settlement might be prevented by two means; public calamity, or negligence in the grantee. For the one, it was just that the state should answer; for the other, the grantee. 2. It was unreasonable, for the state to require the same from him who should be prevented, as from him who should not be prevented from making a settlement. A mere enlargement of time, diminishes, but does not obviate the objection. It does not put both on an equal footing. The man who has spent years in fighting and toiling to obtain a settlement, is still to do just as much as the man who has stayed at home by his fire-side till war is over, and then purchases his warrant. The former has no credit for his toil and wounds. This construction is evidently contrary to the spirit of the act, which was to *gain hardy adventurers, who should join their exer- [*12
tions to those of the state and of the United States, to subdue the Indians; for it totally destroys all motive for such exertions. The state, therefore, might say, and, without doubt, meant to say, to the war warrantee, that a persistence in the endeavor to settle, during the period prescribed, shall be accepted in lieu of actual settlement. That the man who has actually accomplished the settlement and residence, in time of peace, and he who shall have persisted in his endeavors to settle and reside for the stipulated time, during a state of war, but who has been prevented by the enemy from accomplishing his settlement and residence, are equally meritorious, and shall be put on the same footing.

2d. As to the warrantee. Would he purchase, during the war, if he was liable to forfeit his warrant although he persists during the limited time, and if all his expenses and dangers were to go for nothing, and if, at the end of the war, he would be in the same situation as if he had remained at home?

The situation of the state, then, called for money, population and improvement. The means were a sale of the land, subject to settlement, if not prevented by a public calamity. The words and spirit of the act are conformable to these ideas. The title is, for the sale of vacant lands. The

preamble states, that the prices at which they have been heretofore held were found so high as to discourage actual settlers from purchasing and improving. The second and third sections contain the offer of the lands for sale, and the ninth describes the terms.

On this overture, companies and individuals became purchasers. Among the rest, the Holland Company, in April 1792, and August 1793, purchased
*13] 1162 tracts of 400 acres each, which, by losses upon re-surveys, *and bounties to actual settlers, are reduced to 776 tracts, which have cost the company $222,071.10 for purchase-money, and (up to the year 1802) $202,000 in expenses, endeavors to settle, and actual improvements. The Population Company also expended nearly the same amount. The consequence was, that the public treasury was supplied; a bank was established, which furnishes revenues adequate to the whole expenses of the government, so that no taxes have been since imposed; industry and improvements have been stimulated, and the state has advanced rapidly in wealth and prosperity. The persistence and prevention of the Holland company are admitted.

The treaty made with the Indians in 1795, is considered as the epoch from which the two and the five years mentioned in the 9th section begin to run. But there was still further prevention by distance, by the season (for the treaty was ratified in the winter), by intruders (who were pushing in upon the lands, under pretence that the warrants were forfeited by want of settlement within the two years), and by the construction of the act given by the board of property. How, then, are the terms of the contract to be expounded? Not by the words (for they are inconclusive and repugnant), but by the nature of the transaction. By the 3d section, a fee-simple is granted; but the 9th section annexes a condition precedent. The warrant shall not vest any title "unless," &c.

The nature of the transaction, however, gives a possessory title, and an usufructuary property, at least, for the two and the five years, else the warrantee could not go and make a settlement. It is always spoken of in the act as a grant. It may be devised, sold, descend, be taken in execution, &c. By the 9th section, what is given can only be divested by default. The whole estate does not remain in the grantor, until performance of the condition.

*But the settlement and residence for the time mentioned, is not a
*14] *sine qua non* to vest an absolute title. There are cases within the 9th section, in which the title becomes absolute, although the residence shall not have been completed. The words of the act are, "reside thereon for the space of five years next following his first settling of the same, if he shall so long live." If the warrantee, having begun his settlement, should die, before the expiration of the five years, his title is complete. So, if he puts a family on the land to reside, and dies before the end of the term, and the family quits its residence before the expiration of the five years, the title is absolute. So, if an actual settler shall, by force of arms of the enemies of the United States, be driven from his settlement. And so (as we say), "if any grantee shall," by like force, "be prevented from making an actual settlement, and shall persist in his endeavors to make such actual settlement," during the time allowed for making the same, that is, for two years, "he and his heirs shall be entitled to have and to hold the said lands, in the same

manner as if the actual settlement had been made and continued." In each of these cases, the condition is released. If the legislature meant anything less, words were not wanting in which to express their ideas, and here was an opportunity of using them.

The particular words of the proviso are important. "If any grantee shall be prevented:" this implies an attempt and failure: "and shall persist," implying still the want of success: "in his endeavors;" still holding up the idea that the thing is not accomplished; "to make," not, until he make, not persist to make, but persist in his endeavors to make, implying a continued attempt, not a performance. "Shall be entitled to have and to hold, in the same manner *as if*." Here the words *as if*, necessarily imply that the thing itself is not done. The first part of the section gives the lands, if the thing is done, but the proviso also gives it, in a certain case, if it be not done, in the same manner as if it had been done. They who contend that the persistence must continue, until the object is accomplished, make the legislature speak this absurd language: persist until *the settlement has been made, and you shall have the land in the same manner as if the settlement had been made. But we make them speak much more rationally. If you are prevented by the enemy from making the settlement, but persist in your endeavors for two years, you shall have the land, in the same manner as if the settlement had been made. We will take your endeavors for success. If settlement and residence were necessary, in all cases, the proviso is useless. If the legislature meant, by the proviso, only to extend the time, they have been very unfortunate in their language, for there is no expression which indicates such an idea, and it is contradicted by the preceding part of the section, by which the commonwealth reserve the right to grant new warrants as often as defaults shall be made, *for the time*, and in the manner aforesaid. No time is expressed in the act, but the two and the five years. If the time is to be enlarged, who shall say, how long? There is no provision for trying by a jury the question, what is a reasonable time. [*15

The act contemplates but two cases. An actual settlement, within the time, or a prevention, during the time, by the act of God, or of the public enemy. In both cases, the title was to be absolute. The same reason that releases the warrantee who dies, applies more strongly to the warrantee prevented by the enemy, and the 10th section puts them both on the same footing.

Let us consider what is required by the 9th section, and what is relinquished by the proviso? 1. It requires, within two years, a settlement, by clearing two acres for every hundred, by erecting a habitation and by residing five years. Here is evidently a confusion of terms, by requiring a settlement, consisting of five years' residence, to be accomplished in two years. *There are also other absurdities in the same section, equally glaring. Thus, it is declared, that in default of such actual settlement, the commonwealth may issue new warrants to other actual settlers; and that if such actual settler shall be prevented from making such actual settlement, he shall be entitled in the same manner as if the actual settlement had been made. [*16

2. What is relinquished. The condition of residence is released by the death of the warrantee, and prevention releases both residence and settlement. The enacting part of the section may be considered as a covenant to settle; and the proviso as a covenant to convey in case of prevention.

II. If persistence for two years does not for ever and totally release the condition of settlement, yet the warrant vests a title, under one of three aspects.

1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavors to accomplish an improvement, settlement and residence, although his endeavors should not be successful.

To suppose the title to be forfeited, although an accomplishment of the condition has been prevented by the enemy, is to make the proviso of no use whatever. But giving a use to the proviso, and supposing it to mean an extension of time, everything is at sea. Every case would have a different rule, and decisions would vary with every jury. No case could be decided without a lawsuit. But if you allow the warrantee to gain a title by persisting, during the war, and for a reasonable time after, although without success, you render the law intelligible, and give effect to every part. *This construction comports with the peculiar expressions of the act, and is justified by the nature and equity of the case.

*17]

Endeavors during war would be more expensive than success in time of peace, and equally beneficial to the state. By this means also, you put the war-warrantee and the peace-warrantee upon an equal footing. But the legislature fixed a positive period, and left nothing to discretion. Who shall change the nature of the contract? Who give discretion to courts and juries? Who substitute endeavor for performance, in reference to any other time than the legislature contemplated?

2d. The second aspect is, provided he persists, after the war, and accomplishes the improvement in two years, and continues the residence for five years from the cessation of the prevention.

This is what is contended for on the other side, but this is not the express contract which fixes the time, as well as the acts which are to be done. It is not a contract which can be implied; for an undertaking to act in two years from the date of the warrant, does not imply an undertaking to act in two years after a war, which may be fifty years from the date of the warrant. The proviso contemplates no new act, no new epoch, but under the specified circumstances gives a title as if the act had been done in the time prescribed. This construction would make the proviso a mere mockery. It would place the warrantee, who had toiled through the dangers of the war, at a heavy expense, in no better situation than if he had used no exertions at all.

3d. The third aspect is, provided he persists during and after the war, and perform the conditions at any *time before the commonwealth takes advantage of the forfeiture.

*18]

This regards the case as a condition subsequent, the estate continuing after the contingency, until the grantor enters and claims. But this is contrary to the words, which call for endeavors, not performance. This construction destroys all limitation of time.

Upon the whole, there is no clear, safe, equitable and satisfactory construction, but that which supposes the condition to be released by the impossibility of performance within the time prescribed.

III. The inceptive title of the warrantee gives a right of possession, which can only be defeated by an act of the state.

All forfeitures are to be construed strictly. And where compensation

can be made, they are never enforced in equity. The forfeiture claimed is entitled to no favor. The contract itself was ambiguous, and rendered more so by official misinterpretations. The price has been paid. Time, labor and money have been expended in improvements, and attempts to settle. The prevention has been by a public calamity, not by private negligence. The operation of the forfeiture is dishonorable to the state. She seizes the land with all their amelioration, to sell them again to a stranger. Even the state herself, therefore, ought not to be countenanced in taking advantage of the forfeiture.

*But what pretext can justify a stranger in intruding upon the possession of the warrantee? This is the case of a trespasser, who thrusts himself in upon the land, pretending that the warrantee has forfeited his title. Is every person, who chooses to intrude, to be the judge whether the possessor has forfeited his title? This would encourage forcible entries and riots; riot would grow to rebellion. The peace of the commonwealth is at stake. No man can acquire a title by his own tort. [*19

But turn to the words of the act. "That in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers, for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof," &c. There must be proof of default; the party must be heard. The commonwealth *may*, not *shall*, grant new warrants.

It is said, however, that they are to be issued to other actual settlers; which gives a right to any person to enter on a forfeiture. The terms of the act, as well as the nature of the transaction, show that the case of a warrantee, and not a mere settler, is meant. It supposes a new warrant, where an old one had issued. Actual settler, is a *descriptio personæ*. It does not mean a man who has completed, but who contemplates, an actual settlement. This appears from the manner in which the terms actual settler are used in the preamble, *and in the 5th, 8th and 10th sections of the act, and even in the 9th section itself. [*20

The commonwealth may grant new warrants to other actual settlers. Other than whom? Other than the actual settlers who had failed to make an actual settlement in the manner described in the beginning of that section. It means a person who had purchased with an intention, or under a stipulation, to make an actual settlement. There is no express authority given to any person to enter on a warrantee. Can it be implied, by saying that the state may grant to another actual settler? Her act must constitute the forfeiture of the old title: her act must grant the new.

E. Tilghman, on the same side, confined his argument principally to the support of the proposition, that a persistence for two years, after the date of the warrant, and in time of war, in endeavors to make a settlement, gave the same title as if the actual settlement had been made and continued.

He contended, that revenue and population were equally the objects of the legislature in passing the act. It ought not, therefore, to be construed with a sole view to population. The act, like a will, ought to be so construed as to carry into effect th intention of the legislature, and to give operation to all its parts.

To understand the true meaning of the proviso of the 9th section, it is necessary to distinguish between settlement and residence. The warrantee is, by the first part of the section, to make a settlement, "by clearing, fencing and cultivating at least two acres for every hundred, and by *21] *erecting thereon a messuage for the habitation of man." Thus much was to be done in two years, and this may with propriety be called "actual settlement." But this alone was not sufficient to give a title. The party must also "reside, or cause a family to reside, thereon, five years next following his first settling of the same, if he shall so long live." Residence is superadded to settlement, which is the principal requisite.

It is absurd to say, that residence is comprehended in settlement, because settlement must be within two years from the date of the warrant; but the residence is to continue five years following the first settlement. The smaller number (2) cannot include the larger number (5), which must be the case, if residence is a part of settlement. It certainly is not. But it is a requisite additional to settlement, and which must be complied with, to complete the title. Settlement may be begun and completed in the last three months of the two years. Residence, the other requisite, is to commence with the inception of the settlement, and to continue five years, unless the party die: so that settlement is one thing, and residence another. Unless they are different, how can the one commence from the other? If residence be a part of settlement, and not a distinct member of the condition, the death of the grantee, within two years from the date of the warrant, would vest a complete title. A construction plainly inconsistent with the views of the legisture.

That residence is considered a distinct part of the condition, is evident from other parts of the section. Thus it says: "And that in default of such actual settlement and residence, it shall and may be lawful," &c. Again, "reciting the original warrants, and that actual settlements and residence have not been made."

The *proviso* also considers settlement and residence as distinct. The party is to persist in endeavors to make an actual settlement; and if he does so persist, is to hold and enjoy in the same manner as if the actual settle- *22] ment had been made and continued. If actual *settlement included residence, why say continued? Settlement is considered as a distinct thing, separately existing, and continued by residence. If the settlement is not made in two years, in peace, is there not a forfeiture? If so, residence is another essential. If residence is a part of settlement, it must be had in two years; but residence is to be five years from the first settlement. Then, if you abolish two years, as incompatible with five years, you set all at large; no time is prescribed for either settlement or residence; because residence is not to be five years from the date of the warrant, but from the first settlement, which may, on this construction, be at any time. There is no means to reconcile the whole, but to construe settlement to be one thing, to be done in two years from the date of the warrant; and residence to be another, to continue five years from the first settling. Such, then, were the requisites to a complete title.

But at the time of making the act, there was an Indian war, which might probably last more than two years. It was necessary, then, for the legislature to do justice as well to the warrantee who paid money, as to the actual

settler: one of whom might, by the continuance of the war, be prevented from commencing and completing settlement and residence; the other be driven from settlement and residence actually commenced. The provision is, that if the actual settler (with or without warrant) shall be driven therefrom, or the warrantee be prevented from making such actual settlement, "and shall persist in his endeavors to make such actual settlement *as aforesaid*," "then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

The plaintiff and defendant are at issue upon a great question: Is the condition to be performed, according to the terms of the enacting clause, at some time? *If this is determined in the negative, in what time is the matter substituted in lieu of what was required by the enacting clause, to be performed? These questions are distinct and independent of each other; not to be blended together in argument, and if blended, will introduce the utmost confusion. [*23

In considering the proviso, it is natural to inquire, 1st. Who are the objects of relief against the condition? 2d. On what terms, is such relief to be granted? and 3d. What is that relief?

1st. The objects of relief under the proviso certainly are persons not having done what was necessary under the former part of the section, to complete their titles; who had not united settlement and residence; settlers without warrant; and warrantees, having commenced settlements or not.

2d. If any such "actual settler, or any grantee shall be prevented, by force of arms of the enemies of the United States, from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case,

3d. "He and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

The terms of relief are, persisting in endeavors to make such actual settlement as aforesaid. The whole question is as to the legitimate meaning of "persist in his endeavors." For if the grantee or actual settler complies with the proper construction as to the thing intended to be done, the condition is done away.

It is contended, that the party must persist, until settlement and residence are actually achieved. This we say is utterly inconsistent with the letter and spirit of the proviso. Had the legislature intended this, *it would have been so expressed, and might have been readily done, by a declaration that, during war, time should not run against the warrantee or settler. Instead of which, a substitute for settlement and residence is plainly introduced. That substitute is a persisting in endeavors to make such actual settlement as aforesaid. Instead of requiring a persisting in endeavors, until settlement and residence actually obtained or made, the law contemplates something short of settlement and residence, which, being performed, was to operate in the same manner as if the actual settlement and residence had been made and continued. Such actual settlement, in the proviso, is considered as distinct from residence; and to it, as such, the proviso relates. And if the party persists in his endeavors to make such actual set- [*24

tlement as aforesaid (that is, clear, fence, cultivate and build, not reside), then he is to hold in the same manner as if the actual settlement had been made and continued; to wit, by residence. In the proviso, residence is nowhere contemplated, except where the effect of persistence in endeavors is declared to be, to hold "in the same manner as if," &c. The legislature having thus plainly considered settlement and residence as different things, have declared that persistence in endeavors to attain the one, shall be equivalent to the actual accomplishment of both. The proviso affords relief on the ground, and solely on the ground, that settlement and residence were not had.

How strange is *their* construction! If the actual settler or warrantee persists in his endeavors, until he actually makes a settlement, with residence, he shall hold the land as if actual settlement had been made and continued. This renders all the words "in the same manner as if," &c., entirely nugatory. This is not the case to which the proviso applies. It applies only to a case in which settlement and residence had not taken place, but in which, from a proper consideration of circumstances, the party was to hold as if, &c., looking to something other which is to be *as if*. *Nullum simile est idem.* As if, does not mean, the same.

*25] *Persisting in endeavors is all the proviso requires. If unsuccessful, they are still endeavors, within the meaning of the proviso. Attaining the end, is not the only evidence of persisting in endeavors; else all endeavors must necessarily be successful, as, without success, on their principles, there cannot be no endeavors persisted in. If attaining the end was to be absolutely necessary, why did not the legislature expressly prescribe the end and not the means? Or rather, why, having already prescribed the end, in the former part of the section, did they say anything of the endeavor (the means) in the proviso?

By the construction on the other side, the only benefit the grantee or actual settler gains from the proviso, is time, during the actual existence of the impossibility to perform; so that, if the then raging war should last ten years, and the party persist in his endeavors the whole time, his title would still be incomplete, without actual settlement and residence. The legislature never intended to impose such ruinous hardships on persons whose money they had taken, or on actual settlers. If *time* only was their object, why not give it absolutely, during the war, without requiring a circumstance that must be attended with great expense and trouble to the party? Why make endeavors and persistence necessary, unless intended as a substitute for settlement and residence?

On these principles, the proviso does the party more harm than good; it was better for him, at once, to fall a victim to the strict letter of the condition. Had these principles been fairly and clearly avowed and stated in the act, would any man, *flagrante bello*, have paid his money for warrants? No. The state would have remained involved in debt, until the close of the war.

But it is said, you are not to persist in your endeavors during war, but you are to begin, after the peace. There is nothing of this sort in the law; and why, after peace, is persistence required? Why should not the enacting

*26] *clause, after some certain time, recur in full force, if this was the intention? Why not say, that during war, and for such a time after

peace, the condition shall not run against you? Surely, the persistance in endeavors to make a settlement refers to the time during which a hindrance existed; and cannot apply to a time when there would be nothing to hinder the compassing the thing itself.

What is the relief granted? They say, it is only time; a suspension of the forfeiture, during the war. There is no idea of this kind held up in the law. Instead of dispensing with a forfeiture, it dispenses with the condition. It declares, that if something is done, it shall amount to a performance of the condition, and the party shall hold in the same manner as if the condition itself had been performed. It is not enough to say, that the general intention and spirit of the law is only to suspend the forfeiture for a time. Such spirit and intention must be shown and extracted from the bowels of the act.

By our construction, viz., that two years' persistence from the date of the warrant gives a complete title, everything is rendered intelligible and consistent, and every word of the act has its proper meaning and effect. But upon theirs, all is confusion and inconsistency. They confound the larger with the smaller number; they make the legislature speak without any meaning, and they reject whole passages of the law.

If it is settled, that persistence in endeavors to make actual settlement, is a performance of the condition, how long is such persistence to be? Surely, two years only from the date of the warrant, that being the time within which, by the enacting clause, the settlement is to be made, and as persistence is a substitute for settlement, must be for the same term, and not longer.

*The act affords no other terms, no other rule of construction. Persistence cannot apply to the five years' residence, because there can be no residence without settlement; and when there had been a fruitless perseverance, for two years, in endeavors to attain a settlement, there cannot, in the nature of things, be a persistence to attain residence; for settlement being out of the question, there cannot be residence, which presupposes settlement, and which cannot exist without settlement. [*27

Besides, the proviso excludes all ideas of endeavor being applied to residence; they are attached to settlement, and are to operate as if actual settlement had been made and continued. Consequently, endeavors are only to be commensurate with the time required for settlement, viz., two years from the date of the warrant.

McKean (Attorney-General of Pennsylvania), contrà.—The defeat of Harmer in 1790, and of St. Clair in 1791, show that the power of the United States, aided by that of Pennsylvania, was insufficient to protect that part of the country. The view of the legislature, therefore, was the settlement, not the sale of the lands. They reduced the price from $80 to $20 per 100 acres. Settlement was not a condition subsequent, but precedent; or rather, it was a part of the consideration of the sale. With the same view, the legislature reduced the size of the tracts from 1000 to 400 acres, so that on every tract of 400 acres they might have a soldier. It was not their intention, that a large tract should be purchased by any one person or body of men. They meant to have a family upon every tract of 400 acres. The Holland Company purchased 1162 tracts, which was to produce 1162 soldiers, dis

tributed among the same number of tracts. The object was, that the country should be settled, during the war, if possible, so as to form a barrier against the incursions of the Indians. But it is said, a peace was in contemplation. If so, why did they enact the proviso? why stipulate for immediate settlement? why oblige purchasers to persist in their endeavors? Immediate settlement was the object; and if so, they could not mean to limit the
*28] perseverance to *two years; they meant a perseverance as long as there was any obstacle. Everything in the act shows this to be their meaning.

The preamble states that the price at which they had been held was so high as to discourage, not purchasers, but actual settlers. The 2d section offers the lands "for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled." The 3d section declares, that "upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation, within the limits aforesaid, to the secretary of the land-office, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding 400 acres, requiring the surveyor to cause the same to be surveyed for the use of the grantee, his heirs and assigns for ever." The 5th section prohibits the deputy-surveyor, by virtue of any warrant, to survey any tract of land that may have been actually settled and improved, prior to the date of the entry of such warrant with the deputy-surveyor of the district, except for the owner of such settlement and improvement. The 8th section authorizes the deputy-surveyor, upon application of any person who has made an actual settlement and improvement, to survey and mark out the lines of the tract to which such person may, by conforming to the provisions of this act, become entitled, by virtue of such settlement and improvement, provided it does not exceed 400 acres. The 10th section provides, that the lands thus actually settled and improved, according to the provisions of this act, shall remain liable for the purchase-money and interest from the dates of the improvements. And if such actual settler, not being hindered as aforesaid by death, or the enemies of the United States, shall
*29] neglect to apply for a warrant, in ten years after the passing *of this act, the commonwealth may grant the same lands to others, by warrants reciting such defaults.

The 9th section contains a condition precedent, and if it be not strictly complied with, the purchaser has not title. It is a part of the contract, made with his eyes open. The act must be construed as a contract. The several parts must be considered together. The second and third must refer to the ninth section, and be controlled by it.

What is a condition precedent? It is a condition to be performed, before the estate can vest. As, if a man grant that if A. pay 100 marks before such a day, he shall have the land. No title will vest, until the 100 marks are paid.

It has been considered as a condition precedent, by every judge who has passed sentence upon it. Thus, Judge Yeates, in giving his opinion in the case of the *mandamus*, says, "It is admitted on all sides, that the terms of actual settlement and residence are, in the first place, precedent conditions to the vesting of absolute estates in these lands, and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in

the case of warrant-holders or actual settlers."(*a*) The condition is not dispensed with but in *the case of prevention by death, or by force of arms of the enemies of the United States. The question here arises, [*30

(*a*) This question has been agitated in a variety of forms, in the state of Pennsylvania, and a great degree of sensibility is said to have been excited on the subject. In the year 1800, a rule was obtained in the supreme court of Pennsylvania, by the Holland Company, upon the secretary of the land-office, to show cause why a *mandamus* should not be awarded, commanding him to prepare and deliver patents for various tracts of land, for which they had obtained warrants, under the act of April 3d, 1792. The judges delivered their opinions in the following terms :[1]

SHIPPEN, Ch. J.—The legislature, by the act of 3d April 1792, meant to sell the remaining lands of the state, particularly those lying on the north and west of the rivers Ohio and Allegheny. The consideration-money was to be paid, on issuing the warrants. They had, likewise, another subject, namely, that, if possible, the lands should be settled by improvers. The latter terms, however, were not to be exacted from the grantees, at all events. The act passed at a time when hostilities existed on the part of the Indian tribes. It was uncertain, when they would cease; the legislature, therefore, contemplated that warrants might be taken out, during the existence of these hostilities, which might continue so long as to make it impossible for the warrantees to make the settlements required, for a length of time; not, perhaps, until these hostilities should entirely cease. Yet, they make no provisions that the settlements should be made within a reasonable time after the peace; but expressly within two years after the dates of the warrants. As, however, they wished to sell the lands, and were to receive the consideration-money immediately, it would have been unreasonable, and probably, have defeated their views in selling, to require settlements to be made on each tract of four hundred acres, houses to be built, and lands to be cleared, in case such acts should be rendered impossible by the continuance of the Indian war. They therefore, make the proviso, which is the subject of the present dispute, in the following words: "Provided always, nevertheless, that if any such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

When were such actual settlements to be made? The same section of the act which contains the above proviso, gives a direct and unequivocal answer to this question, "within the space of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force or reasonable dread of the enemies of the United States, and it was evident, that the parties had used their best endeavors to effect the settlement, then, by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with, and their title to the lands was complete, and patents might issue accordingly. It is contended, that the words "persist in their endeavors," in the proviso, should be extended to mean, that if, within the two years, they should be prevented, by the Indian hostilities, from making the settlement, yet, when they should be no longer prevented by those hostilities, as by a treaty of peace, it was incumbent on them then to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms (and they would not, perhaps, have been unreasonable), but they have not done so: they have expressly confined the time of making such settlements to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for, from the words they have used, in which there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made

[1] Commonwealth *v.* Coxe, 4 Dall. 170.

is the prevention and perseverance for two years equivalent to a performance of the condition? Is the will to be taken for the deed?

*31] *What is the settlement intended? We say, it includes five years' residence. The proviso speaks of "such actual settlement as afore-

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use of the word "endeavors," which supposes a possibility, at least, if not a probability, as things then stood, of those endeavors failing, on account of the hostilities, and would, therefore, have expressly exacted actual settlements to be made, when the purchasers should no longer run any risk in making them.

The state having received the consideration-money, and required a settlement within two years, if not prevented by enemies; and in that case, dispensing with the condition of settlement and residence, and declaring that their title shall be then good and as effectual, as if the settlement had been made and continued, I cannot conceive they could mean to exact that settlement, at any future indefinite time. And although it is said they meant that condition to be indispensable, and that it must be complied with in a reasonable time, we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves.

It is urged, that the main view of the legislature was to get the country settled, and a barrier formed; this was, undoubtedly, one of their views, and for that purpose, they have given extraordinary encouragement to individual settlers; but they had, likewise evidently, another view, that of increasing the revenue of the state, by the sale of the lands. The very title of the act is "for the sale of the vacant land within this commonwealth;" this latter object they have really effected, but not by the means of the voluntary settlers; it could alone be effected by the purses of rich men, or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued upon the presumption, that the words "persist in their endeavors," relate to the grantees as well as the settlers; but in considering the words of the proviso, it may be well doubted, whether they relate to any other grantee or settler than those who have been driven from their settlements; the word "persist" applies very properly to such: the words of the proviso are, "if such actual settler, or any grantee, shall, by force of arms of the enemies of the United States, be prevented from making such settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement; then, in either case, he and his heirs shall be entitled," &c. Here, besides that the grammatical construction of referring the word "persist" to the last antecedent, is best answered, but the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence; one relates to the grantees, who, it is supposed, may be prevented from making their settlements; the other to the settlers, who are supposed to be driven away from the settlements. The latter words, as to them, are proper; as to the grantees who never began a settlement, improper. The act says, in either case, that is, if the grantees are prevented from making their settlements, or if the settlers are driven away, and persist in their endeavors to complete their settlements, in either case, they shall be entitled to the land. I will not say, this construction is entirely free from doubt; if it was, there would be an end of the question.

But taking it for granted, as it has been done at the bar, that the words relate to the grantees, as well as the settlers; yet, although inaccurate with regard to the former, it seems to me, the legislature could only mean to exact from the grantees their best endeavors to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then entitled to their patents. If the legislature really meant differently, all I can say is, that they have very unfortunately expressed their meaning.

said," thereby referring to the description of settlement in the former part of the section, that is, "by clearing, fencing and cultivating, at least *two acres for every hundred, erecting thereon a messuage for the [*32

The propriety of awarding a *mandamus* is another question, which I mean not to discuss, as I presume a decision of a majority of the court will make it unnecessary.

YEATES, J.—I have long hoped and flattered myself, that the difficulties attendant on the present motion would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision; the question has often occurred to our minds, under the act of 3d of April 1792, which has so frequently engaged our attention in our western circuits.

The Holland Company have paid to the state the consideration-money of 1162 warrants, and the surveying fees on 1048 tracts of land; besides making very considerable expenditures by their exertions, honorable to themselves, and useful to the community (as has been correctly stated), in order to effect settlements. Computing the sums advanced, the lost tracts by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands; it is said, that averaging the whole, between $230 and $240 have been expended by the company, on each tract of land they now lay claim to.

The Indian war which raged previous to, and and at the time of the passing of the law, and until the ratification of the treaty at Fort Grenville, must have thrown insurmountable bars in the way of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances; the scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions; besides, it is obvious, that settlements, in most instances, could not be made until the lands were designated and appropriated by surveys, and more especially so, where warrants have express relation to others depending on a leading warrant, which particularly locates some known spot of ground.

On the head of merit, in the Holland Land Company's sparing no expense to procure settlements, I believe, there are few dissenting voices beyond the mountains; and one would be induced to conclude, that a variety of united, equitable circumstances, would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion upon the abstract legal question; whether, if a warrant-holder, under the act of 3d of April 1792, has begun to make his actual settlement, and is prevented from completing the same, "by force of arms of the enemies of the United States, or is driven therefrom," and shall make new endeavors to complete the same, but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with and extinguished? I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons collected from the body of the act itself.

1. The motives inducing the legislature to enact the law are distinctly marked in the preamble, that "the prices fixed by law for other lands" (than those included in the Indian purchase of 1768) "are found to be so high, as to discourage actual settlers from purchasing and improving the same." 3 Dall. Laws 209.

2. "The lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, are offered for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of 7*l.* 10*s.* for every hundred acres thereof." By § 2, the price of lands is thus lowered, to encourage actual settlements.

3. By § 3, "upon the application of any person who may have settled or improved, or is desirous to settle and improve, a plantation, within the limits aforesaid, there shall be granted to him a warrant not exceeding four hundred acres," &c. The application

habitation of man, and residing, or causing a family to reside thereon, for the space of five years next following his first settling of the same."

*33] *By the proviso, no time is limited for the persisting. We say, it means persisting with effect; otherwise, the object of the legislature

granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form, all such warrants have issued.

4. By § 5, "lands actually settled and improved, prior to the date of the entry of a warrant with the deputy-surveyor of the district, shall not be surveyed thereon, except for the owner of such settlement and improvement." This marked preference of actual settlers over warrant-holders, who may have paid their money into the treasury for a particular tract, even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intentions of the legislature.

5. By § 8, "the deputy-surveyor of the district shall, upon the application of any person who has made an actual settlement and improvement on these lands, survey and mark out the lines of the tract of land, not exceeding four hundred acres for such applicant." The settlement and improvement alone are made equivalent to a warrant; which may be taken out, by § 10, ten years after the time of passing this act.

6. I found my opinion, on what I take to be the true and legitimate construction of § 9, in the close of which, is to be found the proviso, from whence spring all the doubts on the subject.

It has been said at the bar, that three different constructions have been put on this section. 1. That if the warrant-holder has been prevented by Indian hostilities, from making his settlement within two years next after the date of his warrant, and until the 22d of December 1795 (the time of ratification of Gen. Wayne's treaty), the condition of settlement and residence is extinct and gone. 2. That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavors to make an actual settlement and residence for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the conditions. And 3. That in all events, except the death of the party, the settlement and residence shall precede the vesting of the complete and absolute estate.

Though such great disagreement has obtained, as to the true meaning of this § 9, both sides agree in this, that it is worded very inaccurately, inartificially and obscurely. Thus, it will be found towards the beginning of the clause, that the words "actual settlement" are used in an extensive sense, as inclusive of residence for five years; because its constituent parts are enumerated and described to be by "clearing, fencing and cultivating at least two acres for every hundred acres, contained in one survey; erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years next following his first settling the same, if he or she shall so long live." In the middle of the clause, the same words are used in a more limited sense, and are coupled with the expressions "and residence," and in the close of the section, in the proviso, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense as they first conveyed; because the terms "such actual settlement," used in the middle of the section, are repeated in the proviso, and refer to the settlement described in the foregoing part; and the words "actual settlement as aforesaid," evidently relate to the enumeration of the qualities of such settlement. Again, the confining of the settlement to be within the space of two years next after the date of the warrant, seems a strange provision. A war with the Indian natives subsisted, when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay could not be ascertained generally.

would be totally defeated, if the war should continue two years after the date of *the warrants. Besides, the proviso would be repugnant to [*34
the enacting clause, and therefore void. It only provides that the incipient title should not be lost during the war, if thereby the settlement

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Still, I apprehend, that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction said to have been made of the proviso in this ninth section; because it rejects as wholly superfluous, and assigns no operation whatever to the subsequent expressions, "if any grantee shall persist in his endeavors," &c., which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me, to militate against the general spirit and words of the law, and distorts its great prominent features, in the passages already cited, and for other reasons which I shall subjoin. I adhere to the third construction, and will now again consider § 9. It enacts, in the first instance, that "no warrant or survey for lands, lying north and west of the rivers Ohio and Allegheny and Conewango creek, shall vest any title, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall, within the space of two years next after the date of the same, make or cause to be made, an actual settlement thereon, by clearing, &c.: provided always, nevertheless, that if any such settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid; then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

"Persist" is the correlative of attempt or endeavor, and signifies "hold on," "persevere," &c.; the beginning words of the section restrict the settlement "to be within two years next after the date of the warrant, by clearing, &c., and by residing for the space of five years, next following his first settling of the same, if he or she shall so long live," and in default thereof, annexes a penalty of forfeiture in a mode prescribed; but the proviso relieves against this penalty, if the grantee is prevented from making such settlement by force, &c., and shall persist in his endeavors to make such actual settlement as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the proviso declares, that persisting, &c., shall be equivalent to a continuation of the settlement.

To be more intelligible, I paraphrase the ninth section thus: Every warrant-holder shall cause a settlement to be made on his lands, within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture by a new warrant; nevertheless, if he shall be interrupted or obstructed by external force, from doing these acts within the limited periods, and shall afterwards persevere in his efforts, in a reasonable time after the removal of such force, until those objects are accomplished, no advantage shall be taken of him for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question proposed by the counsel of the Holland Company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground, the 11th April 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defence; and then fixes his residence as near the spot as he can consistently with his personal safety, does the warrantee lose all pretensions of equity? Or, suppose, he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the Indian hostilities; but is, at length, compelled to remove by a superior force; is all to go for nothing, and must he necessarily begin again? I answer to both queries in the negative—by no means. The proviso supplies the

was prevented. *Every person who claims under this act must be an actual settler. It does not say, that if the grantee or actual settler shall be prevented, or driven away, he shall hold; but, if prevented or driven away, and he shall persist, then he shall hold.

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chasm of successive years of residence; for every day and week he resides on the soil, he is entitled to credit in his account with the commonwealth; but upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement. Although a charity cannot take place according to the letter, yet it ought to be performed *cy pres*, and the substance pursued. 2 Vern. 266; 2 Fonbl. 221.

It has been objected, that such a contract with the state is unreasonable, and hard on those land-holders, and ought not to be insisted upon: it will be said, in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences. The only question is, whether the interpretations given of it be correct or not.

7. A due conformity to the provisions of the act is equally exacted of those who found their preference to lands on their personal labor, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of land-holders, as to actual settlement and residence, than that the claims of the former must be limited to a single plantation, and the labor be exerted by them, or under their direction; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. Addison 340-41.

It is admitted, on all sides, that the terms of actual settlement and residence are, in the first place, precedent conditions to the vesting of absolute estates in these lands; and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in the case of warrant-holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controlled by imperious circumstances, was the great criterion which marked the preference in such cases; and I have seen no reason to alter my opinion.

8. Lastly, it is obvious from the preamble, and § 2, that the settlement of the country, as well as the sale of lands, were meditated by this law; the latter, however, appears to be a secondary object with the legislature. The peopling the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute, and, I fear, tedious, in delivering my opinion, it remains for me to say a few words respecting those persons who have taken possession of part of these lands, supposing the warrants to be dead, according to the cant word of the day, and who, though not parties to this suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth, in a method prescribed by law. Innumerable mischiefs and endless confusion would ensue, from individuals taking upon themselves to judge when warrants cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in Morris's Lessee *v.* Neighman and Shaines:[1] "If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing that no person should take advantage of their own wrong, and that it does not lie in the mouths of men, like those we are speaking of, to say the warrants are dead; we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act." On the whole, I am of opinion, that the rule should be discharged.

SMITH, J.—I have had a full opportunity of considering the opinion delivered by my brother YEATES: and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent. I could not hope, indeed, to add to the argu-

[1] 4 Dall. 209.

*What is persisting? Buying implements? No. Going on the land? We do not contend for that. But still it is something, and who is to determine what it is? It is a fact which must be decided by a jury in every case; which would be productive of endless litigation.

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ment; and I am certain, I could not equal the language, which he has used on the occasion.

By the Court.—Let the rule be discharged.

Since this decision was pronounced, the subject has been revived and agitated in various interesting forms. In the winter of 1801-2, several petitions were presented by the intruders to the legislature, requesting their interposition, but the committee of the senate, to whom these petitions were referred, reported against them, and admitted, that the controversy belonged exclusively to the courts of justice. But soon after this report was made, a bill was introduced, which recited the existing controversies, gave a legislative opinion against the claim of the warrantees, and instituted an extraordinary tribunal to hear and decide between the parties. The appearance of this bill produced two remonstrances from the Holland Company, but without effect. As soon as it became a law, the attorney-general and the counsel for the company were invited to a conference with the judges, on the carrying of it into effect; but, upon mature consideration, the counsel for the company declined taking any part in the business, and assigned their reasons in a letter addressed to the judges, dated the 24th of June 1802. An issue was then formed, by the direction of the judges, which was tried at Sunbury, on the 25th of November following, before Yeates, Smith and Brackenridge, Justices.[1]

The charge, as delivered by Mr. Justice Yeates, is as follows: That the decision of the court and jury on the the present feigned issue should "settle the controversies arising from contending claims to lands north and west of the rivers Ohio and Allegheny and Conewango creek," is an event devoutly to be wished for by every good citizen. "It is indispensably necessary that the peace of that part of the state should be preserved, and complete justice done to all parties interested, as effectually as possible." (Close of preamble to the act of 2d April 1802, p. 155.) We have no hesitation in declaring, that we are not without our fears, that the good intentions of the legislature, expressed in the law under which we now sit, will not be effected. We hope we shall be happy enough to acknowledge our mistake hereafter.

It is obvious, that the validity of the claims of the warrant-holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of the 3d April 1792, considered as a solemn contract between the commonwealth and each individual. The circumstances attendant on each particular case may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act. The first question proposed to our consideration is as follows: Are warrants heretofore granted under the act of 3d April 1792, valid and effectual in law, against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants, under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence required by the said act, at any time before the date of such warrants respectively, or within two years after?

It will be proper here to observe, that on the motion for the *mandamus* to the late secretary of the land-office, at the instance of the Holland Company, the members of this court, after great consideration of the subject, were divided in their opinions. The Chief Justice seemed to be of opinion, that if a warrantee was, "by force of arms of the enemies of the United States, prevented from making an actual settlement, as described in the act, or was driven therefrom, and should persist in his endeavors to make such actual settlement thereafter," it would amount to a performance of the condition in law. Two of us (Yeates and Smith) thought, that in all events, except the death of

[1] Attorney-General *v.* The Grantees, 4 Dall. 237.

*When the prevention ceased, they were to settle in a reasonable time; otherwise the purchaser of 1793 would be in a better situation than the purchaser of 1796, because the former would get his title, without the condition of settlement.

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the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant-holder should cause a settlement to be made on his lands, within two years next after the date of the warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture, by a new warrant; but if, nevertheless, he should be interrupted or obstructed by force of the enemy from doing those acts, within the limited periods, and shall afterwards persevere in his efforts, in a reasonable time after the removal of such force, until these objects should be accomplished, no advantage shall be taken of him for the want of a successive continuation of his settlement." To this opinion, Judge BRACKENRIDGE subscribes.

It would ill become us to say, which of these constructions is entitled to a preference. It is true, that in the preamble of the act of the 2d April 1802 (p. 154), it is expressed, that "it appears from the act aforesaid (3d of April 1792), that the commonwealth regarded a full compliance with those conditions of settlement, improvement and residence, as an indispensible part of the purchase or consideration of the land itself." But it is equally certain, that the true test of title to the lands in question must be resolved into the legitimate meaning of the act of 1792, extracted *ex viceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered in bank; yet, if a different interpretation of the law shall be made by courts of competent jurisdiction in the dernier resort, I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question be, are titles under warrants issued under the law of the 3d of April 1792, for lands north and west of the rivers Ohio and Allegheny and Conewango creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the law, at any time before, or within two years after, the dates of the respective warrants, in time of profound peace, when they were not prevented from making such actual settlement, by force of arms of the enemies of the United States, or reasonable and well-grounded fear of the enemies of the savages? The answer is ready, in the language of the acts before us, and can admit of no hesitation.

"No warrant or survey for those lands shall vest any title, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall, within the space of two years next after the date of the same, make or cause to be made, an actual settlement thereon, by clearing, &c., and in default thereof, it shall and may be lawful to and for the commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof," &c. (Act of the 3d of April 1792, § 8.) For "the commonwealth regarded a full compliance with these conditions of settlement and residence as an indisputable part of the purchase or consideration of the lands so granted." (Preamble to act of 1802.)

But if the true meaning of the question be, whether under all given or supposed circumstances of peace or war, of times of perfect tranquillity or imminent danger, such warrants are not *ipso facto* void and dead in law? we are constrained to say, that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant taken out, early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the land applied for, by all the necessary preparation of provisions, implements of husbandry, laborers, cattle, &c., cannot, with any degree of personal

*If the settlement is begun within the two years, and continued for five years, it is sufficient. Until a survey, there could be no appropriation; and until appropriation, there could be no settlement, and there could be no effectual residence, unless the settlement was made *with- [*39

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safety, seat himself on the lands, within two years after the date of the warrant, and by reason of the just terror of savage hostilities. Will not the proviso in the 9th section of the act of 3d April 1792, excuse the temporary non-performance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no control? Or suppose, another warrant, depending, in point of description, on other leading warrants, which the district-surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey, until the two years were nearly expired, and the depredations of the Indians should intervene for the residue of the term, will not this also suspend the operation of the forfeiture? Nothing can be clearer to us, than that the terms of the proviso embrace and aid such cases; and independent of the strong expressions made use of, we should require strong proof to satisfy our minds that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.[1]

It is said in the books, that conditions rendered impossible by the act of God are void. Salk. 170; 2 Co. 79 *b;* Co. Litt. 206 *a;* 290 *b;* 1 Roll. Abr. 449, pl. 50; 1 Fonbl. 199. But conditions precedent must be strictly performed to make the estate vest, and though become impossible, even by the act of God, the estate will not vest; *aliter*, of conditions subsequent. 12 Mod. 183; Co. Lit. 218 *a;* 2 Vern. 339; 1 Ch. Cas. 129, 138; Salk. 231; 1 Vern. 183; 4 Mod. 66. We desire to be understood to mean, that the "prevention by force of arms of the enemies of the United States" does not, in our idea, absolutely dispense with and annul the conditions of actual settlement, improvement and residence, but that it suspends the forfeiture, by protracting the limited periods. Still, the conditions must be performed *cy pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavors to make such actual settlement, improvement and residence, until the conditions are fairly and fully complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretence of being an actual settler, shall seat himself on lands previously warranted and surveyed, within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. If the party himself is the cause wherefore the condition cannot be performed, he shall never take advantage. Co. Litt. 206; Doug. 661; 1 Rol. Abr. 454, pl. 8; Godb. 76; 5 Vin. 246, pl. 25.

We trust, that we have said enough to convey our sentiments on the first point. Our answer to the question, as proposed, is, that such warrants may or may not be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of our opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by, its own peculiar circumstances.

The second question for decision is, are the titles that have issued from the land-office, under the act aforesaid, whether by warrant or patent, good and effectual against the commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded on the certificates of two justices of the peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged,

[1] In Hazard v. Lowry, 1 Binn. 166, it was ruled, that the proviso excuses a survey, as well as a settlement; and that two years after the pacification, by General Wayne's treaty, was a reasonable time for making a settlement which had been prevented by the enemy.

in the two years. Did the legislature mean to dispense with the five years' residence, if the settlement could not be made in two years? The 9th section says, the title shall not vest, unless, &c. The only difficulty was, to
*40] limit the time within which the settlement should be made. *If the settlement is incomplete, he is still to persist. If the improvements

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the conditions of settlement, improvement and residence, required by the said act, could not be complied with?

It was stated in evidence, on the motion for the *mandamus*, and proved on this trial, that the board of property, being desirous of settling a formal mode of certificate on which patents might issue for lands north and west of the rivers Ohio and Allegheny and Conewango creek, required the opinion of Mr. Ingersoll, the then attorney-general, thereon; on due consideration, a form was afterwards adopted, on the 21st of December 1797, which was ordered to be published in the Pittsburgh Gazette, and patents issued, of course, on the prescribed form being complied with.

The received opinion of the supreme executive magistrate, the attorney-general, the board of property, and of a respectable part of the bar (whose sentiments on legal questions will always have great and deserved weight), at that day, certainly was, that if a warrant-holder was prevented by force of arms of the enemies of the United States from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavors to make such settlement, that the condition was extinguished and gone. Persisting in endeavors, was construed to mean something, attempts, essays, &c., but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some, it was thought, that the endeavors were only to be commensurate as to the time of making the actual settlement, and were tantamount, and should avail the parties "in the same manner as if the actual settlement had been made and continued."

The decisions of the court in Morris's Lessee *v.* Neighman and Shaines,[1] at Pittsburgh, May 1799, tended to make the former opinion questionable; and two of the justices of the supreme court adopted a different doctrine, in their judgment between the Holland Company and Tench Coxe.[2] In the argument in that case, it was insisted by the counsel for the plaintiffs, that the board of property, in their resolves, and the governor, by his patent, represented the commonwealth, *pro hâc vice;* and that interests vested under them which could not afterwards be defeated.

We cannot subscribe hereto. If the conditions of settlement, improvement and residence are indispensable, at all events, they become so by an act of the different branches of the legislature. The governor, who has a qualified negative in the passing of laws, cannot dispense with their injunctions; it cannot be said, that this case falls within the meaning of the 9th section of the second article of the constitution; "The governor shall have power to remit fines and forfeitures, and grant reprieves and pardons, except in case of impeachment;" it relates merely to penalties consequent on public offences: nor can it be pretended, that the board of property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the law of 1792 cannot, with any degree of justice, be ascribed to the governor or board of property for the time being. They considered themselves, in their different functions, virtually discharging their respective duties in carrying the act into execution, according to the generally received opinion of the day; they never intended to purge a forfeiture, if it had really accrued, nor to excuse the non-performance of a condition, if it had not been complied with agreeable to the public will, expressed in a legislative contract.

The rule of law is thus laid down in England. A false or partial suggestion by the grantee to the king, to the king's prejudice, whereby he is deceived, will make the grant of the king void. Hob. 229; Cro. Eliz. 632; Yelv. 48; 1 Co. 44 *a*, 51 *b;* 3 Leon. 5; 2 Hawk. 398; 3 Bl. Com. 226. But where the words are the words of the king, and

[1] 4 Dall. 209. [2] Ibid. 171.

are made, but the residence not completed, it is said, he is not to persist. But the proviso says, that if the actual settler shall be driven off, and shall persist, &c. What is he to persist to do? Something, *certainly, which remained to be done; and nothing remained to be done but to complete his residence. But if he persist in his endeavors to do this, the [*41

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it appears that he has only mistaken the law, there he shall not be said to be so deceived to the avoidance of the grant, *per* Sir SAMUEL EYRE, J., 1 Ld. Raym. 50; 6 Co. 55 *b*, 56 *b*, accord. But if any of the lands concerning which the question arises, become forfeited, by the omission of certain acts enjoined on the warrant-holders, they do not escheat to the governor for the time being, for his benefit; nor can he be prejudiced as governor by any grant thereof; they become vested in the whole body of the citizens, as the property of the commonwealth, subject to the disposition of the laws.

We are decidedly of opinion, that the patents, and the prevention certificates recited in the patents, are not conclusive against this commonwealth, or any person claiming under the act of 3d of April 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the land-officers. But we also think, that the circumstance of recital of such certificates will not, *ipso facto*, avoid and nullify the patent, if the actual settlement, improvement and residence, pointed out by the law, can be established by other proof. We must repeat on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2. Here we feel ourselves irresistibly impelled to mention a difficulty which strikes our minds forcibly. Our reflections on the subject have led us to ask ourselves this question on our pillows. What would a wise, just and independent chancellor decree on the last question? Executory contracts are the peculiar objects of chancery jurisdiction, and can be specifically enforced by chancery alone; equity forms a part of our law, says the late chief justice truly. 1 Dall. 213.

If it had appeared to such a chancellor, by the pleading or other proofs, that the purchase-money had been fully paid to the government by the individual, for a tract of land, under the law of the 3d April 1792; that times of difficulty and danger had intervened; that sums of money had been expended to effect an actual settlement, improvement and residence, which had not been accomplished fully; that by means of an unintentional mistake on the part of the state-officers in granting him his patent; not led to that mistake by any species of fraud or deception on the part of the grantee; he had been led into an error and lulled into a confidence, that the conditions of the grant had been legally complied with, and therefore, he had remitted in his endeavors therein; would not he think, that under all these circumstances, thus combined, equity would interpose and mitigate the rigid law of forfeiture, by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the United States, and peace with the Indian nations, both which rendered an immediate settlement of the frontiers, in some measure, less necessary than heretofore?

But it is not submitted to us to draw the line of property to these lands; they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated. We are confined to the wager, on the matters before us, and on both questions we have given you our dispassionate sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess and feel an ardent desire that peace and tranquillity should be perserved to the most remote inhabitants of this commonwealth.

time during which he is prevented and persists, shall go to his credit. Hence, there must be a persistence for five years at least.

*42] *The warrant gave a right to enter the land, to survey it, and to make the settlement. But this right would be forfeited, under the

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The same question was again agitated in the circuit court of the United States, in April 1803, in the case of Balfour's Lessee v. Meade.[1] The charge of Judge Washington to the jury was as follows:

WASHINGTON, J.—The importance of this cause led the court to wink at some irregularities in the argument of it at the bar, which has tended to protract it to an unreasonable length. Depending on the construction of laws of the state, and particularly on that of the 3d of April 1792, it had, at first, the appearance of a difficult and very complicated case. It is not easy, at the first reading of a long statute, to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was formed on Saturday, before we parted, open, however, as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain and to understand the subject, it will be necessary to take a general view of the different sections of the act of the 3d of April 1792, upon which this cause must turn. The first section reduces the price of all vacant land, not previously settled or improved within the limits of the Indian purchase made in 1768, and all precedent purchases, to 50*s.* for every 100 acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Allegheny river and Conewango creek, to 5*l.*, to be granted to purchasers in the manner authorized by former laws. The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Allegheny and Conewango, to persons who will cultivate, improve and settle the same, or cause it to be done, at the price of 7*l.* 10*s.* per hundred acres, to be located, surveyed and secured as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by settlement, and to all except those lying north and west of the Ohio, Allegheny and Conewango, by warrant, without settlement.

The third section, referring to all the above lands, authorizes application to the secretary of the land-office by any person having settled or improved, or who was desirous to settle and improve a plantation to be particularly described, for a warrant for any quantity of land not exceeding 400 acres; which warrant is to authorize and require the surveyor-general to cause the same to be surveyed, and to make return of it, the grantee paying the purchase-money and fees of the office. The eighth section, which I notice in this place because intimately connected with the third section, directs the deputy-surveyor to survey and mark the lines of the tract upon the application of the settler. This survey, I conceive, has no other validity than to furnish the particular description, which must accompany the application at the land-office for a warrant. The fourth section, amongst other regulations, protects the title of an actual settler, against a warrant entered with the deputy-surveyor posterior to such actual settlement.

The ninth section, referring exclusively to the lands north and west of the Ohio, Allegheny and Conewango, declares, "that no warrant or survey of lands within that district shall give a title, unless the grantee has, prior to the date of the warrant, made or caused to be made, or shall, within two years after the date of it, make or cause to be made, an actual settlement, by clearing, fencing and cultivating two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing, or causing a family to reside, thereon for five years next following his first settling the same, if he shall so long live, and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case, as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Allegheny and Conewango, could be

[1] 4 Dall. 363.

former part of the section, if not exercised in two years. This was the right which the proviso meant to protect, and nothing more. This is the right which is saved, *by persisting as long as the prevention continues. But when the prevention ceases, the ultimate condition of settlement [*43

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acquired in no other manner than by actual settlement; no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or if not, so preceded by actual settlement, the warrant would give no title, unless it were followed by such settlement within two years thereafter. The question then is, what constitutes such an actual settler, within the meaning and intention of this law, as will vest in him an inceptive title, so as to authorize the granting to him a warrant? not a *pedis possessio;* not the erection of a cabin, the clearing or cultivation of a field. These acts may deserve the name of improvements, but not settlements. There must be an occupancy accompanied with a *bonâ fide* intention to reside and live upon the land, either in person or by that of his tenant; to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this intention be only future, either as to his own personal residence or that of a tenant, then the execution of that intention by such actual residence fixes the date; the commencement of the settlement, and the previous improvements, will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the *quo animo* with which it was done, of the intention to settle; but neither nor all will constitute a settlement, if unaccompanied by residence. Suppose, then, improvements made, the person making them declaring at the time that they were intended for temporary purposes of convenience, and not with a view to settle and reside; could this be called an actual settlement, within the meaning and intention of the legislature? Surely, no. But though such acts against express declarations of the *quo animo* will not make a settlement, it does not follow, that the converse of the proposition will; for a declaration of an intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff. In 1793, he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five pens (for not being covered, they do not deserve the name of cabins), and in five, six or seven days, having accomplished this work, he returns into the fort, to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing these labors which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins, and from inhabiting them? Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was, to erect what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and consequently, could not have been intended for a present settlement. He was, besides, an officer in the army, and whilst in that service, he could not settle and reside at his cabin, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards; his own statements when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistible, that he did not mean, in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed, that an improvement was equivalent to a settlement, for vesting a right to those lands. It is not pretended, even now, nor is it proved by a single witness, not even by Crouse, who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down for a moment on lands encompassed by dangers from a savage enemy? I answer, no. At such a time it was very improbable, that men would be found rash enough to make settlements.

is still to be performed. As the law does not require impossibilities, a reasonable time after cessation *of the war must be allowed to make the settlement. We say, two years is that reasonable time, because that was the time originally fixed by the contract, which was predicated upon the idea that there was no obstacle.

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But yet no title could be acquired, without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual *bonâ fide* settlement of the defendant with his family, for I give no credit to the notice from the plaintiff to the defendant in July 1795, since, so far from accompanying it with actual settlement, he speaks of a future settlement which, however, was never carried into execution. Everything which I have said with respect to the 400 acres surveyed in the name of George Balfour, will apply *à fortiori* against the three other surveys in the name of Elizabeth Balfour, &c., who, it is not pretended, were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law, then, had stopped at the proviso, it is clear, that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made such a settlement as the law required, by urging the danger to which any person attempting a residence in that country would have been exposed. He relies on the proviso to the ninth section of the law, which declares, "that if any such actual settler, or any grantee in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if each actual settlement had been made and continued." Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Grenville was signed on the 3d of August 1795, and ratified the 22d of December in the same year: although Meade settled with his family, in November 1795, it is not conclusive proof that there was no danger even then, and at any rate, it would require some little time and preparation, for those who had been driven off, to return to their settlements, and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title, at some time or other, and this could only have been created by actual settlement, preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant.

I do not mean to say, that he must have had such an actual settlement as this section requires, to give a perfect title; for if he had built a cabin, and commenced his improvement, in such manner as to afford evidence of a *bonâ fide* intention to reside, and had been forced off by the enemy, at any stage of his labors, persevering, at all proper times afterwards, in endeavors to return, when he might safely do so, he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso which was made for his benefit; this he has not done.

Decisions in the supreme court and in the common pleas of this state have been cited at the bar, two of which I shall notice, for the purpose of pointing out the peculiar mark which distinguishes them from the present, and to prevent any conclusions from being drawn from what has been said either to countenance or impeach those decis-

*But it is said, that the commonwealth alone can enter for the forfeiture, and that there is no private right of entry. But if this is a condition precedent, no right ever vested, and therefore, there can be no forfeiture. The *only right given was a permission within two years to enter, for the purpose of surveying and settling; but this right [*46

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ions. The cases I allude to are The Holland Company *v.* Coxe,[1] and the feigned issue tried at Sunbury.[2]

The incipient title under which the plaintiffs claimed in those causes were warrants authorized by the third section of the law. The incipient title in the present case is settlement. The former was to be completed by settlement, survey and patent; this to precede the warrant; and for the most distinct explanation of this distinction, it will be important to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained who may be an actual settler to demand a warrant, namely, one who has gone upon and occupied land with a *bonâ fide* intention of an actual present residence, although he should have been compelled to abandon his settlement by the public enemies, in the first stages of his settlement; but actual settlement, intended by the 9th section, consists in clearing, fencing and cultivating two acres of ground at least on each one hundred acres, erecting a house thereon, fit for the habitation of man, and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso which declares that "if such actual settler shall be prevented from making such actual settlement," &c., the plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared nor fenced any land, and is forced off by the enemies of the United States, before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required; or if the warrant-holder, who likewise has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause from making these improvements, &c., he too shall be excused if, as is required also of the settler, he has persevered in his endeavors to make those improvements, &c. But what it becomes such grantee to do before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys; 1st. Because they are a mere description of the land which the surveyor is authorized by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the land-office at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and gives notice of the bounds thereof, that others may be able to make adjoining locations, without danger of interference; this is not such a survey as is returnable so as to lay the foundation of a patent; 2d. It is not authorized by a warrant; 3d. It was not for an actual settler; 4th. It was not made by an authorized surveyor, if you believe, upon the evidence, that the authority to Steel was ante-dated, and given after the survey was returned. Not the warrant; 1st. Because it was not a warrant of title, but of acceptance; 2d. It is not founded on settlement, but improvement, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal valid consequence.

As to the *caveat;* the effect of it was to close the doors of the land-office against the further progress of the plaintiff in perfecting his title. The dismissal of it again opened the door, but still the question as to the title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

[1] 4 Dall. 171. [2] Ibid. 237.

expired with the two years after the date of the warrant, or of the close
*47] of the war. *The land is to be granted to other actual settlers; this term is explained in the 5th and 10th sections, and means those who were actually on the land and had begun their settlement. The commonwealth could not grant these lands to actual settlers, unless there was
*48] *a private right of entry, for there cannot be actual settlement, without actual entry. These expressions of the act imply as complete a right of entry as a warrant itself. By the act of the 22d of April 1794, vol. 3, p. 581, 636, no warrant can be obtained for unimproved lands. There must be a previous actual settlement.

*49] *It is not necessary that any act should be done on the part of the commonwealth, because there is no title to be defeated. But if she is bound to do any act, the act of the actual settler is her authorized act.
*50] He cannot be a trespasser, because the land was vacant. *By the 15th section of the act, certain holders of warrants theretofore granted are authorized to locate them in any district of vacant land in the state, provided that the owners of such warrants "shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Allegheny river and Conewango creek are made subject by this act;" that is, they are to make their settlement in two years from the date of their warrants, although their warrants were more than two
*51] years old when the act *passed. This can only be done by giving a construction to this section similar to that which we contend ought to be given to the 9th.

W. Tilghman, on the same side.—The treasury of Pennsylvania was overflowing by the sales of lands between 1784 and 1792. The utmost that has been received from the sale of the lands under the act of 1792, including the tract called the triangle, is $500,000.

There are two descriptions of persons contemplated by the act. 1st. The moneyed man who could procure settlers; and 2d. The hardy but poor actual settler, who was to have a credit of ten years for his purchase-money. The state did not want money, but a barrier. Population, and not revenue, was the object. The actual settlement of the land was the *sine qua non*
*52] *of the contract. This appears from the whole tenor of the act itself, as well as from the general circumstances and policy of the state.

The term actual settler has two different significations, as used in the act. But there can be no settlement, without actual personal residence. An actual settler sometimes means a person who is on the land, with an intent to remain, and sometimes it means fencing, clearing, cultivating, building and residing five years. By the act of the 30th December 1786, vol. 2, p. 488, it is declared, "that by a settlement shall be understood an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to

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The plaintiff, therefore, having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title, and your verdict ought to be for the defendant.[1]

The jury found for the defendant.

[1] See also, Huidekoper *v.* Douglass, 1 W. C. C. 109; and Huidekoper *v.* McLean, Id. 136.

time, unless interrupted by the enemy, or by going on the military service of this country during the war." Thus, the word settlement, in the 8th section, is used in its common acceptation. It is merely the inception of title; but the settlement mentioned in the 9th section is the completion of title. The 9th section was intended to define more exactly what kind of settlement should vest a title.

There being, then, no settlement without residence, and no time of residence prescribed, except the five years, if there has not been such a residence, there has been no residence, and if no residence, no settlement. Settlement, therefore, includes both improvement and residence.

Every tract of 400 acres was to be specifically settled. The misfortune of the Holland Company was, that they undertook an impossibility. They had engaged to settle 1162 tracts in two years. The words "in default," &c., show that settlement was the main object. It is improbable, that the proviso should be intended totally to defeat the great object of actual settlement; and yet that would be its effect, if the war should continue for two years, which, at the time of passing the act, was a very probable event.

*Much reliance has been placed on the words, "as if;" yet, on our construction, we allow them their full effect. The settlement was to [*53 be made in two years; but, says the proviso, if you shall be prevented from making it within two years, and persist until it be accomplished, you shall hold the land *as if* it had been made within the two years according to the enacting clause. But if persisting two years in time of war gives a complete title, the proviso gives the purchaser in time of war better terms than the enacting clause gives to a purchaser in time of peace. For the latter is obliged to settle and reside five years, while the former gets the land without any such condition.

But, say they, the proviso operates in favor of those only who have been prevented from improving. Suppose, a man has improved, but is driven away before the end of his five years' residence: upon their construction, he would lose his land, while that of the man who has done nothing, would be saved. We admit, that persistence is not required during the war; for it would be idle to impose unavailing efforts; and the question, what is persistence? would open a door to endless litigation. One jury would decide one way and another the contrary. The persisting is to begin when the war ceases. If actual settlement means only improvement, it would be absurd to say, made and continued. The word continued cannot apply to a thing which, when once done, is done for ever. There was the same reason for settlement after the war, as during its existence.

Ingersoll, in reply.—Three questions arise in this case. 1st. Are endeavors persisted in, accepted by the act as a substitute for actual settlement and residence? *2d. For what period must those endeavors be continued, [*54 so as to operate as a dispensation with the condition, and amount to such substitute? 3d. If a forfeiture has been incurred, who is to take advantage of it? actual settlers, or the commonwealth?

1st. Does the act contemplate a persistence in endeavors as a substitute for actual settlement and residence? It may be necessary first to ascertain the meaning of the words improvement, settlement and residence, both in their general import, and in the appropriate sense in which they are used in

the act of 1792. By improvement is understood clearing, cultivating or building on lands previously unappropriated. In degree, it is infinitely various, from the blazing of a tree with a tomahawk to the highest degree of cultivation. The first improver has generally been favored in Pennsylvania. But by the present act, he has no preference, except in certain specified cases. Improvement and settlement are not convertible terms. There may be improvement, without settlement, but there cannot be settlement, without improvement. Settlement, in the order of things, is subsequent to improvement, and includes it. It signifies a place on which a person lives, after having made an improvement, with or without his family. Whenever the residence commences, the settlement is computed from the time that the improvement was first tenanted.

The act of assembly adopts words of a previously ascertained import. Warrant, survey, improvement and settlement were an inception of, and gave to the warrantee, a defeasible title. The patents were not to issue until after five years' residence, when the right was complete and indefeasible. Payment of the purchase-money, warrant and survey, gave a defeasible title, inchoate and possessory. This *right, whatever it was, was liable to forfeiture by a non-compliance with the terms of the act. Residence is a continued settlement. Improvement, as described in the act, settlement and residence for five years next following the first settlement, were conditions precedent, not to a possessory, but to an absolute title, unless prevention by war should furnish an excuse. That improvement, settlement and residence are used in the act as successive and distinct terms, is evident from the act itself. The 5th section speaks of land settled and improved; the 7th, of actual settlement and improvement; and the 9th, of actual settlement and residence; and of actual settlement made and continued. The settlement, including such an improvement as is described in the law, is to commence within two years from the date of the warrant. The residence for five years is to commence from the first settling. Hence, residence is a continuation of settlement, not a constituent part of it.

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It it true, that the legislature, when declaring by what means a settlement shall be made, have included a residence of five years, but the absurdity of including a residence of five years, in a settlement to be made in two years, evidently shows that they have admitted an error in their language. It is clear, that they do not mean what they say, and the question is, what did they mean to say? To make the least possible alteration in the words, so as to express their meaning, is to substitute the future tense for the participle; "shall reside," instead of "residing." This removes all the difficulties of the language, and throws great light npon the whole act. The sentence will then read thus: "no warrant shall vest any title in the lands, unless the grantee shall, within two years from the date of such warrant, make an actual settlement thereon, by clearing, fencing and cultivating at least two acres for every hundred, erecting thereon a messuage for the habitation of man, and shall reside thereon for the space of five years next following his first settling of the same." If, then, the word "residing" be rejected for its substitute "shall reside," *there is nothing in the act to justify the proposition that settlement includes five years' residence. There is not another word in the whole act which can suggest such an idea; on the contrary, there are many expressions totally repugnant to the supposition.

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Having thus endeavored to ascertain the meaning of the terms improvement, settlement and residence, let us consider the meaning of the proviso. We contend, that if the grantee has, by force of arms of the enemies of the United States, been prevented from making an actual settlement, within two years after the date of his warrant, having during that time persisted in his endeavors to make such settlement, such persistence, though ineffectual, is accepted as a substitute for actual settlement and residence.

We admit, that it was with a hope that hardy adventurers would effect an establishment reaching from the Ohio to Lake Erie, and cut off the intercourse between the northern and the western Indians, that the assembly of Pennsylvania passed the law in question. It was at a time when the President of the United States was preparing to hold a treaty of peace with the western Indians, at Detroit; and in the same session, they authorized the employment of a military force to aid and strengthen those who were exposed on the frontiers. We agree, that it was to encourage the immediate actual residence of bold but poor men, that the legislature required no purchase-money for ten years from such as placed themselves upon the lands and began settlements. To this description of adventurers, they gave a further security, by protecting them against all warrants not entered in the books of the surveyor of the district, at the time the settler fixed himself on the land. From such as inclined to pay money, and operate by placing tenants on the land, and giving such tenants bounties for settling, they required a prompt co-operation with the actual settlers, in accomplishing the great undertaking.

Let it be recollected, that the person who claimed by actual settlement could hold but one tract, the warrant-holder as many as he could pay for, using only different *names which is perfectly known to be but matter of form. The warrantees were obliged to place a settler on each [*57 tract, within two years from the date of the warrant, if there should be peace, and at all events, to be ready, and make the attempt, to support the settlers, if the war should continue. Thus they made it the interest of both descriptions, operators with money, and operators with labor, to make a joint and steady effort for two years to realize the expectations formed of this new barrier.

Here it may not be improper to remind the court, that, as the law of Pennsylvania then stood, any alien might purchase and hold land in that state. It has been said, that the act was not intended to give an opportunity for speculation; it was certainly intended that foreigners should buy any quantity of land, to the extent of their means of payment. We do not wish to treat this subject technically; but from the very nature of the property, and the condition as expressed in the law, the grantee has a right to enter upon the land, maintain suits for its recovery or defence, take the profits, alienate, mortgage it, bind it by suffering judgments, transmit it to heirs, subject only to the conditions of the original grant.

Suppose, there had been no proviso; take the enacting clause of the section absolutely by itself, what would be the condition of the holders of warrants dated in 1792 and 1793? The warrantee might enter, nay, he was bound to enter, by the nature of his grant; the public enemy prevents him; the state and the United States are unable to protect him; without any *laches* in him, the performance of the condition becomes impossible, by the

act of the public enemy. Would the common law say that the estate should be lost? Are not these conditions what the law terms subsequent? If precedent, no interest could arise. The warrantee could exert no act of ownership, until the *conditions were all performed. Here, his performance depends upons his being exclusively the possessor and owner.

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In one sense of the word, all conditions are precedent; that is, they ought to be performed, before the estate becomes absolute; but in law, those only are termed precedent which must be performed before the grantee can enter upon the estate or recover at law. Conditions subsequent refer to cases where the party may immediately take and enjoy the grant, but perform afterwards, having, in the meantime, a qualified title, and the right of possession. Is it not a settled and a reasonable rule, that conditions tending to defeat an estate, once qualifiedly vested, shall be construed strictly? and also, that courts will hold a condition to be either precedent or subsequent, according to the intent of the party creating it, whatever be the form of words, and when the same words may constitute either the one or the other, according to the nature of the case? We are to show that there is a substitute for actual performance; what that substitute is, will be a subject of inquiry under the 2d head.

The legislature considered two years as a reasonable time after the date of the warrant, in which to complete the specified improvements in a season of peace. A distant wilderness was to be explored, provisions to be collected and transported; clearing, cultivating and building, where laborers were scarce, were difficult and of slow progress. Actual settlement within two years was of indispensable necessity, in order to obtain full title, unless prevented by the enemies of the United States. The question then offered itself to the legislature, shall the continuance of the war release the condition and endeavors be equivalent to performance?

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*We contend, that the principle of the proviso is, that if the warrantee does what he can, according to circumstances, he shall not be injured on account of the war, nor thereby be delayed in the acquisition of his title. The price of the lands, and the terms of purchase, were fixed upon the basis of peace. Twenty dollars per hundred acres, with the condition of settlement and residence, was a full consideration in a time of peace. The legislature could not expect to get better terms in a time of war. As the price was to be the same in war and peace, the modification must be in the terms of the condition of settlement and residence.

If, with the same price, you exact similar conditions of settlement and residence, at an indefinite distance of time, and after an intervening war, during the whole of which you require a constant persistence in endeavors to make such settlement, you, in effect, increase, you double or multiply the sum to be paid as the consideration of the land; and in addition to the original terms of price, settlement and residence, you gain the use of the money, and the co-operation of individuals in forming that barrier, which was one of the great objects of the act; the purchaser loses both the interest of his money and the use of his land. It is impossible, therefore, to require endeavors during, and accomplishment after, the war, and yet say, that the purchaser does not pay a higher price for the land on account of the war.

It becomes important to consider, whether the endeavors were to be

persisted in during the war; for we have been lately told, for the first time, that persist means desist during the war, and after the war, it again means persist. It is admitted, that a frontier of hardy inhabitants to oppose against the incursions of the savage enemy was a leading consideration with the legislature; it was natural for them to wish attempts to settle might be made during the war. It was acknowledged to be *unreasonable, [*60
that the hazardous experiment should be made at the expense of the adventurers. The event was doubtful: hopes of success were, however, entertained. The law contemplated the disposal of two millions of acres. What number of persons might be induced to share in its undertaking, was uncertain. But the words of the act admit of no doubt, that the persisting was to be in a time of war. If the grantee shall be prevented by the enemy, and shall persist in his endeavors; that is, in his endeavors to surmount the obstacle which prevented the settlement, namely, the force of arms of the enemies of the United States, then, &c.

2d. What is the period of time, during which the endeavors were to be continued, in order to effect a release of the condition, and amount to a substitute for performance? As two years from the date of the warrant was the time in which the settlement was to be made, if there had been no prevention, we say, that perseverance in endeavors, during the same period, in a time of war, was all which the legislature required: Because, without the proviso, the estate of the grantee would then have become absolute, at common law, and the proviso, being for the benefit of the grantee, shall not place him in a worse situation than if it had not been inserted: Because, to adopt the principle which is urged against us, that we ought to commence in a reasonable time after the removal of the force, is worse than forfeiture, as it introduces infinite confusion and endless controversy: Because, taking possession, clearing, fencing, cultivating and building, are nowhere in the law required of the warrantee, after two years from the date of the warrant, and persistence must relate to the act of taking and maintaining possession: *Because, the law does not provide for cases of interruption [*61
by war, for more than two years; and to require longer efforts would be lengthening the persistence to the end of the war, and five years afterwards; which would be inconsistent with the last clause of the proviso, giving absolute estates after certain persistance had failed: And because, if the persistance had been construed to be indefinite, no man of any prudence among ourselves, and no foreigner or individual would have advanced a dollar on those lands. No man could, on that idea, conjecture when he might get a title; the war might continue ten years; the country might be restored to the Indians for a stipulated time; or setttlements might have been prohibited by the United States; and in all these events, the purchaser would have lost his money and labor.

The legislature departed from the common law, in requiring a persistence during the war. For what purpose? To carry a favorite point. An establishment of settlers from Presqu' Isle to the Ohio. What do they promise for this extra requisition? An absolute title, if the exertions for two years should be ineffectual. But he is to "persist in his endeavors to make such actual settlement *as aforesaid;*" that is, within two years from the date of the warrant. No other kind of settlement, and no other time is prescribed. But he could not persist to make such actual settlement within

two years from the date of the warrant, after those two years had expired; and a settlement made after the two years could not have availed.

3d. If the persistence must be for more than two years, when will it end? Where is the term at which the legislature has said the estate shall become absolute? If the grantee get possession, at the end of the five years, must he go still further and reside five years? There can be no pretence for persisting five years, because, without a settlement made, there is no epoch from which the five years are to begin to run; and there can be no settlement made but within two years from the date of the warrant. *If no settlement within the two years, no question can ever arise respecting the five years.

*62]

4th. If the proviso has any meaning different from the common law, respecting force of arms of a public enemy, it certainly means to impose a new duty upon the grantee, and to give him an equivalent. What was the new duty? Persistence for two years, whether the country was at peace or war. What was the equivalent? Substitution of ineffectual, though sincere persistance in endeavors, for actual settlement. What was the motive for this departure from the common law? A sanguine hope of removing the enemy to a great distance from our old settlements, by blocking up the pass through which they so easily entered. With this construction of the act, every proceeding of the state, and of the grantees, will perfectly harmonize.

But if the meaning be doubtful, and resort should be had to the common law, such a construction would be made as might confirm the estate, and quiet a *bonâ fide* purchaser; and no construction could possibly be adopted, which would repeal such an express stipulation in favor of the grantee, as is contained in the last clause of the proviso.

5th. If a forfeiture has been incurred, or if the title has reverted to the state, by the default of the grantee, by whom can advantage be taken? By individuals, or by the state, and in what method? We contend, by the state only. And we rely upon general principles; on the reason and convenience of the thing; on the express provisions of the legislature, and on the decisions of the state judges, without a dissentient voice, or the expression of a doubt. If any individual may enter upon the tenant of the Holland Company, whenever he shall choose to say that *the settlement is not completed in due time, they may be dispossessed of every foot of land they have taken up. Numbers and strength are against them.

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It is a general principle of law, that the commonwealth can only take by inquest of office, of entitling, or of instruction. The title of the sovereign must appear on record. This rule is founded in good sense and propriety, and is enforced, in this instance, by a further rule, that whoever comes into possession with title, or by law, shall not be dispossessed without process. If uninformed individuals, under the influence of bias and passion, are to decide the question of forfeiture, and to enter on the lands, at their discretion, stay as long as they please, before they apply for a warrant, and so in succession, upon the idea either of forfeiture or failure in persistence in endeavors to settle, innumerable mischiefs and endless confusion will indeed ensue. The legislature foresaw the great inconveniences that would result from constituting every needy adventurer a judge of their meaning in this law, and have, therefore, marked out the mode in which advantage shall be taken

of a default in the grantee, by providing that, in default of actual settlement and residence, the commonwealth may grant new warrants to other actual settlers. The commonwealth, therefore, is to be satisfied, in the first place, that the default has been made, and in the second place, that the applicant is such an actual settler as may purchase, and in the third place, a warrant must issue to the applicant, before he can have any right to enter.

By the terms other actual settlers, the legislature meant persons who were willing to come under engagements to settle; persons who will purchase the land, subject to the condition of settlement; or, in the language of the second section of the act, "who will cultivate, improve and settle the same," not who have cultivated, improved and settled; or, in the language of the 3d section, "who are desirous to settle and improve."

**Lewis*, on the same side.—The proviso does not relate to the residence. A settlement may be made and not continued. If a man has completed his settlement, and is driven off by the enemy, before he has finished the five years' residence, we say, the residence is dispensed with; for he is only to persist in endeavors to make the settlement; and if the settlement is already made, he cannot be required to persist in his endeavors to make it. That part of the proviso, therefore, relative to persistence, does not apply to him who has finished his settlement. The proviso, as to him, will read thus: that if such actual settler shall be driven from his settlement, he shall be entitled to hold in the same manner as if the settlement had been continued. Our construction, therefore, does not involve the consequence which gentlemen have supposed. [*64

There is a passage of the act which has not been noticed, and which strongly implies that residence is not included in settlement. It is this: "And that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers, for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so as often as defaults shall be made." If settlement includes the five years' residence, then an actual settler is a person who has made an actual settlement by clearing, fencing, cultivating, building and residing five years on the land. If, on default, the commonwealth is to grant the land to such an actual settler only, there never can be but one default, because the second warrantee will have complied with all the requisites for a full and absolute title before the warrant is granted. The words, "and so as often as defaults shall be made," would, in such case, be nugatory and nonsensical.

No argument can be drawn from the 15th section; for it does not follow, that because one section requires a particular construction, different words, relative to a different subject in another section, must have a similar construction. It only shows, what we all agree is the fact, that the act is very inaccurately drawn, and cannot be understood according to its strict letter.

*Wednesday, February 27th, 1805, MARSHALL, Ch. J., delivered the opinion of the court as follows:— [*65

The questions which occurred in this case, in the circuit court of Pennsylvania, and on which the opinion of this court is required, grow out of the act passed by the legislature of that state, entitled "an act for the sale of

the vacant lands within this commonwealth." The 9th section of that act, on which the case principally depends, is in these words, "and be it further enacted," &c.

The questions to be considered, relate particularly to the proviso of this section; but to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described therein shall vest in him.

Two classes of purchasers are contemplated. The one has already performed every condition of the sale, and is about to pay the consideration-money; the other pays the consideration-money, in the first instance, and is afterwards to perform the conditions. They are both described in the same sentence, and from each an actual settlement is required as indispensable to the completion of the title.

In describing this actual settlement, it is declared, that it shall be made, in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside thereon for the space of five years next following his first settling of the same, if he or she shall so long live."

*66] *The manifest impossibility of completing a residence of five years, within the space of two years, would lead to an opinion, that the part of the description relative to residence, applied to those only who had performed the condition, before the payment of the purchase-money; and not to those who were to perform it afterwards. But there are subsequent parts of the act which will not admit of this construction, and consequently, residence is a condition required from the person who settles under a warrant, as well as from one who entitles himself to a warrant by his settlement.

The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading, suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of "and residing, or causing a family to reside thereon," reading "and shall reside," &c. The effect of this correction of language will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that in the view of the legislature, the settlement and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words "such actual settlement and residence," which prove that residence is required from the warrantee, prove also that settlement and residence are, in contemplation of the law, distinct operations. In the nature of things, and from the usual

*67] import of words, they are also distinct. To make a *settlement, no more requires a residence of five, than a residence of five hundred

years; and, of consequence, it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms settlement and residence being understood, the court will proceed to consider the proviso. That part of the act treats of an actual settler (under which term is intended as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee who had made an actual settlement in performance of the conditions annexed to his purchase), and of "any grantee in any such original or succeeding warrant;" who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced, are brought together in the same sentence, and terms are used appropriate to the situation of each, but not applicable to both. Thus, the idea of "an actual settler," "prevented from making an actual settlement," and after "being driven therefrom," "persisting in his endeavors" to make it, would be absurd. To apply to each class of purchasers all parts of the proviso, would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is, to apply the provisions distributively to the description of persons to whom they are adapted, *reddendo singula singulis*. The proviso then would read thus: "Provided always, nevertheless, that if any such actual settler shall be driven from his settlement, by force of arms of the enemies of the United States; or any grantee, in any such original or succeeding warrant, shall by force of arms of the enemies of the United States, be prevented from making such actual settlement, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the *same manner as if the actual settlement had been made and continued. [*68

The two cases are, the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavors to make one. It is perfectly clear, that in each case, the proviso substitutes something for the settlement to be made within two years from the date of the warrant, and for the residence to continue five years from the commencement of the settlement, both of which were required in the enacting clause. What is that something? The proviso answers, that in the case of an "actual settler," it is his being "driven from his settlement by force of arms of the enemies of the United States," and in case of his being a grantee of a warrant, not having settled, it is "persisting in his endeavors to make such actual settlement." In neither case, is residence, or persisting in his endeavors at residence, required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement; for in the same sentence, they say, that the person who comes within the proviso shall hold the land, "as if the actual settlement had been made and continued."

It is contended, on the part of the defendant, that as the time during which persistence shall continue is not prescribed, the person claiming the land must persist until he shall have effected both his settlement and residence, as required by the enacting clause of the act. That is, that the proviso dispenses with the time, and only with the time, during which the con-

dition is to be performed. But the words are not only inapt for the expression of such an intent ; they absolutely contradict it.

*69] *If the proviso be read so as to be intelligible, it requires nothing from the actual settler who has been driven from his settlement. He is not to persist in his endeavors at residence, or, in other words, to continue his settlement, but is to hold the land. From the warrantee who has been prevented from making a settlement, no endeavors at residence are required. He is to " persist in his endeavors," not to make and to continue such actual settlement, but " to make such actual settlement as aforesaid." And if he does persist in those endeavors, he is to hold the land, " as if the actual settlement had been made and continued." The construction of the defendant would make the legislature say, in substance, that if the warrantee shall persist in endeavoring to accomplish a particular object, until he does accomplish it, he should hold the land, as if he had accomplished it. But independent of the improbability that the intention to dispense only with the time in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used, which seem to restrict the time during which a persistence in endeavors is required. The warrantee is to persist in his endeavors " to make such actual settlement as aforesaid." Now, " such actual settlement as aforesaid," is an actual settlement within two years from the date of the warrant. As it could only be made within two years, a persistence in endeavoring to make it, could only continue for that time.

If, after being prevented from making an actual settlement and persisting in endeavors, those endeavors should be successful, within the two years after which the person should be driven off, it is asked, what would be his situation ? The answer is a plain one. By persisting, he has become an actual settler ; and the part of the proviso which applies to actual settlers protects him. If, after the two years, he should be driven off, he is still protected. The application of external violence dispenses with residence.

*70] The court feels itself bound *to say so, because the proviso contains a substitute, which, in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause ; and of that substitute, residence forms no part.

In a great variety of forms, and with great strength, it has been argued, that the settlement of the country was the great object of the act ; and that the construction of the plaintiff would defeat that object. That the exclusive object of an act to give lands to settlers, would be the settlement of a country, will be admitted ; but that an act to sell lands to settlers, must have for its exclusive object the settlement of the country, cannot be so readily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far those two objects might be consulted, or how far the one yielded to the other, is only to be inferred, from the words in which the legislative intention had been expressed. How far the legislature may have supposed the peopling of the district in question to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shown by their own language. At any rate, if the legislature has used words, dispensing with residence, it is not for the court to say, they could not intend it, unless there were concomitant expression, which should explain those words in a manner different from their ordinary import.

There are other considerations in favor of the construction to which the court is inclined. This is a contract; and although a state is a party, it ought to be construed according to those well-established principles which regulate contracts generally. The state is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property. *If he should couch his propositions in such ambiguous terms, that they might be understood differently, in consequence of which sales were to be made, and the purchase-money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase-money. All those principles of equity, and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction. [*71

It being understood that the opinion of the court on the two first questions, has rendered a decision of the third unnecessary, no determination respecting it has been made.

It is directed, that the following opinion be certified to the circuit court.

Certificate of the Opinion.—1st. That it is the opinion of this court, that under the act of the legislature of Pennsylvania, passed the 3d day of April, A. D. 1792, entitled "an act for the sale of the vacant lands within this commonwealth," the grantee, by a warrant of a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the 10th of April 1793, the date of the said warrant, until the 1st of January 1796; but who, during the said period persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 9th section of the said law prescribes to vest a title in the said grantee.

2d. That it is the opinion of this court, that a warrant of a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, granted in the year 1793, under and by virtue of an act of the legislature of Pennsylvania, entitled "an act for selling the vacant lands in this commonwealth," to a person, who, by force of arms of the enemies of the United States, was *prevented from settling and improving the said land, and from residing thereon from the date of the said warrant until the 1st of January 1796, but who, during the said period, persisted in his endeavors to make such settlement and residence, vests in such grantee a fee-simple in the said land, although, after the said prevention ceased, he did not commence, and, within the space of two years thereafter, clear, fence and cultivate at least two acres for every hundred acres contained in his survey for the said land, and erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling of the same, the said grantee being yet in full life.[1] [*72

[1] The case was subsequently tried in the circuit court on these principles, and resulted in a verdict in favor of the plaintiff. 4 Dall. 392; 1 W. C. C. 258. Thus establishing the validity of the title of the Holland Land Company.

JOHNSON, J.—I concur in the decision given by the court in this case; but there was a question suggested and commented on in the argument, which has not been noticed by the court, but which appears to me to merit some consideration.

It was inquired by the counsel for the defendant, should the court adopt the principle that persistence for two years is to be substituted for an actual settlement and residence, what is to be the effect of a partial prevention? Is the warrantee to be subjected to the necessity of making good his settlement, should the prevention cease or commence at any point of time during the two years, without any, or under what, limitation?

It is undoubtedly true, that any construction of a statute which will produce absurdities, or consequences in direct violation of its own provisions, is to be avoided. It were better not to depart from their literal sign fication, than to involve consequences so inconsistent with the nature and very idea of legislation. But it does not appear to me, that any embarrassment will attend the construction of this act which the court has adopted; that the case of a partial duration of the existence of the preventing cause is not within the view of the proviso; that it is not excepted from the operation of the enacting clause. It would be absurd, to impose upon the warrantee the necessity of performing in a few months, perhaps, at the most inconvenient season of the year, a condition for which the act proposes to hold out
*73] to him an indulgence *of two years; when prevented too by a cause not within his control, and against which the state was bound to protect him. If such were the case now before the court, I should be of opinion, that we must resort to general principles for a decision. With regard to the performance of conditions, it is a well-known rule, that obstructions interposed by the act of God, or a public enemy, shall excuse from performance, so far as the effect of such preventing cause necessarily extends.

In cases of partial prevention, I should, therefore, be of opinion, that it would be incumbent upon the warrantee to satisfy the court that he had complied with the conditions imposed by the act, so far as he was not necessarily prevented by the public enemy.

It may appear singular, that a deficiency of a single day, perhaps, should produce so material an alteration in the rights or situation of the warrantee. But the legislature of Pennsylvania were fully competent to make what statutory provisions they thought proper upon the subject; and the court is no further responsible for the effect of the words which they have used to express their intent, than to endeavor to give a sensible and consistent operation to them, in every case that can occur.

United States *v.* Hooe *et al.*

Priority of the United States.—Costs.

The United States have no lien on the real estate of their debtor, until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has made a voluntary assignment of all his property; or, the debtor having absconded, concealed or absented himself, his property has been attached by process of law.[1]

A mortgage of part of his property, made by a collector of the revenue, to the surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgagor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts, at the time the mortgage was given, and although the mortgagee knew, at the time of taking the mortgage, that the mortgagor was largely indebted to the United States.[2]

Costs are not to be awarded against the United States.

Error to the Circuit Court of the district of Columbia. (Reported below, 1 Cr. C. C. 116.)

Mason, attorney of the United States for that district, on the 17th of August 1801, filed a bill in equity against Robert T. Hooe, W. Herbert, John C. Herbert, and the executors, widow and heirs of Col. John Fitzgerald, late collector of the customs for the port of Alexandria, and obtained an injunction to prevent the sale of certain real *estate, in Alexandria, advertised for sale by W. and J. C. Herbert, under a deed of trust made by Fitzgerald for the indemnification of Hooe. [*74

The material facts appearing upon the record were, that Fitzgerald, upon being appointed collector, executed a bond to the United States, on the 10th of April 1794, with Hooe as surety, in the penalty of $10,000, for the faithful performance of the duties of his office. In April 1798, he was found to be greatly in arrears, and upon a final adjustment of his accounts, on the 15th of August 1799, the balance against him was $57,157. On the 16th of January 1799, Hooe having knowledge that Fitzgerald was largely indebted to the United States, but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the bank of Alexandria, to meet the drafts of the treasury of the United States, and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety for Fitzgerald in the bond to the United States, and Fitzgerald proposing, when he should wish to obtain a loan of money from the bank of Alexandria, to draw notes, to be indorsed by Hooe, whereby the latter might be liable and compelled to pay the same, and the former being desirous of securing and indemnifying Hooe from all damages, costs and charges which he might, at any time thereafter, be subject and liable to, by reason of any misconduct of Fitzgerald in the discharge of his duty as collector, or for or on account of any notes drawn by him for his particular use and accommodation, and indorsed by Hooe, and negotiated at the bank of Alexandria. The indenture then witnessed, that for those purposes, and

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(*a*) Present, Marshall, Ch. J., Cushing, Paterson, Washington and Johnson, Justices.

[1] See note to United States *v.* Fisher, 2 Cr. 358.

[2] But although the priority of the United States is subject to a specific lien upon the debtor's property, it overreaches the general lien of a judgment. Thelusson *v.* Smith, 2 Wheat. 396.

in consideration of the trusts and confidences therein after expressed, &c., and of one dollar, &c., Fitzgerald bargained and sold, &c., to the trustees, W. and J. C. Herbert, the real estate therein described, to have and to hold the same to them, and the survivor of them, &c., "in trust, to and for the uses and purposes hereinafter mentioned, and to and for no other use and purpose whatsoever; that is to say, in case he the said John Fitzgerald shall neglect any part of his duty as collector of the said port of Alexandria," &c., "or in case any note or notes so drawn, indorsed and negotiated
*75] at the bank of Alexandria, for the particular use *and accommodation of him the said John Fitzgerald, shall not be taken up and discharged by him, when the same shall become payable; that in either case, as soon as any demand shall be made upon him the said R. T. Hooe," &c., "for the payment of any sum or sums of money which ought to be paid by the said John Fitzgerald," &c., then the trustees should, upon notice given them by Hooe of such demand, proceed to sell the property for ready money, and after paying the expenses of sale, should pay and satisfy the sum or sums of money so demanded of Hooe, either as security for Fitzgerald's due and faithful execution of the office of collector of the said port of Alexandria, or as indorser of any note or notes so drawn by Fitzgerald, "and negotiated at the bank of Alexandria for the particular accommodation of the said John Fitzgerald; and lastly, to pay over to him the surplus. And in further trust, that if Fitzgerald should duly keep Hooe indemnified, &c., and should duly pay the several notes which should be so drawn by him, and indorsed by Hooe, and negotiated at the said bank, "for the particular accommodation of him the said John Fitzgerald, as the same shall become payable," then the trustees should reconvey, &c.

Hooe had indorsed Fitzgerald's notes at the bank to a large amount, and at the time of his death, there were unpaid two notes of $1000 each, and one of $1800, one of which for $1000, together with interest upon the whole, amounting to $288.94, was afterwards paid by Mr. Keith, one of the executors, in order to prevent a sale of the property under the trust. There was also evidence tending to show that the money borrowed from the bank upon Hooe's indorsement, was applied in discharge of warrants drawn by the treasury upon Fitzgerald.

Fitzgerald died in December 1799, having by his will directed his real estate to be sold for the payment of his debts. There was no positive evidence of his insolvency.

The bill charged, that he died insolvent, and that the United States had a right, in preference to all others, to apply his property to the discharge of the debt, and if there should be a deficiency, to resort to the surety for the
*76] balance, so far as the penalty of the bond would justify; *and that the deed of trust was fraudulent as to the United States.

On the 1st of May 1802, the injunction was dissolved by consent, and an interlocutory decree entered, ordering the trustees to pay the proceeds of the sale into court, subject to future order touching the contending claims of the United States and Hooe.

At November term 1802, the court passed the following decree. "The objects of the bill filed in this cause were to set aside a deed, executed on the 16th of January 1799, by John Fitzgerald to William Herbert and John Carlyle Herbert, conveying certain property therein mentioned, in trust, for

the purpose of indemnifying Robert Townsend Hooe, as indorser of certain notes negotiable in the bank of Alexandria, and as surety of John Fitzgerald, in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to compel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him; and further to restrain and enjoin the said trustees from making sale of the said real property.

"An injunction for the said purpose was granted by one of the judges of this court, in vacation; and afterwards, viz., at April term 1802, after the appearance of the defendants, who were of full age, an agreement was made, and entered on the records and proceedings of this court, to the following effect, viz., that so much of the former order of this court as restrained the defendants, W. Herbert and John C. Herbert, from selling the property in the deed of trust, in the bill mentioned, be discharged; and it was further decreed and ordered, that the said trustees should pay the proceeds arising from the sale of the said property, or of any part thereof, into this court, subject to the future order of the court, touching the contending claims of the United States and of R. T. Hooe, one of the defendants to the said bill: And now, at November term 1802, the said cause came *on, by consent of parties, and by order of the court, on the bill, and on the [*77 answers of the defendants (those of the infants being taken by their guardians, appointed for that purpose), and on the exhibits in the said bill and answers referred to, and on those afterwards admitted, and the arguments of counsel being heard in the said cause, and the same being by the court fully considered: It is the opinion of the court, that the deed of trust, in the said bill mentioned, was made *bonâ fide*, and for a valuable consideration, and was fairly executed by the said John Fitzgerald, to indemnify and save harmless the said R. T. Hooe from all loss and damage, by reason of his indorsement of several notes, negotiated at the bank of Alexandria, amounting to the sum of $3800, to enable the said John Fitzgerald to pay that sum to the United States; which appears to have been paid accordingly; and also, to indemnify and save harmless the said R. T. Hooe against all loss and damage, by reason of his having become bound in a bond, in the penalty of $10,000, payable to the United States, as security for the said John Fitzgerald's faithful performance and due discharge of the office of collector of the customs in the district of Alexandria. That there does not appear to have been any fraud in the said parties, or either of them, and that the said deed is not invalidated by any law of the United States.

"It is, thereupon, by this court, decreed and ordered, that the bill in this cause, as to all the defendants, except R. T. Hooe, W. Herbert and J. C. Herbert, be retained for the further order and decree of this court, and that as to the said defendants, R. T. Hooe, W. Herbert and J. C. Herbert, the said bill be dismissed, with costs to the said defendants. And as to the money which has arisen from the sale of the said real property, the net amount of which is $14,318.66, after deducting the charges of the sale, and which has been, by the order of this court, deposited by the clerk thereof in the bank of Alexandria; this court doth decree and order, that the said clerk do pay the sum of $4318.66, part thereof, to the said trustees, W. Herbert and J. C. Herbert, to be by them applied to the discharge *of [*78

the sum of $3127, due upon certain notes negotiated in the bank of Alexandria, on which the said R. T. Hooe was an indorser for the said John Fitzgerald; and also to the repayment to the executors of the said John Fitzgerald, of the sum of $1185, advanced and paid by them to the bank of Alexandria, for and on behalf of the said R. T. Hooe, in part payment of the notes negotiated in the said bank for the said John Fitzgerald, and indorsed by the said R. T. Hooe, which it was intended the said R. T. Hooe should be indemnified against by the said deed; and the residue, if any there should be, of the said sum of $4318.66, to be paid by the said clerk into the treasury of the United States, in discharge of so much of the balance due from the estate of the said John Fitzgerald; and that as to the residue of the proceeds of the said sale, being the sum of $10,000, the said clerk do pay the same into the treasury of the United States, expressly in discharge of the said sum of $10,000, for which the said R. T. Hooe is bound in the bond, which, in the said bill and answers is referred to, and to go also in discharge of so much of the claim of the United States against the said John Fitzgerald, and the same is decreed and ordered accordingly.

To reverse this decree, a writ of error issued returnable to February term 1803, which was dismissed, for want of a statement of the facts upon which the decree was founded. (1 Cr. 318.)

The November term 1802, of the circuit court, at which the original decree was entered, being continued by adjournment to April 1803, *Mason*, after the dismissal of the writ of error, moved the court below to make a statement of the facts upon which the decree was founded, to be sent up with a new writ of error; and urged, that as it was, in contemplation of law, the same term in which the decree was made, it was competent for the court to open it for that purpose. But the court, being of opinion, that by the writ of error, the record was completely removed, *and the decree thereby made absolute, refused to make the statement.

*79]

A new writ of error was sued out by the United States, returnable to February term 1804; upon the return of which—

Swann, for the defendant in error, contended, that the late act of congress of 3d March 1803 (2 U. S. Stat. 244), did not apply to this case, because it was passed after the final decree rendered; and that the court was still precluded from looking into this case, and correcting the errors in the decree, if any such existed, without a statement of the facts upon which the decree was founded; but—

By the Court.—The words of the act are, "that from all final judgments or decrees, rendered or to be rendered, in any circuit court," "in any cases of equity," &c., "an appeal shall be allowed," "subject to the same rules, regulations and restrictions, as are prescribed in case of writ of error." A perfect analogy exists between the cases of appeals and of writs of error, as to the time in which they may be granted, and the judge who can grant the one, may allow the other. The act of congress comprehends past cases as well as future.

The cause was continued for argument, and at this term (Saturday, February 23d, 1805), was argued by *Mason*, for the United States, and by *C. Lee* and *Swann*, for the defendants in error.

Mason, after observing that the evidence did not support the allegation that the money borrowed of the bank, upon Hooe's indorsements, was applied to the use of the United States, contended, 1. That the deed was fraudulent as to all the world, because it empowered Fitzgerald to borrow money *upon it, for his own use, while it protected the property from his creditors. 2. That Hooe has no preference to the United States; [*80 and even if the deed was not fraudulent as to all the world, yet Hooe stands in such a situation that he must be postponed to the United States and all other creditors.

1. Hooe admits that he had notice of Fitzgerald's default, to at least the amount of $30,000, but the exact amount is unimportant. And although, in his answer, he gives an opinion as to the value of Fitzgerald's estate, at the date of the deed, yet he admits, that such as it then was, it now is, excepting any depreciation which it may have suffered.

The deed, inasmuch as it contains a power to raise money upon it, in future, for his own use, is a deed in trust for himself, and therefore, fraudulent, upon general principles of law. His power to borrow money upon it, is unlimited by anything but the value of the property and the good will of Hooe; and the money thus raised upon it might have been applied exclusively to his own use. The words of the statute of 13 Eliz. c. 5, which have, in substance, been inserted into the Virginia code of laws, are large enough to take in this case; and the cases decided under it clearly apply to the present deed. Indeed, that part of the statute which makes such deeds void as to creditors, is no more than a declaration of the pre-existing rule of the common law. 2 Bac. Abr., tit. Fraud; 2 Com. Dig., tit. Covin.

The 5th sign of fraud mentioned in *Twyne's Case*, 3 Co. 81 *b*, is, that there "was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud." And it is unimportant, whether the trust be expressed or implied. Every gift made on a trust is out of the proviso of the act. Here, it was part of *the trust, that Fitzgerald [*81 should raise money upon the deed, to his own use; and a deed which covers the property from his creditors, and gives the grantor the whole benefit and use of it, is the very kind of deed which the statute meant to avoid. If, then, the deed is void as to creditors, Fitzgerald is dead, and the United States must be preferred in payment.

2. Hooe cannot be preferred to the United States, in consequence of this deed, even supposing it not to be fraudulent under the statute of Elizabeth, but must be postponed to the United States and all other creditors. This case stands on the same ground as a bond given for duties, in which case it is enacted by the act of 4th of August 1790, § 45 (1 U. S. Stat. 169), that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied." The insolvency here mentioned, means an inability to pay all his debts, and is so expounded by the act of 2d of May 1792, § 18 (1 U. S. Stat. 263), in which it is "declared, that the cases of insolvency in the said 44th (45th) section mentioned, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or

her creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

A voluntary assignment, for the benefit of his creditors, made by a debtor, unable to pay all his debts, is one of the cases in which the United States are to have a preference. The word "voluntary" does not mean, without consideration, but without compulsion of law, as in cases under a bankrupt law. A deed made to secure a just debt may, in this sense of the
*82] word, be a voluntary deed of assignment. The instant a man *makes such a voluntary assignment, the preference of the United States attaches, if, upon subsequent inquiry, it shall appear that he is unable to pay all his debts. The act of 2d of March 1799, § 65 (1 U. S. Stat. 676), has the same words, explanatory of the term insolvency, with those of the 18th section of the act of 1792. (Ibid. 263). The legislature did not mean to confine it to cases of insolvency, under a bankrupt or insolvent law of any of the states, or of the United States, nor to voluntary conveyances of all the property of a debtor, for the benefit of his creditors.

In the present case, all the property remains in the same state in which it was at the time of the deed, and it is not contended, that it is sufficient to pay all the debts; for if it is, Hooe can receive no injury; but if it is insufficient, then he can derive no benefit, until the United States are first satisfied.

We do not contend that the United States had a lien upon the property. That is a distinct question, and has been decided by this court, at the present term, in the case of *United States* v. *Fisher et al.* (2 Cr. 358.) But it is right, that the interest of all should prevail over that of an individual.

We admit, that Fitzgerald had the right to sell and alien the property, but it does not follow, that he could, by a mortgage, or an assignment, prefer a particular creditor to the United States. The object of the legislature was, that if a man is unable to pay all his debts, and attempts to give a particular preference, his hand shall be stopped, until the debt due to the United States shall be satisfied. If it turn out that he was actually insolvent, the United States, and not the individual creditor, shall have the preference.

The object of the deed is, that if Fitzgerald's estate should be insufficient
*83] to pay all his debts, Hooe shall be preferred. *But the act of congress says, that in that event, the United States shall be preferred. The deed and the act are inconsistent with each other, and the deed must yield to the act. Among individual creditors, he had a right to prefer one over another, and such deeds would have been effectual, saving the priority of the United States.

This question is the same as if it had arisen upon a bond given for duties; for by the act of 3d of March 1797, § 5 (1 U. S. Stat. 515), it is enacted, "that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," &c., "the debt due to the United States shall be first satisfied; and the priority hereby established, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof," &c., "as to cases in which an act of legal bankruptcy shall be committed."

This is a voluntary assignment, and Fitzgerald died insolvent. It is not necessary that he should have been so, at the time of executing the deed.

If he become so afrerwards, and before the trust is executed, it is sufficient. It is the intention of the law, if there is an actual insolvency, that all priorities should yield to that of the United States. The United States, therefore, have a right to the whole of Fitzgerald's estate, in the first place; and if that is insufficient to pay the debt, they may resort to Hooe for the whole penalty of the bond, if necessary.

C. Lee and *Swann*, contrà, contended, 1st. That the deed was made *bonâ fide*, and for a valuable and good consideration, and therefore, valid upon general principles both of law and equity. 2d. That it was not invalidated by any statute of the United States.

*1. Indemnity is a good consideration, within the statute of Eliz. *Worseley* v. *Demattos*, 1 Burr. 474, to the whole of which case the attention of the court is requested, because, in almost every part, it is applicable to the present. [*84

The deed was also *bonâ fide*. There is no evidence that Hooe knew of Fitzgerald's inability to pay his debts, at the date of the deed. Indeed, there is no positive evidence of the insolvency of the estate, even at this moment. It has none of the marks of fraud mentioned in *Twyne's Case*. 1. It is only for a part, perhaps, not a third part, of his estate. 2. Although Fitzgerald remained in possession, yet, it being real estate, possession was no mark of fraud, and could not deceive and defraud others, because the deed must of necessity be upon record. 3. It was not made secretly. 4. It was not made pending any process against Fitzgerald. 5. Here was no secret trust for the benefit of the grantor. 6. It contains no unusual clauses in support of its honest and fair intentions, which, Lord Coke says, always induce suspicion.

The whole evidence in the case shows, that the only intention of the parties was that which is expressed fully and fairly in the deed. He had a right to indemnify Hooe, at the time of giving the bond, and it can make no difference, whether he executed the deed at that time or afterwards; the consideration was equally good at one time as at the other. It could be no fraud in Hooe, to wait for security as long as he thought himself safe; and it could be no fraud in Fitzgerald, to give a security, which he was bound in honor and conscience to give, whenever it should be demanded.

Mason, in answer to a question from the Chief Justice, whether there was any act of congress which subjected the lands of the debtors of the United States to a specific lien, said, he knew of none, unless it was the act of 11th July 1798, § 15. (1 U. S. Stat. 594.) But in the present case, Fitzgerald, by his will, charged his lands with the payment of his debts; and if he had not, they would have been liable to an *elegit*.

*Chief Justice.—I have considered the act of 1798; it only creates a lien when a suit is commenced. [*85

Monday, February 25th, 1805. Marshall, Ch. J.—I am directed by the court to inform the counsel in this case, that they do not wish to hear any argument from the counsel of the defendants in error, upon the general question of fraud, being satisfied on that point. The court also wishes to draw the attention of the counsel, to the question, whether there is any evidence of Fitzgerald's insolvency in the record.

Mason, for the United States.—The deed in this case is contingent; the power to the trustees to sell is contingent. They can only sell, to indemnify Hooe. Until he is damnified, they have no power to sell. The rents, issues and profits, are to be taken by Fitzgerald only; and the legal estate being in the trustees, the property is protected from the *elegit* of the creditors. Suppose, the property conveyed to be double the value of Hooes' claim, the residue would be protected from creditors, and would still be a fund from which Fitzgerald might draw supplies to himself. But the insolvency mentioned in the act of congress, means an inability to pay his debts, in contradistinction to an insolvency under a bankrupt law, or an insolvent act.

A voluntary deed, in the act, means a deed by a person unable to pay all his debts, made without coercion of law, to give a preference to some of his creditors. It is not necessary, that it should be a conveyance of all his effects. Suppose, he should make three separate deeds; one, to one of his creditors, for one-third of his estate; a second, to another creditor, for another third of his estate; and a third deed, to a third creditor, for the residue. The two first deeds would not be less fraudulent than the third, be-
*86] cause they conveyed only a part of the estate. *The decree of the court below is erroneous, because the answers and evidence specified the estate and effects of Fitzgerald, and the court ought to have ascertained the value, and from thence inferred his insolvency. An insolvency so ascertained would have been such an insolvency as would have given the United States a preference.

As to the question, whether the insolvency appears upon the record, the bill charges the fact, and none of the answers or depositions denies it. A comparison of the balance due with the effects and estate disclosed in the answers, affords the strongest corroboration ; and even Hooe, in his answer, does not deny a knowledge of it. But whether he knew it or not, it is sufficient, if we establish the existence of the fact; for in all cases, "where any revenue officer," "indebted to the United States," "shall become insolvent," "the debt due to the United States shall be first paid."

C. Lee and *Swann*, contrà.—The insolvency contemplated by congress means a legal insolvency, not a mere incapacity to pay, unattested by some notorious act of failure, such as a voluntary assignment of all the effects for the benefit of creditors, or the closing of doors to prevent process being served, &c. The cases provided for by the act are, 1. If the debtor "shall become insolvent." 2. Where the estate of a deceased debtor "shall be insufficient to pay all the debts." 3. Where "a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof." 4. Where "the estate and effects of an absconding, concealed or absent debtor, shall be attached."

The 1st case is that of legal and public insolvency, where the estate and
*87] effects are assigned by law. If it *meant every case where a man was actually incapable of paying all his debts, it would frequently look back and undo all the negotiations of an extensive trade, for many years ; for it often happens, that a merchant continues in business and credit, long after his capacity to pay all his debts has ceased. Besides, it would have been unnecessary for the legislature to add expressly the case of a voluntary assignment, where there was an inability to pay all the debts, if

such inability alone was within the meaning of the words "shall become insolvent."

2. The case of a deceased debtor, whose estate shall be insufficient to pay all the debts, would also have been included in the term insolvent, if it is to have so large and loose a construction as is contended for by the counsel for the United States.

3. And so would be the case of a voluntary assignment. But it is said, that the present deed is such a voluntary assignment as is contemplated in the act. The words of the act are, "a debtor not having sufficient property to pay all his debts," that is to say, the whole of whose property shall be insufficient to pay all his debts, "shall make a voluntary assignment thereof," that is, of the whole of his property. The assignment contemplated in the law must, therefore, mean an assignment of the whole; but this is only an assignment of a part, certainly, not so much as half his property, and is, therefore, a complete answer as to that point.

4th. The fourth case is of an attachment of the estate and effects of an absconding, concealed or absent debtor, and does not absolutely require an insolvency, or even an inability to pay all the debts; but is a case of suspicion, in which a public act has been done and suffered, giving notice of the insolvency, if it really exists. Even supposing, then, that Fitzgerald was actually unable to pay all his debts at the time of executing this deed of trust (which fact, however, does not appear), yet, as his property was not divested by act of law, nor by such a voluntary assignment as is contemplated by the act of congress, the priority of the United States had not attached, *so as by any possibility to avoid the deed of trust. This construction of the act of congress is warranted by the decision of a very respectable circuit court of the United States, in the case of *United States* v. *King*, Wall. C. C. 13. [*88

The United States are plaintiffs in equity for an injunction, and the burden is on them to prove all the material allegations of their bill. It is on them to prove the insolvency, not on us to disprove it. If, then, the deed is not fraudulent in itself, nor made void by any act of congress, the judgment of the court below was correct, and ought to be affirmed.

Wednesday, February 27th, 1805. Marshall, Ch. J., delivered the opinion of the court.

The first point made in this case, by the attorney for the United States, is, that the deed of the 16th of January 1799, is fraudulent as to creditors generally. It is not alleged, that the consideration was feigned, or that there was any secret trust between the parties. The transaction is admitted to have been, in truth, what it purports to be; but it is contended, that the deed, on its face, is fraudulent as to creditors.

The deed is made to save Hooe harmless on account of his having become the security of Fitzgerald to the United States, and on account of notes to be indorsed by Hooe for the accommodation of Fitzgerald in the bank of Alexandria. These are purposes for which it is supposed this deed of trust could not lawfully have been executed; and the deed has been pronounced fraudulent under the statute of 13th of Elizabeth.

That statute contains a proviso, that it shall not extend to conveyances made upon good consideration, and *bonâ fide*. *The goodness of the consideration, in the case at bar, has been admitted; but it is alleged, [*89

that the conveyance is not *bonâ fide ;* and for this, *Twyne's Case* has been principally relied on. But in that case, the intent was believed by the court to be fraudulent, and in this case, it is admitted not to have been fraudulent. It is contended, that all the circumstances from which fraud was inferred in that case, are to be found in this ; but the court can find between them no trait of similitude. In that case, the deed was of all the property ; was secret ; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case, the deed is of part of the property ; is of record ; is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor. In the case of *Hamilton* v. *Russell* (1 Cr. 310), this court declared an absolute bill of sale of a personal chattel, of which the vendor retained the possession, to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right. That the grantor is to receive the rents and profits until the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant.

That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent, for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due. All the covenants in this deed appear to the court to be fair, legitimate and consistent with common usage. It will barely be observed, that the validity of this conveyance is to be tested by the statutes of Virginia, which embrace this subject. But this is not mentioned as having any influence in this case.

*90] *The second point for which the plaintiffs contend is, that this is a case in which the priority of payment claimed by the United States in cases of insolvency, intervenes and avoids the deed. This claim is opposed on two grounds. It is contended, 1st. That at the time of making this deed, Fitzgerald was not insolvent in point of fact ; and 2d. That this deed was not a transaction which evidences insolvency under the act of congress.

In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected.

In the case at bar, it will be observed, on the first objection made by the defendants, that the insolvency, which is the foundation of the claim, must certainly be proved by the United States. It must appear, that at the time of making the conveyance, Fitzgerald was "a debtor not having sufficient property to pay all his debts." The abstract from the books of the treasury is undoubtedly complete evidence so far as it goes ; but it is not intended to show the state of Fitzgerald's accounts in January 1799. If that had been its object, it would have credited him for the bonds then reported to be on hand. If the case turned entirely on this point, the court would probably

send it back for further explanation respecting it. But this would be unnecessary, as it is the opinion of the court, that the decree is right, however this fact may stand.

If a debtor of the United States, who makes a *bonâ fide* conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the the nature of a lien, from the instant he became indebted; the inconvenience of which, where the debtor continued to transact business with the world would certainly be very great.

*The words of the act extend the meaning of the word insolvency to cases where "a debtor, not having sufficient property to pay all his [*91 debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors." The word "property" is unquestionably all the property which the debtor possesses; and the word "thereof" refers to the word "property" as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words "or part thereof," or others of similar import, would have been added. If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a *bonâ fide* conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act.

It is observable, that the term insolvency was originally used, and the subsequent sentence is designed to explain the meaning and intent of the term. The whole explanation relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense. It is the opinion of the court, that there is no error in the decree of the circuit court, and that it be affirmed.

After the opinion was given, it was stated, that the court below had decreed the United States to pay costs, and it was suggested, that that circumstance might have escaped the notice of this court, in affirming the decree generally.

Mason observed, that costs were only given by statute, and that the United States are not bound by a statute, unless they are expressly named in it. That there was no means of compelling the United States to pay them.

Marshall, Ch. J.—That would make no difference, because we are to presume they would pay them, if bound by law so to do.

**Mason.*—There is no precedent of a judgment against the United States for costs. In the case of the *United States* v. *La Vengeance*, [*92 3 Dall. 301, the decree of the circuit court was affirmed, with costs. But the next day the Chief Justice directed the words "with costs" to be stricken out, as there appeared to have been some cause for the prosecution. But he observed, in doing this, the court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States, but left it entirely open for future discussion.

March 6th. The Court directed the decree of the court below to be affirmed, except as to costs, and reversed so much of the decree as awarded the United States to pay costs, and directed that no costs be allowed to either party in this court.

Peyton *v.* Brooke.[1]

Costs of execution.

In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both.

This case came before the court, upon a bill of exceptions to the opinion of the Circuit Court of the district of Columbia, for the county of Alexandria, upon a motion for execution on a forthcoming bond, taken under the act of assembly of Virginia. Rev. Code, p. 309.

The bond, upon which the motion was made, recited a *ca. sa.* against Peyton, in favor of Brooke, for $525 and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight, and marshal's fees and commissions, and all costs, $19.96, amounting in the whole to $578.82. The execution on which the bond was taken was for $525 and $20, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight.

*93] *The whole amount of costs taxed on the original judgment was $20.12, and 602 pounds of tobacco, including the costs of issuing an execution. The bond was taken upon an *alias ca. sa.*, the first having been returned *non est*. The first execution was for $525, and $20.12, and 602 pounds of tobacco. The execution upon which the bond was taken included 22 pounds of tobacco (the clerk's fees for issuing the *alias ca. sa.*), and did not include 12 cents, part of the costs taxed upon the original judgment.

The plaintiff, in the court below, released 44 pounds of tobacco, the costs of issuing both executions, and the court below gave judgment for the plaintiff. The defendant brought his writ of error.

Wednesday, February 27th, 1805. The Court called for statements of the case, agreeable to the rule of the court.

Swann, for the defendant in error, said, he had supposed the rule to extend only to plaintiffs in error. The court said, they expected them from both sides. No statements were prepared.

Marshall, Ch. J.—We wish to give general notice to the gentlemen of the bar, that unless statements of the case are furnished, according to the rule, the causes must either be dismissed or continued.

Jones, for the plaintiff in error.—There are two objections to the proceedings of the court below. 1st. That the *alias capias* and the bond include 22 pounds of tobacco for the clerk's fee, in issuing the *alias capias*. 2d. That the *alias capias* does not include 12 cents, taxed as part of the costs on the original judgment.

For this variance between the bond and the original judgment, the court

*94] below ought not to have awarded *execution upon the bond, but ought to have quashed both the bond and the execution upon which it was

[1] See s. c., in the court below, 1 Cr. C. C. 96, 128.

founded. Every execution must pursue the judgment, or it is void. The judgment having included all the costs, a ministerial officer cannot add anything, unless warranted by statute. No fee is given by statute for issuing an *alias capias*.

The execution was, therefore, void, and no subsequent release of the fee by the plaintiff can make it good. The plaintiff, if he takes out an *alias ca. sa.*, must do it at his own cost. The words of the act of assembly (Rev. Code, p. 308, § 2) are, "when any writ of execution shall issue, and the party at whose suit the same is issued, shall afterwards desire to take out another writ of execution, at his own proper costs and charges, the clerk may issue the same, if the first writ be not returned and executed."

MARSHALL, Ch. J.—Does not that relate to an *alias* taken out before the return-day of the first execution?

Jones.—No *alias* execution can issue, until after the return-day of the first. If the first execution be returned, not executed; or if it be executed and not returned, the plaintiff may have an *alias*, but it must be at his own expense.

MARSHALL, Ch. J.—Would not an action at common law lie on the bond, even if the execution was quashed upon which the bond was founded?

C. Lee.—If the bond was erroneous, the court would quash it, as well as the execution. (*Simm* v. *Johnson*, in the court of appeals of Virginia, reported in Washington's or Call's Reports.)

MARSHALL, Ch. J.—The plaintiff may quash the bond, and proceed on the original judgment; but the defendant can only quash the execution. A difference *was taken between a bond on a *ca. sa.* and a bond on a *fi. fa.* [*95 under the construction of the statute of Hen. VIII., respecting sheriffs taking bonds *colore officii*. The case is reported. I was counsel and argued the case. I believe it was that of *Simm* v. *Johnson*.

Simms, for the defendant in error.—At common law, a creditor might have an *alias capias*, if the first was returned *non est*. The statute provides, that he may also have an *alias*, if the first be not returned executed. If the first be not returned, the *alias* must be at the plaintiff's costs; if it be returned, the *alias* is to be at the costs of the defendant. In no case is judgment given for the costs of an execution. The clerk never taxes it, until he issues the execution. The constant and uniform practice of the courts of Virginia is, to add the cost of the *alias*, if the first be returned and not executed.

But if the clerk had not a right to insert the cost of the *alias ca. sa.*, that does not vitiate the bond. It is but the act of a ministerial officer, and the court have a right to correct it. The sheriff is to take the bond for the amount mentioned in the execution. It is not right, that the error of the clerk should deprive the plaintiff of his security; especially as the bond is given for the benefit of the debtor, and the creditor has released the whole amount in dispute. It is no cause to quash the bond; nor to render it void at common law.

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[1] The case of Syme *v.* Johnson is reported in 3 Call 558.

Swann, on the same side.—The judgment is for costs; all the costs which have accrued or shall accrue. It is admitted, that we have a right to recover the costs of the first execution; and even if the clerk has mistaken the law, in adding the costs of the second, yet, that error is cured by the plaintiff's release. In the case of *Scott* v. *Hornsby*, 1 Call 41, the court of appeals of Virginia decided, that if a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment.

*96] **Jones*, in reply.—The awarding of execution on a forthcoming bond, upon motion, is a summary remedy given by statute, in derogation of the common law, and therefore, the provisions of the statute must be strictly pursued. The release cannot aid an error in the exercise of this summary jurisdiction. I admit, the practice to be, that if the bond be for more than the judgment, and the plaintiff releases the excess, it will support a judgment. So, if the bond be for too small a sum, it is still good as a bond at common law. But in neither case, will it support the summary proceeding, by motion.

The taking a forthcoming bond is one mode of executing the writ. If the defendant be arrested, the quashing of the execution releases his body. So, if goods be taken on a *fi. fa.*, and the *fi. fa.* be quashed, the goods are discharged. So, in this case, the bond (being taken in lieu of the goods or of the body) would be discharged, by the quashing of the execution.

It is true, the judgment is for costs; but it cannot be in the alternative; that is, if one execution, then for 22 pounds of tobacco; and if two executions, then for 44 pounds of tobacco.

Marshall, Ch. J.—The court is of opinion, that the act of assembly contemplates the case where the first execution is not returned nor executed; that is, where it is out and may be served. The clerk is right in adding the costs of the *alias ca. sa.* The judgment is for costs, generally; which includes all the costs belonging to the suit, whether prior, or subsequent to the rendition of judgment. If new costs accrue, the judgment opens to receive them.

Judgment affirmed, with costs.

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*97] *Lambert's Lessee *v.* Paine.

Devise in fee.

A devise of "all the estate called Marrowbone, in the county of Henry, containing by estimation 2585 acres of land," carries the fee.[1]

Quære? Whether a British subject, born in England, in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia, by descent or by devise?

This was an ejectment brought in the Circuit Court of the United States, for the middle circuit in the Virginia district; in which John Doe, a subject of the King of Great Britain, residing without the state of Virginia, lessee of John Lambert, another subject of the King of Great Britain, complains of Richard Roe, a citizen of Virginia, residing within the said state, and

[1] Abbott *v.* Essex Co., 18 How. 262; s. c. 2 Curt. 126.

claims possession of a messuage and tenement, containing 156 acres of land, in the county of Henry, being part of a tract of land called Marrowbone.

The jury found the following special verdict, viz: "That George Harmer, being seised in fee of the lands in the declaration mentioned, on the 25th of June 1782, made a paper writing, purporting to be his last will and testament, all written with his proper hand, and signed by him; which will we find in these words:

"'In the name of God, Amen. I, George Harmer, of the commonwealth of Virginia, being perfectly well and of sound mind and memory, do make and ordain my last will and testament, in manner and form following, that is to say, all the estate, both real and personal, that I possess or am entitled to, in the commonwealth of Virginia, I hereby give and devise unto my friend, Thomas Mann Randolph, of Tuckabo, and Henry Tazewell, of the city of Williamsburgh, in trust, upon these conditions, that when John Harmer, my brother, now a subject of the King of Great Britain, shall be capable of acquiring property in this country, that they, or the survivor of them, do convey, or caused to be conveyed, to him, in fee-simple, a good and indefeasible title in the said estate; and in case the said John Harmer should not be capable of acquiring such right, before his death, then that my said trustees, or the survivor of them, do convey the said estate in manner aforesaid, to John Lambert, son of my sister, Hannah Lambert, when he shall be capable of acquiring property in this country; and in case John Lambert should not, before his death, be capable of acquiring a title to the said estate, then I direct the same to be conveyed *to my sister, Hannah Lambert, if she, [*98
in her lifetime, can acquire property in this country. But if the said John Harmer, John Lambert and Hannah Lambert should all die before they can acquire property legally in this country, then I desire that my trustees aforesaid may cause the said estate of every kind to be sold, and the money arising from such sale, together with the intermediate profits of the said estate shall be by them remitted to the mayor and corporation of the city of Bristol, in England, to be by them distributed, according to the laws of England, to the right heirs of my said sister, Hannah Lambert, to whom I hereby give all such money, excepting the sum of 100*l.* lawful money to each of the afore-mentioned trustees, which shall be paid out of the first money arising from the sales afore mentioned, or from the profits arising to my heirs. In witness whereof, I have hereunto set my hand and affixed my seal this 25th of June, 1782.'

"We find, that on the 12th day of September 1786, the said George Harmer, being seised as aforesaid, duly executed another writing testamentary, which we find, in these words:

"'In the name of God, Amen. I, George Harmer, being sick and weak in body, but in perfect mind and memory, do give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land; likewise, one other tract of land in said county, called Horse-pasture, containing, by estimation, 2500 acres; also, one other tract, in the county aforesaid, containing, by estimation, 667½ acres of land, called the Poison-field. It is my desire that all my negroes, horses and other property be sold, and after paying my debts, the balance, if any, be remitted to my nephew, John Lambert, out of which he shall pay his mother five hundred pounds,' &c.

"Afterwards, on the 12th or 13th day of September 1786, he departed this life, without revoking the will or writing testamentary last mentioned; and without any other revocation of the will first mentioned, than the said writing testamentary of the 12th of September 1786. We find, that John Harmer, mentioned in the paper writing of June 1782, departed this life about the year 1793. We find, that John Lambert, named in the paper
*99] writings *aforesaid, the lessor of the plaintiff, was, if capable of inheriting lands in Virginia, heir-at-law to the said George Harmer; that he was born in England, on or before the year 1750; that he has never resided in any of the United States of America, and is, and ever has been, from the time of his birth, a subject of the King of Great Britain. We find, that George Gilmer aforesaid, under whose heir and devisees the defendant holds, died in the month of November 1793. We find, that in the December session 1798, the general assembly of Virginia passed an act, which we find at large in these words:

"'An act vesting in the children of George Gilmer, deceased, certain lands therein mentioned (passed January 12th, 1799). § 1. Be it enacted by the general assembly, that all the right, title and interest, which the commonwealth hath, or may have, in or to the following lands, lying in the county of Henry, which George Harmer, by his last will and testament, devised to a certain George Gilmer, and which, since the death of the said George Gilmer, it is supposed have become escheatable to the commonwealth, to wit, one tract called Marrowbone, containing, by estimation, 2585 acres; one other tract called Horse-pasture, containing, by estimation, 2500 acres; and one other tract called the Poison-field, containing, by estimation, 667½ acres, shall be, and the same are hereby released to, and vested in, the children, whether heirs or devisees, of the said George Gilmer, deceased; to be by them held and enjoyed, according to their respective rights of inheritance, or devise under his will, as the case may be, in the same manner as if the said George Gilmer had died seised of the lands in fee-simple, and an office had actually been found thereof; saving, however, to a certain John Lambert, who, as heir-at-law to the said George Harmer, claims the said lands, and to all and every other person or persons, bodies politic and corporate (other than the commonwealth), any right, title or interest, which he or they might or would have had in or to the said lands, or any part thereof, against the said children and devisees, if this act had never been made. § 2. This act shall commence in force from the passing thereof.'

"We find, that George Harmer was, at the time of his death, seised in fee
*100] of the lands in the *declaration mentioned, which are of the value of $3000, and that George Gilmer, at the time of his death, was seised of the same, under the devise to him from the said George Harmer. We find the lease, entry and ouster in the declaration mentioned. On the whole matter, if the court shall be of opinion, that the law is for the plaintiff, we find for the plaintiff the lands and tenements in the declaration mentioned, and 20 cents damages; and if the court shall be of opinion, that the law is for the defendant, we find for the defendant."

Upon this verdict, the judgment of the court below was for the defendant. The transcript of the record contained a bill of exceptions by the defendant, to the refusal of the court to the admission of testimony to prove that George Harmer, at the time he made the will in favor of Gilmer, de-

clared to the person who wrote it, that it was his intention to give Gilmer the fee-simple. There was also an agreement of counsel, that if the court should be of opinion, that the first will ought not to have been admitted in evidence, because not proved before a court of probate, then so much of the verdict as related to that will should not be considered as forming any part of this case.

The writ of error was sued out by the plaintiff, and general errors assigned. The case was argued at February term 1803, by *Minor* and *Mason*, for the plaintiff in error, and by *Key*, for the defendant.

Minor, for the plaintiff, insisted on the following points, viz: 1st. That the devise from George Harmer to George Gilmer, dated 12th of September, 1786 ,of all the estate called Marrowbone, is only a devise for life. 2d. That John Lambert, heir-at-law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent. *3d. That the will of 12th September 1786, is only a partial, and not a total revocation of the will of 25th June 1782; and that this will passes [*101 and disposes of the reversionary interest of the testator's estate, according to the legal import of that will. 4th. That by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert. 5th. That John Lambert, if an alien, is capable of taking by devise, and is protected by the treaty of 1794 between the United States and Great Britain. 6th. Or that, if not, the property remains in him until office found for the commonwealth.

1. That the devise to Gilmer is only for life. In the first will of 1782, which is wholly written with the testator's own hand, he evinces not only a knowledge of the import, but of the necessity of technical words of limitation or perpetuity; yet, in the will of 1786, he uses expressions which convey a life-estate only, and uses no words which can be construed into an intention wholly to revoke the will of 1782. The first will disposes of the fee to his near relations; and hence results a strong presumption, that he meant to give only a life-estate by the will of 1786. The will of 1782 makes use of strong terms of limitation or perpetuity, and clearly shows his intention of securing the fee-simple to his brother and heir, John Harmer, who had, in fact, given him this very land. In the last will, he does not notice his former will, nor mention his brother and heir, but devises "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land," &c., to Doctor George Gilmer.

It is generally true, that a devise of real property without words of limitation, conveys only an estate for life. This is the general rule, and must prevail, unless such circumstances appear, as are sufficient to satisfy the conscience of the court, that the testator *intended to convey a fee. [*102 *Bowes* v. *Blackett*, Cowp. 235. So, in the case of *Hogan* v. *Jackson*, Ibid. 306, Lord MANSFIELD said, "if the words of the testator denote only a description of the specific estate, or lands devised; in that case, if no words of limitation are added, the devisee has only an estate for life. But if the words denote the quantum of interest or property that the testator has in the lands devised, there, the whole extent of his interest passes, by the gift, to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator. It is now clearly

settled, that the words 'all his estate,' will pass everything a man has; but, if the word 'all' is coupled with the word 'personal,' or a local description, there the gift will pass only personalty, or the specific estate particularly described."

And in the case of *Loveacres* v. *Blight*, Cowp. 355, Lord MANSFIELD said, "in general, wherever there are words and expressions, either general or particular, or clauses, in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place; so, if the court cannot find words in the will, sufficient to carry a fee, though they themselves should be satisfied, beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law. Now, though the introduction of a will, declaring that a man means to make a disposition of all his worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, where he has used no words of limitation, it will not do alone. And all the cases cited in the argument, to show that the introductory words in this case would alone be sufficient, fall short of the mark; because they contained other words, clearly manifesting the intention of the testator to pass a fee."

The case of *Right* v. *Sidebotham*, Doug. 759, is also very strong. There, the introductory clause testified the intention of the testator to dispose of all his worldly goods and estates, and also a disinheriting legacy to the heir. The devise, then in question, was coupled by the word "and" with another devise to *the same devisee, her heirs and assigns, yet it was held not sufficient to carry the fee. Lord MANSFIELD says, "the rule of law is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. All my estate, or all my interest, will do; but 'all my lands lying in such' a place, is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life." The same principle is laid down in Gilbert on Devises 24.

*103]

Thus, we find that the intention of the testator must be sought by fixed rules, and when found, it must not only be sufficiently proved, to satisfy the conscience of the court, but must be coupled with apt and sufficient words to pass a fee. See the case of *Frogmorton* v. *Wright*, 3 Wils. 418, which is a strong case for the plaintiff. So is also the case of *Chester* v. *Painter*, 2 P. Wms. 335. In the case of *Fletcher* v. *Smiton*, 2 T. R. 656, the words were, "all my estates," and the decision was upon the ground of an intention clearly appearing to dispose of his whole interest.

There is nothing in the present case, to show an intention of conveying a fee, unless it be the words "all the estate called Marrowbone, in the county of Henry, containing 2585 acres of land." The testator does not, in the beginning of his will, as in most of the cases cited, declare an intention of disposing of all his estate and interest. There is a difference between the terms "all *the* estate" and "all *my* estate." The latter is certainly a more evident allusion to the degree of interest than the former. The expressions "all the estate called Marrowbone," are clearly words of locality, and not of interest. What idea would a lawyer have of an estate called Marrowbone, containing 2585 acres? Could he ascertain whether it was an estate for

years, for life, or in fee? Besides, the expression is coupled with two others which are most clearly descriptive of the thing, and not of the degree of interest. "Likewise one other tract of land, called Horse-pasture; also one other tract, called the Poison-field." Here, by the word "likewise," is implied that the testator meant to devise the same degree of interest in each of the tracts; and by the word "other," it is evident, that he intended the former description as a description of a tract of land *as to locality only, and not of his degree of interest in it. Having, in the first part of the sentence, used [*104 an equivocal word, and having, in the subsequent clause of the sentence, used synonymously a word which is certain in its meaning, and clearly descriptive of the thing, and not of the interest, it is fair to conclude, that the equivocal meaning of the former is explained and rendered certain by the latter; and that he meant no more by the word "estate," than by the expression "tract of land."

It is a rule, that where words are used synonymously, the word most frequently used shall govern the sense. Here, the term "tract of land" is twice used as synonymous to "estate;" the former, therefore, ought to control the sense of the latter. It is true, that "all my estate" has sometimes carried the fee; but to induce a departure from the general rule, the intention must be clear to pass a fee. The word "all" is coupled with a local description; it relates to the number of acres, and not to the degree of the testator's interest in the land. The word "estate," as used in Virginia, is generally understood to mean a description of the property or thing, and not of the interest; and this court will respect the provincial meaning, to come at the true intention of the testator. It is not probable, and therefore, is not to be presumed, that he would give his estate to a stranger, and disinherit his heir, who had given him this very estate; and it is to be observed, too, that he does not, in his last will, even mention his brother John, to whom, by the first will, he had given all his estate.

2. The second point is, that John Lambert, heir-at-law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent. If he is incapable of holding lands in this country, it must be, because he is an alien born. Is he such, under the legal acceptance of the word alien? A definition of an alien is thus given in *Calvin's Case*, 7 Co. 16 *a*: "An alien is a subject that is born out of the ligeance of the king, and under the ligeance of another." Wood's Inst. 23; 1 Inst. 198 *b*; 1 Woodd. 386. John Lambert, the lessor of the plaintiff, was born in England, in *the year 1750, under the allegiance of the king of Great [*105 Britain. At his birth, he had inheritable qualities, of which he can be deprived by one mode only, and that is the commission of a crime sufficient to work corruption of blood. 1 Bl. Com. 371. This is not pretended. Lambert was born within the ligeance of the king, the then common sovereign of this country and England; and therefore, is not an alien born.

Those born under common allegiance may acquire and hold lands; and in time of war, they may join the one, but must render service to the other, for the land. Bracton, lib. 5, c. 24, fol. 427 *b*; 1 Hale's P. C. 68; *Calvin's Case*, 7 Co. 27 *b*. The words of Bracton are: "*Est etiam et alia exceptio quæ tenenti competit ex persona petentis propter defectionem nationis, qæ ditatoria est, et non perimit actionem, ut si quis alienigena qui* [*non*] *fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes, nec*

etiam sive rex ei concesserit placitari, quia sicut Anglicus non auditur in placitando aliquem de terris et tenementis in Francia, ita nec debet Francigena, et alienigena, qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia. Sed tamen sunt aliqui Francigenæ in Franciæ, qui sunt ad fidem utriusque, et semper fuerunt ante Normanniam deperditam, et post, et qui placitant hic et ibi, ea ratione qua sunt ad fidem utriusque, sicut fuit W. comes Marreschallus et manens in Anglia, et M. de Feynes manens in Francia, et alii plures; et ita tamen si contingat guerram moveri inter reges, remaneat personaliter quilibet eorum cum eo cui fecerit ligeantiam, et faciat servitium debitum ei cum quo non steterit in persond. See also *Calvin's Case*, 7 Co. 25 *a*, *b*.

A man born in the English plantations, is a subject. Wood's Inst. 23. He that is born in the mother country must, *à fortiori*, be a subject, and capable of all the rights of a subject in the colonies. One of these rights is that of acquiring property. "All persons may convey, as well as purchase, except men attainted of treason," &c., "aliens born," &c. Wood's Inst. 233; 1 Inst. 42 *b*. But it has been proved, that the lessor of the plaintiff is not an alien born; he, therefore, may purchase or take. If he once had an inheritable quality, or a capacity to take, and has not forfeited it by any crime, it follows, that he has it yet. The separation of the colonies from England, could
*106] not, in law or *reason, deprive him of this right. *Calvin's Case*, 7 Co. 27 *a*, *b*.

Calvin's Case was shortly this: Calvin was born in Scotland, after the crowns of England and Scotland were united on the head of James I. The question was, whether he could maintain an assise of *novel disseisin* of lands in England. The plea was, "that he was an alien, born at Edinburgh, within the kingdom of Scotland, and within the ligeance of the king of Scotland, and out of the ligeance of the king of England." One of the objections on the part of the defendants was, that if *post-nati* were, by law, legitimated in England, great inconvenience and confusion would follow, if the king's issue should fail, whereby those kingdoms might again be divided. But to this, it was answered by the judges, that "it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth: For as the *ante-nati* remain aliens as to the crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms, by descent subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth, so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert!) should, by descent, be divided, and governed by several kings; yet it was resolved, that all those that were born under one natural obedience, while the realms were united nnder one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was, by judgment of law, a natural subject, at the time of his birth, become an alien, by such a matter *ex post facto*. And in that case, upon such an accident, our *post-natus* may be *ad fidem utriusque regis*, as Bracton saith, in the afore-mentioned place, fol. 427."

The present case is stronger than Calvin's. There, the question was, whether he had gained a right; but here, it is, whether he has lost one. The

same rule prevailed when the Saxon heptarchy became united under the King of the West Saxons. *Calvin's Case*, 7 Co. 23 *b*. And also with regard to the possessions held by the kings of England in France, at various times, such as the Dukedom of Acquitain, and the Earldoms of Poitiers, Normandy and Anjou. So, with regard to the islands of Jersey, Guernsey, *Man, [*107
Ireland, &c. *Calvin's Case*, 7 Co. 19, &c.; 1 Hale's P. C. 68, 69. Suppose, a division of these states, it would follow, from the doctrine contended for by the opposite counsel, that people born in the same country, and under one common allegiance, would be aliens to each other.

The Kings of England themselves did homage to the Kings of France for provinces which they held, such as Normandy, Guienne, Brittany, &c. This was also the case with many of their subjects; as in the case of the Duke of Richmond, Duke D'Aubigny, &c. Hale's P. C. 68; *Calvin's Case*, 7 Co. 27 *b*. In this country, the personal services are dispensed with, but the land pays the common tax or duty. Alienage is incident to birth only. *Doe ex dem. Duroure* v. *Jones*, 4 T. R. 308.

It is not just or reasonable, that a man should be punished, without committing a crime, or for an act committed by a superior power which he could not control. Suppose, a secession of one of these states; would it be just, that the citizens of the other states, holding property in that state, should forfeit it, or lose their rights?

The reasons of policy for prohibiting aliens from holding lands are stated in *Calvin's Case*, 7 Co. 18 *b*, to be three: 1. The secrets of the realm might thereby be discovered; 2. The revenues of the realm should be taken and enjoyed by strangers born; 3. It should tend to the destruction of the realm. But none of these apply to the present case. Lambert lives out of the realm, and therefore, cannot betray its secrets. The land will continue to pay the taxes, which, being the sinews of war, will preserve the realm. Besides, the case applying only to the *ante-nati*, is limited in extent, and its operation will be constantly diminishing by failure of heirs, by alienations, by naturalization, &c. The English, who understand the principles of the common law at least as well as we do, have allowed our citizens to inherit in similar cases. The cases of the Chichester estate, and an estate recovered by Mr. Boyd, and the Earl of Cassel's estate, are examples. A liberal policy should dictate a reciprocation of the same principle.

*3. The third point, viz., that the will of 12th September 1786, is [*108
only a partial, and not a total, revocation of the will of 25th June 1782; and that this will passes and disposes of the reversionary interest of the testator's estate, according to the legal import of that will, was admitted by the opposite counsel, in case the second will devised a life-estate only.

4. The fourth point, that by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert, was also admitted, if he is not to be considered as an alien.

5. The fifth point is, that John Lambert, if an alien, is yet capable of taking by devise, and is protected by the treaty of 1794, between the United States and Great Britain. By the 9th article of the treaty, "it is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the

same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

The only doubt which can be raised upon this article arises from the word "hold." But treaties ought to be liberally expounded, so as to meet the full intention of the contracting parties. There can be no doubt, but the intention was to secure, not only actual possession, but rights which would have vested but for the alienage of the parties. This is apparent, from the provision made for legal remedies, which would be wholly useless, if the former expressions were meant to comprehend only lands in actual possession. If, therefore, Lambert is to be considered as an alien, yet the treaty destroys that bar to his recovery.

*109] *6. The sixth point is, that although Lambert should be considered as an alien, and is not protected by the treaty, yet he is capable of taking by devise, and of holding the land, until office found for the commonwealth. He certainly has a good right against all the world, except the sovereign. In England, land purchased by an alien does not vest in the king, until office found. Co. Litt. 2 *b*, Hargrave's note 3 ; *Page's Case*, 5 Co. 52 *b* ; 1 Jones 78, 79 ; *Englefield's Case*, Moore 325 ; 2 Bl. Com. 293. If he had been tenant-in-tail, he might have barred the remainder. Goldsb. 102 ; 4 Leon. 84. An alien may take by devise, Powell on Devises 316, 317, 318 ; *Knight* v. *Duplessis*, 2 Ves. 362, and may hold until office found. "For," says Powell, "when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in, to all intents and purposes, as any other devisee would have been, until something further be done to take the estate devised out of him again ; for as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land, until office found ; but if he die before office, the law casts the freehold and inheritance upon the king, for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, has no retrospect to the time of its being consummate, nor does it affect the land in the hands of the devisee, until another thing is done to entitle the king, not under the devise, but by right of his prerogative, viz., office found ; the tenant being an alien, and consequently, though of capacity to take lands in his own right, yet not of capacity to hold them."

Key, contrà, contended, 1st. That George Harmer, by the will of 1786, devised a fee to Gilmer. 2d. That if he did not, yet the lessor of the plaintiff cannot recover.

1. The word "estate," in the devising clause of a will, where it refers to land, denotes and carries the testator's interest in the land. And there is no *110] difference in construction *of law, whether the words are "all *my* estate," or "all *the* estate." Both carry the whole interest of the testator. In the present case, there are no words of locality that operate as description, and prevent the fee from passing. It is admitted, that the word estate, where it is coupled with personalty, shall be restrained, and will not carry the fee of lands ; upon the principle *noscitur a sociis*. This case is not within this distinction, because the word estate refers wholly to the land, and the whole personal estate is disposed of by a subsequent, independent clause. Consequently, no cases can apply but where the expressions

are similar to those of the present will, and refer to lands. In the case of *Wilson* v. *Robinson*, 2 Lev. 91 ; 1 Mod. 100 (25 *Car. II.*, *Anno* 1672), the words were, "all my tenant-right estate at Brigisend, in Underbarrow," and it was held, that they passed the fee. This is the general rule of law, and is uniformly supported by the authorities from the year 1672 to the present time ; except the case cited by the plaintiff's counsel, from 2 P. Wms. The case in 2 Lev. 91, is exactly like the present ; the word lands is used in the same sentence, and in the same manner as in the present case.

The word "estate," in wills, always means the interest, unless controlled by words of restriction. Words of locality will not restrain the force of the word estate. In the case of *The Countess of Bridgewater* v. *Duke of Bolton*, 1 Salk. 236; s. c., 6 Mod. 106, the words were, "all other my estate, real and personal, not otherwise disposed of by this my will, for to be given by him to his children as he shall think convenient, I solely trusting to his honor and discretion that he will give them such provision as will be necessary." "*Et per* HOLT, Ch. J., who delivered the resolution of the court, the rents pass by these words 'all my real and personal estate,' for the word estate is *genus generalissimum*, and includes all things real and personal, and the fee of the rents passes, at least, the whole estate of the devisor; for all his estate is a description of his fee. In pleading a fee-simple, you say no more than *seisitus in dominico suo ut de feodo;* and in *formedon*, or other action, if a fee-simple be alleged, you say *cujus statum* the demandant now has." And he held, "that devising all his estate, and *all his [*111
estate in such a house, was the same, and that all his estate in the thing passed in either case."

The next case is that of *Barry* v. *Edgeworth*, 2 P. Wms. 323 (*Anno* 1729), which overrules the case of *Chester* v. *Painter*, cited by the plaintiff's counsel from 2 P. Wms. 235 (*Anno* 1725). In this case of *Chester* v. *Painter*, the court probably took the whole will together, and from the testator's having used the word heirs, in some of the devises, and omitted it in the devise in question, concluded, that it was not his intention to pass the fee. In the case of *Barry* v. *Edgeworth*, the words were, "all her land and estate in Upper Catesby, with all their appurtenances," and the Master of the Rolls held it to be decided by the case of *The Countess of Bridgewater* v. *Duke of Bolton*, 1 Salk. 236, and said, "the word estate naturally signifies the interest rather than the subject, and its primary signification refers thereto; and although the devise be of all her land and estate in Upper Catesby, this is not restrictive with respect to the estate intended to pass by the will, but only as to the land." "And as the word estate has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it; for then none could give any opinion thereupon." This case refers to that of *Murry* v. *Wyse*, 2 Vern. 564 (*Anno* 1706), where the words "all the rest and residue of his real and personal estate whatsoever," were held to pass a fee. s. c., Precedents in Chan. 264.

In the case of *Ibbetson* v. *Beckwith*, Cas. temp. Talbot 157, the words were, "as touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise and dispose of the same in the manner following." Then follow two devises of "estates," burdened with the payment of debts and legacies, which were admitted to carry a fee; after which came the devise in question: "Item, I give unto my loving mother all my estate at

Northwith close, North closes, and my farm held at Roomer, with all my goods and chattels as they now stand, for her natural life, and to my nephew Thomas Dodson, after her death, if he will but change his name to Beckwith; if he does not, I give him only 20*l.*, to be paid him for his life out of Northwith close, North close, and the farm held at Roomer; which I give
*112] her, upon my nephew's refusing to change *his name, to her and her heirs for ever." The question was, whether Thomas Dodson took an estate for life or in fee. The Lord Chancellor decreed that he took the fee; and said, that the word estate carries the fee, and that no case had been cited "to warrant the altering the known legal signification of it." See also Gilb. Devises 25. So, in the case of *Bailis* v. *Gale*, 2 Ves. 48 (*Anno* 1750), testator devised to his wife all that estate he bought of Mead, for so long as she shall live; and in another clause said, "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." The Lord Chancellor said, that the word estate is admitted to be sufficient to make a description not only of the land, but the interest in the land; and he held that the fee passed to Charles.

The case of *Hogan* v. *Jackson*, Cowp. 306, shows that the word estate is sufficient to pass all the interest of the testator in the thing devised. So, in the case of *Loveacres* v. *Blight*, cited from Cowp. 355, Lord Mansfield says, "the word estate comprehends not only the land or property a man has, but also the interest he has in it." And in *Denn* v. *Gaskin*, Cowp. 659, he puts the words, "all my estate," as an example of an expression tantamount to words of limitation. See also the case of *Hodges* v. *Middleton*, Doug. 434, where the argument of counsel is strong to the same effect. All the subsequent cases refer to that of *Barry* v. *Edgeworth*, 2 P. Wms. 523, and none of them refer to that of *Chester* v. *Painter*, in 2 Ibid. 335. The case of *Right* v. *Sidebotham*, cited from Doug. 763, does not apply to the present case, as the words of that devise were, "all my lands, tenements and houses," and not all the estate, as in our case. The authority from Gilb. on Devises, p. 24, is answered by p. 25, and a reason why a fee did not pass in the case in p. 24, is, because the word estate was coupled with personalty. The case of *Frogmorton* v. *Wright*, cited from 3 Wilson 418, had no words descriptive of the testator's interest, and the case of *Fletcher* v. *Smiton*, cited from 2 T. R. 660, is a strong case to show that the word estates will carry the fee, unless restrained by other words, clearly showing a contrary intention. A description of the place cannot, in reason, restrict the
*113] operation of the word *estate, because, unless the place be named, you cannot tell either what land, or what estate the testator meant to pass.

But it is said, there is a difference between the expressions, "all *my* estate," and "all *the* estate," and that the former more clearly indicates the interest than the latter. Nothing but the refinement of ingenious men could find a diversity in these expressions. When a testator is disposing of his worldly affairs, it is his own property that he means to dispose of, and not that of another person. When, therefore, he uses the expression, *the* estate, it means the same as *his* estate. But this subtlety of construction was soon exploded in express terms. It was suggested by the counsel, in the case of *Bailis* v. *Gale*, 2 Ves. 48, but Lord Hardwicke held, that it makes no difference which mode of expression is used. So, there was once an attempt made to distinguish between the words "at" and "in," such a place; but

this was overruled by Lord TALBOT, in the case of *Ibbetson* v. *Beckwith*, Cas. temp. Talbot 157. The word "at" was used in the case in 2 Lev. 91, and in the case before Lord TALBOT. But the word "in" was used in the case of *Barry* v. *Edgeworth*, 2 P. Wms. 523, yet the decisions in those cases were all the same way.

From this chronological view of cases, it seems clear, that the word estate, in a will, carries the whole interest of the testator, unless there are other words clearly indicating an intention to give a less estate. No such words appear in the present will; hence it follows, that the whole interest of the testator was devised to the defendant.

2. But if Doctor Gilmer took only a life-estate, yet the lessor of the plaintiff is not entitled to recover. 1st. Because John Harmer stands before him in the first will; and if the doctrine of *ante-nati* is correct, it applies to him as much as to Lambert, and therefore, upon the death of Doctor Gilmer, the estate vested in John Harmer, who was the person last seised. But *the special verdict does not find Lambert to be the heir of John Harmer, but of George Harmer, which is wholly immaterial. If Lambert is not the heir of the person last seised, he cannot recover. For if the first devise to John Harmer took effect, the contingent devise to Lambert could not; and therefore, if the latter is entitled at all, it must be as heir of John Harmer, and not as devisee of George Harmer. [*114

Equitable estates are governed by the same rules as estates at law. George Harmer died in 1786; John Harmer died in 1793. Either John Harmer was an alien, or he was not. If he was not an alien, then he took under the devise, and it is not stated who was his heir. If he was an alien, then he was, or was not, competent to take as devisee. If competent to take, then the record does not state Lambert to be his heir. If he was was not competent to take under the devise, neither is Lambert, for the same reason. But if Lambert can take as devisee, so could John Harmer, and the lessor of the plaintiff must then show a title under him. The will states John Harmer to be the testator's brother, and Lambert to be his sister's son; but it does not thence, follow, that he was heir-at-law of John Harmer; for the sister might be of the half-blood. Everything must appear in the special verdict to complete the plaintiff's title; and upon the strength of his own title only can he recover.

But the doctrine of *ante-nati* is not correct. The king, under whose allegiance the two were born, is the common bond which connects the inheritable blood. The English doctrine is, that a man can never expatriate himself, and hence, they have allowed our citizens, born before the revolution, to inherit to British subjects. But, by the revolution of 1776, and the declaration of independence, new relations took place. A new sovereignty was created, to which British subjects, not in this country at that time, never owed allegiance, and therefore, they can have no inheritable blood as to lands in this country.

But it is said, that Lambert, if an alien, could take and hold, until office found. *If Lambert, as an alien, could take, so could John Harmer, and therefore, upon his death the inheritance devolved upon the commonwealth, without office. Co. Litt. 2 *b*; 1 Bac. Abr. 81. An alien can never take by operation of law, and therefore, a *feme* alien cannot be endowed, nor can an an alien be tenant by the curtesy. 1 Bac. Abr. 83. An [*115

alien purchaser may take and hold, until office found; and may protect himself against an ejectment, because no one who has not a better title, can recover against the possessor. But he cannot maintain an ejectment. If John Harmer took anything, it was the reversion in fee, subject to the life-estate of Gilmer. If John Harmer died before Gilmer, then, upon the death of John Harmer, this reversion vested in the commonwealth. If Gilmer died before John Harmer, then, upon the death of the latter, the whole estate vested in the commonwealth.

Then, as to the treaty of 1794. John Harmer having died in 1793, and the inheritance being, by his death, cast upon the commonwealth, it was not a subject within the meaning of the treaty. John Lambert did not, at that time hold the land, for it had gone to the commonwealth of Virginia. The treaty did not intend to divest a right actually vested in the commonwealth.

Mason, in reply.—The word estate may mean the interest as well as the thing; but whether it is to have that sense annexed to it or not, depends upon the intention of the testator, collected from the whole circumstances of the case. All the facts found by the verdict are to be taken into consideration, to form a correct idea of the testator's intention. By the first, he clearly meant to give the fee to his brother and his heirs. The second will does not expressly revoke the first, and contains nothing which can be construed into an implied total revocation, unless the word estate conveys a fee to Doctor Gilmer. All the cases which have been cited, are governed entirely by the intention of the testator. Where the intention was to pass a fee, there the word estate has been adjudged sufficient to carry the intention into effect. The words "the estate called Marrowbone," in common acceptation, mean the tract of land called Marrowbone. They cannot neces-
*116] sarily *mean the fee-simple, because the estate would still be called Marrowbone, whether the interest was for life or for years.

The case of *Chester* v. *Painter*, 2 P. Wms. 336, has not been overruled. It is consistent with all the other cases. It did not appear to be the intention of the testator to give the fee, and therefore, although the word estate was used, it was held, that the fee did not pass. This shows that the word estate is not alone sufficient. Where words may be used in a large or in a contracted sense, the true construction is to be sought only by the intention of the person using them.

In the present will of 1786, there is no preamble stating it to be the intention of the testator to dispose of all his estate by that will; nor is there any residuary devise. As the first will is not expressly revoked, the two wills are to be considered as forming but one will. In such a case, the rule of construction is, that every clause shall be carried into effect, if possible. No repugnance shall be presumed, if the whole can stand together; and if one construction will reconcile the various parts, and another will make them repugnant, the former is to be adopted. To suppose, that the word estate, in the last will, conveyed the fee, would be to create a repugnance to the first will, and therefore, that construction is not to be given to the word, if it will bear another. It must be admitted, that it uay be used in two senses. In one, it means the thing and the interest; in the other, it means the thing only. The one may be termed the technical, and the other the

common sense of the word. By giving it the latter construction, the two parts of the will can be reconciled, and therefore, that construction ought to be adopted.

It is conceded, that the legal estate in the trustees cannot be set up against the *cestui que trust.* It ought also to be admitted, that this doctrine holds between those parties only ; but as to everbody else, the trust and the legal estate remain separate, to support the trust. In such a case, the commonwealth cannot take by office found, but must sue in chancery to have the trust executed for its benefit.

It will not be contended, that the trustees were not competent to take and hold the property in trust. The *devises to John Harmer and John Lambert were contingent. If the contingency has not happened, [*117 the trustees still hold, for the purpose of executing the trust, when the contingency shall happen. John Harmer died in 1793, before the contingency happened upon which his devise depended. Upon his death, John Lambert's right under the will accrued. He had a title under the trust ; and the treaty of 1794 protects it. The treaty is a nullity, unless it protects such rights as this. If it protects only good and indefeasible titles, it is wholly useless, for such titles can protect themselves.

But if any right vested in John Harmer, then the title of Lambert is good as his heir-at-law. For the jury have found him to be heir-at-law of George Harmer ; but he could not be the heir of George, if John left any children ; and if John left no children, then is Lambert heir to John. The conclusion is irresistible ; as much so, as if the jury had found it. As to the objection that Lambert's mother might be sister of the half-blood, it would prevent him from being heir to George as well as to John.

February 18th, 1805. This cause was again argued at this term by the same counsel, before Cushing, Paterson, Washington and Johnson, Justices. Marshall, Ch. J., having formerly been of counsel for one of the parties, did not sit, and Chase, J., was absent. The argument took nearly the same course as before.

Minor, for the plaintiff in error, in addition to his argument as already reported, contended, that the rule of the common law, which requires words of limitation to create a fee-simple, was never departed from, until after the statute of wills ; and even then, the courts did not depart from, but only softened, the rule ; and that only in cases where the intention was clear to pass the fee. *Timewell* v. *Perkins*, 2 Atk. 103.

He then went into a minute examination of the following cases, viz : *Beawes* v. *Blackett*, Cowp. 240; *Bailis* v. *Gale*, 2 Ves. 48; *Wilson* v. *Robertson*, 2 Lev. 91; s. c., 1 Mod. 100 ; *Countess of Bridgewater* v. *Duke *of Bolton*, 1 Salk, 236; *Goodwin* v. *Goodwin*, 1 Ves. 228; [*118 *Tanner* v. *Morse*, Cas. temp. Talb. 284; *Tanner* v. *Wyse*, 3 P. Wms. 295; *Beachcroft* v. *Beachcroft*, 2 Vern. 690; and *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157; and from the whole, deduced this principle, that the intention of the testator must be so clear as not to admit of a doubt; for if there is the smallest ground of doubt, the court will not disinherit the heir.

He also cited the case of *Markant* v. *Twisden*, from Eq. Cas. Abr. 211, pl. 22, where it was held, that the words "all the rest and residue of my estate, chattels, real and personal," carried only a life-estate; and the case of

Bowman v. *Milbanke*, 1 Lev. 130, in which the words were, "I give all to my mother, all to my mother." Yet there, although every feeling of the heart is engaged in support of that filial piety which could so fervently speak its intention of giving his whole estate to his mother, it was held, that the land did not pass. In our case, the feelings are all thrown into the opposite scale: the devise is to a stranger, in exclusion of the heir; and that heir the very brother to whose bounty the testator was indebted for this very estate.

"Uncertain words in a will must never be carried so far as to disinherit the heir-at-law. And though there be words which of themselves would disinherit him, yet, if they come in company with other words which render their import less forcible, they ought to be construed favorably for the heir;" *Shaw* v. *Bull*, 12 Mod. 594; in which case, the words of the devise were, "and all the overplus of my estate to be at my wife's disposal, and make her my executrix."

In the case of *Moore* v. *Denn*, 2 Bos. & Pul. 247, the words of the will were, "First, I give and devise unto my kinsman, Nicholas Lister, all that my customary or copyhold messuage or tenement, with the appurtenances, situate and being in Ecclesfield aforesaid, as the same is now in the tenure or occupation of Valentine Sykes; all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever or wheresoever, and also all my goods, chattels and personal estate, of what nature or kind soever, *119] after payment *of my just debts and funeral expenses, I give, devise and bequeath the same unto my loving wife, Sissily Carr, and I do hereby nominate and appoint her sole executrix of this my last will and testament." Upon this devise, it was decided, by the house of lords, on a writ of error, that the wife took only an estate for life. In the present case, it is sufficient for us, if the words of the will are doubtful; for if the intention to devise the fee is not clear, beyond all doubt, the presumption is in favor of the heir-at-law.

2. Upon the question of alienage, in addition to the authorities produced on the former argument, he cited Vaughan 279, pl. 5, and 286, pl. 3, that a person born in the plantations may inherit lands in England; and 2 Tuck. edit. of Bl. Com., App. p. 53, 54, 61, 62, that the *ante-nati* of England, who remained British subjects, after the declaration of independence, were still capable of inheriting lands in America, or holding those which they already possessed.(*a*)

Key, for the defendant in error, upon the question of the devise, took the same ground as in his former argument.(*b*) There is a difference in the

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(*a*) JOHNSON, J.—Does not the last clause of the will of 1786 show that the testator meant, by that will, to dispose of his whole estate?

Mason.—That clause relates only to personal estate. The word property is coupled with negroes and horses, which shows in what sense he meant to use it. But if it comprehends the reversion of the real estate, yet, as he appointed no person to make the sale, the reversion would descend to the heir-at-law, until some person should be appointed by proper authority, to carry that clause of the will into effect.

(*b*) WASHINGTON, J.—Is the will of 1782 so executed and recorded as to pass lands?

Key.—The jury have found that he executed it, and it is not necessary that a will

effect of the word "estate" when used in the preamble of a will, or in the residuary *clause, and when used in a specific devise. When used in the devising clause, it always carries the whole interest of the testator in the thing devised. [*120

An argument has been drawn from the manner in which the two other estates are described; and it is said, that because they are not called estates, but tracts of land, the devise clearly gives only a life-estate in those two tracts, and therefore, it is to be presumed, that the testator only meant to give a life-estate in the Marrowbone tract; because he has coupled them all together by the words "likewise" and "also." But we say, that he meant to give the fee of all the tracts to George Gilmer, and that the words are sufficiently large to carry that intention into effect.

In the case of *Cole* v. *Rawlinson*, 1 Salk. 234, the words of the devise were, "I give, ratify and confirm, all my estate, right, title and interest, which I now have, and all the term and terms of years which I now have, or may have, in my power to dispose of, after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsley;" and it was adjudged, that the fee of the Bell Tavern passed, by force of the words "and also," which caused the preposition "in" to be understood, so as to read "and also in the Bell Tavern." So, in the present case, the three specific objects of the devise are connected by the words "likewise" and "also," and you must apply the first part of the devising clause to each subject, and read it thus: "likewise, I give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate in one other tract of land called Horse-pasture." The word "likewise" shows that he meant to give the same interest in the two other tracts, which he had given in Marrowbone.

Upon the question of alienage, he contended, that by the common law, every man is an alien to that government under whose allegiance he was not born. The capacity to inherit results from the fact that the heir and ancestor both owe allegiance to the sovereign of the country where the lands lie. The right of inheritance is *derived only through one common sovereign. The allegiance due to that sovereign is the *commune vinculum* which connects the heir with his ancestor, as to the tenure of lands. This common allegiance must exist at the time of the birth of the heir, and continue unbroken until the time of the descent. If this allegiance is not to be confined to the sovereign of the country where the lands lie, it would follow, that where the ancestor and heir were both natural-born subjects of a foreign state (for instance, subjects of France), and the ancestor should be naturalized in this country, and become a purchaser of lands here, the heir, although not naturalized, would still have a right to inherit those lands, because they both owed allegiance to France, their common and natural sovereign. [*121

The American *ante-nati* may inherit lands in England, because the ancestor and heir both owed a common allegiance to the sovereign of that country where the lands lie. But the British *ante-nati* never owed allegi-

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of lands should be recorded, under the laws of England, and the law is considered the same in Maryland. I do not object to the will on that account.

ance to the government of this country, and therefore, the British heir cannot inherit the American lands of his American ancestor.

If, then, the capacity to inherit depends upon a common allegiance to the sovereign of that country where the lands are, it will follow, that when that common allegiance ceases to exist, the capacity to inherit must cease also. The common allegiance to the sovereign of this country ceased by the declaration of independence, or, at least, when that independence was acknowledged by the King of Great Britain, at the treaty of peace, whereby he assented to the withdrawing our allegiance; and the principle of the common law, that natural allegiance must be perpetual, is not so rigid, but that it may be shaken off with the assent of the sovereign to whom it was due. For in 1 Hale H. P. C. 68, Lord HALE says, "that though there may be due from the same person, subordinate allegiances," "yet there cannot, or, at least, should not, be two or more co-ordinate absolute allegiances, by one person to several independent or absolute princes; for that lawful prince that hath the prior obligation of allegiance from his subject, cannot *122] lose that interest, without his own consent, *by his subject's resigning himself to the subjection of another; and hence it is, that the natural born subject of one prince cannot, by swearing allegiance to another prince, put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested, without the concurrent act of that prince to whom it was first due. Indeed, the subject of a prince, to whom he owes allegiance, may entangle himself, by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot, by such a subjection, divest the right of subjection and allegiance that he first owed to his lawful prince."

Hence, it is clearly the opinion of Lord HALE, that natural allegiance may be divested and dissolved, with the concurrent act of that prince to whom it was due; and by a note of the editor, in the same page, it seems, that the doctrine of perpetual allegiance refers only to a private subject's swearing allegiance to a foreign prince, and has no relation to a national withdrawing of allegiance. If the American revolution is to be considered as such a national withdrawing of allegiance, then that withdrawing was complete and perfect, even before the assent of the King of England was obtained, and the American *ante-nati* are as totally absolved from all allegiance to the British king, as if they had been natural-born aliens.

There being, then, no common allegiance between the British and the American *ante-nati*, at the time of the descent cast, there can be no capacity to inherit the one to the other, even were it not necessary that the common allegiance should be to the sovereign of the country where the lands lie.

Lord HOLT, also, in the same page, shows in what sense Lord COKE, in *Calvin's Case*, and Bracton, before him, have used the expression, "*ad fidem utriusque regis.*" He says, "it appears by Bracton, that there were very *123] many that had been anciently *ad fidem regis *Angliæ et Franciæ*, especially, before the loss of Normandy; such were the *comes mareschallus* that usually lived in England, and M. de Faynes, *manens in Francia*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties, so that they swore or professed ligeance, or lige homage, only to one; and the homage they performed to the other, was not purely lige

homage, but rather feudal, as shall be shown more hereafter; and therefore, when war happened between the two crowns, *remaneat personaliter quilibet eorum cum ei, cui fecerat ligeantiam, et faciat servitium debitum ei cum quo non steterat in persona*, namely, the service due from the feud or fee he holds."

The opinion of the court in *Calvin's Case*, 7 Co. 27, that if the kingdoms of England and Scotland "should be, by descent, again divided and governed by several kings," "those born under one natural obedience, while the realms were united under one sovereign, would remain natural-born subjects and not aliens," was at least an extra-judicial opinion; and it is not very clear, what is the meaning of it. Does it mean, that they would be natural-born subjects of both kingdoms, or only of that which should remain governed by the same king? If the former, yet the case is not parallel to ours. Ours is a case where a new sovereignty has sprung up, and no person could be born under its allegiance, before its existence. According to *Calvin's Case*, allegiance does not depend upon the country in which the person is born, but upon the obedience and subjection of that country at the time of the birth. A person, therefore, born before the independence of the United States, cannot be called a natural-born subject of the United States; and if he was not here, at the time of the revolution, he cannot maintain a suit, as to lands in this country, but by virtue of some express stipulation in a treaty.

Mason, in reply.—If the declaration of independence, and the treaty, totally divested all allegiance, so that the British *ante-nati* are aliens to us, it would equally make American *ante-nati* aliens to the British. But we all know, that cases have happened, in which American *ante-nati* have been adjudged capable of inheriting *lands in Great Britain; and if those [*124
British decisions were correct, they must have been grounded upon the principle that our *ante-nati* were not aliens to the King of Great Britain; and if the declaration of independence did not make us aliens to them, it could not make them aliens to us. The American revolution only discharged the political relation which subsisted between us and the crown of England. It did not destroy individual rights or capacities. The revolution was to accomplish a great national object. No one individual can be charged with it. It was a national act, to maintain national rights, and only such rights were affected by it. It only absolved our allegiance, but did not, *ex necessitate*, take away the capacity to inherit.

Cushing, J.—Are not allegiance, and the capacity to inherit, connected together?

Mason.—Yes; and therefore, the common law will not consider the allegiance so totally absolved, as to make him an alien who was born a subject, and thereby deprive him of the right of inheritance. Although, by the act of Virginia, in 1779, Lambert was to be considered as an alien, and incapable to sue, &c., yet that act was repealed by the treaties, and therefore, he stands just where he did before the revolution.

The private rights of individuals were not affected by the revolution, except by the laws of the several states. The object of the treaties was to put individuals as nearly as possible on the same footing as before the revolution; and the words of the treaties are sufficiently large to accomplish

that purpose. They are, "and that no person shall, on that account, suffer any future loss or damage." If Lambert is, on that account, to be deprived of his right of inheritance, it will be such a loss and damage as will be a violation of the treaty of 1783.

*125] *What is common law in England is common law in Virginia; what is law and justice there, is law and justice here. Policy, justice and magnanimity require that we should apply the same beneficial rule to them which they have extended to us.

PATERSON, J.—Would not the decisions have been the same in England, if there had been no such article in the treaty?

Mason.—Yes, if there are no British statutes to prevent it; and the decisions would have been similar in Virginia, if there were no act of assembly on the subject.

In this position, I am supported by a very learned judge in Virginia (Judge TUCKER), who is not suspected of any improper partiality to Great Britain, or her subjects. In his notes to Blackstone's Commentaries, vol. 2, Appendix, p. 53, 54, he says, "all persons born within the United States, whilst colonies of Great Britain, were natural-born subjects of the crown of Great Britain." "The natives of the colonies, and the natives of the parent state, were, in consequence thereof, of equal capacity to inherit or hold lands in the different parts of the British empire, as if they had been born, and their lands situated in the same country. And, in fact, many native Americans did hold estates in England, and on the other hand, great numbers of natives of Great Britain, who had never been in America, possessed estates in lands in the colonies. By the declaration of independence, the colonies became a separate nation from Great Britain; yet, according to the principles of the laws of England, which are still retained, the natives of both countries, born before the separation, retained all the rights of birth; or, in other words, American natives were still capable of inheriting lands in England, and the natives of England, who remained subjects of the crown of Great Britain, were still capable of inheriting lands in America,

*126] *or of holding those which they already possessed." And again, in p. 61, he says, "by the common law, upon the separation between America and Great Britain taking place, the natives of Great Britain were constructively natural-born in America, and notwithstanding that separation, might hold lands here, as if they had been residents in America." After mentioning the act of assembly of Virginia of May 1779, c. 55, by which they were declared aliens, he says, "by the treaty of peace, the common-law principle that the *ante-nati* of both countries were natural-born to both, and as such, capable of holding or inheriting in both, seems to have been revived; in consequence of which, they are now capable of holding, purchasing or inheriting, in the same manner as if they were citizens."

As to the question of the devise, it is not denied, that the word estate is sufficiently large to carry the fee; nor, that the intention of the testator is to govern the construction of the will. But we contend, that the word estate is not alone sufficient to carry the fee. It is only a word which courts will lay hold of, to effectuate the intention of the testator: but then the intention to pass a fee must be clear, beyond all manner of doubt, before the court will disinherit the heir-at-law.

Lambert v. Paine.

March 1st, 1805. The judges now delivered their opinions *seriatim.*

JOHNSON, J.—This is a writ of error from the circuit court of Virginia to reverse a judgment in ejectment given for the defendant.

The circumstances of the case come out on a special verdict, from which it appears, that George Harmer, under whom both parties claim, was a citizen of the state of Virginia. That on the 25th June 1782, he made a will, by which he devised "all the estate, both real and personal, which (he) possessed, or was entitled to, in the commonwealth of Virginia," to certain trustees *" in trust and upon these conditions: that when John Harmer, (his) [*127 brother, (then) a subject of Great Britain, shall be capable of acquiring property in this country, then they, or the survivor of them, do convey, or cause to be conveyed, to him, in fee-simple, a good and indefeasible title in the said estate;" and in case John Harmer should not be capable of acquiring such right, before his death, he then directs the conveyance to be executed to his nephew, the plaintiff; and in case of his not being capable of acquiring lands, before his death, he directs the estate to be sold and the proceeds paid over to other relations.

In the year 1786, George Harmer executes another will, which, as every part of it is material to the case before us, I will peruse at length. (Here he read the will of 1786.) The testator died soon after executing the last mentioned will. His brother, John Harmer, died in 1793, having never become a citizen. The jury further find, that John Lambert, the plaintiff, is a British subject, was born before the revolution, viz., in the year 1752, and is heir-at-law to the testator. The treaties with Great Britain, and an act of Virginia, vesting in George Gilmer any interest that may have escheated, are also found in the verdict. The land sued for is a part of the Marrowbone tract.

The questions suggested are, 1. What estate is conveyed to George Gilmer by the will of 1786? 2. If but an estate for life, does the will of 1782 remain unrevoked as to the remainder, so as to convey it to the plaintiff? 3. And last. Is John Lambert disqualified to inherit as an alien; or, if incapable, generally as such, is he not protected by the treaties existing between this government and Great Britain, particularly the 4th article of the treaty of London?

To form a judgment on the first point, it is necessary to consider, *1. The general import and effect of the word estate, as applied to a [*128 devise of realty. 2. Whether its general import is controlled or altered by the subsequent words, used in a similar sense, in the will of 1786.

I consider the doctrine as well established, that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by *my* or *the*, or followed by *at* or *in*, or in the singular or plural number. The intent with which it is used is the decisive consideration; and I should not feel myself sanctioned in refining away the operation of that intent, by discriminations so minute as those which have been attempted at different stages of English jurisprudence.

The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true, that its meaning may be restricted, by circumstances or expressions indicative of its

being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject. To one not accustomed to the discriminations of technical refinement, it would seem, that no doubt could be entertained as to the interest devised to Gilmer. The plain, ordinary import of the words would convey the idea of an absolute disposition of every article of property disposed of by the will. That words of inheritance are necessary to convey a fee, is certainly a good general rule of the common law; but, in the case of wills, it is entirely subordinate to expressions of the testator's intention.

In the case before us, there is no necessity for extending the decision of the court beyond the words made use of in disposing of the Marrowbone tract. But it is contended, that the words adopted by the testator, in devising the two other tracts, are used in the same sense as those in the first devising clause, and being of a *more restricted signification, ought *129] to limit the word estate to a description of the mere locality. I think otherwise. When a word is made use of, to which a clear legal signification has been attached, by successive adjudications, it ought rather, in my estimation, to control the meaning of those of a more equivocal purport. But the construction of a will ought to depend much more upon the evident intent of the testator, than upon the strict import of any term that he may make use of. Too critical an examination of the diction of a will, is rather calculated to mislead the court, than to conduct it to a just conclusion.

I infer the intent of the testator, in the case before us, from the following circumstances, extracted from the special verdict.

1. In the first clause of the will of 1782, the testator makes use of the expression "all the estate, both real and personal, which I possess, or am entitled to, in the commonwealth of Virginia," evidently under an impression that the word estate is sufficient to convey a fee; because, out of the estate, thus devised to his trustees, he instructs them to convey to his brother, or nephew, in the alternative stated, a good and indefeasible title in fee-simple.

2. There is no reason to infer, from anything in this case, that the testator intended only to make a partial disposition of his property; that he intended to die intestate as to any part of it. The fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of everything that he possesses. That such was the particular intention of this testator, I think fairly inferrible from the general nature of the residuary bequest. The word other, in my opinion, is referrible to the whole preceding part of the will, and excludes, as well the lands devised to Gilmer, as the negroes and horses which he directs to be sold. We must give it this construction, or else suppose, either that the word property, here used, is confined to personalty, or, that it includes everything that he possessed, both real and personal; in which latter case, it would comprise even the lands previously disposed *of. It follows, therefore, that in the *130] clause in which he proposes to dispose of the whole residue of his property, he omits making any disposition of any interest in the lands in question; evidently, as it impresses me, upon the supposition, that he had already disposed of his whole interest in them. What object could the testator propose to himself, by dying intestate as to the remainder in fee, in

the lands in question? He knew that his heir-at-law was an alien, and, as, such, incapable of holding lands under a government to which he did not owe allegiance. This circumstance is evident, from the will of 1782; and it is equally evident, from the same will, that he felt that repugnance, which is common to all men, at the idea of suffering his lands to escheat, and knew the means of preventing it.

I am, therefore, of opinion, upon the first point, that George Gilmer took a fee in the land which is the subject of this suit, and this opinion disposes also of the second point, and renders it unnecessary for me to consider the third.

WASHINGTON, J.—The only question in this cause which I mean to consider is, whether the will of George Harmer, made in 1786, passes to George Gilmer an estate in fee, or for life, in the Marrowbone land. The words of the clause containing the bequest are "I give to Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, lying in Henry county, containing, by estimation, 2585 acres, and likewise, one other tract called Horse-pasture, containing, by estimation, 2500 acres; also one other tract containing, by estimation, 667½ acres, called the Poison-field."

The rule of law most certainly is, that where, in a devise of real estate, there are no words of limitation superadded to the general words of the bequest, nothing passes but an estate for life; but since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean a disposition of his whole interest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which, from their legal import, comprehend the whole interest *of the testator in the thing devised. But if other words be used, re- [*131
straining the meaning of the general expressions, so as to render it doubtful, whether the testator intended to pass his whole interest or not, the rule of law which favors the right of the heir must prevail. Thus, it has been determined, that the words "all my estate at or in such a place," unless limited and restrained by other words, may be resorted to, as evidence of an intention to pass, not only the land itself, but also the interest which the testator had in it. But words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate. Except for the establishment of general principles, very little aid can be procured from adjudged cases, in the construction of wills. It seldom happens, that two cases can be found precisely alike, and in the present instance, I do not recollect that a single one was read at the bar which bears an analogy to it. The case of *Wilson* v. *Robinson*, which comes the nearest to it, is of doubtful authority. No reasons are given by the court for their opinion, and consequently, it is impossible to know, whether it was or was not influenced by other parts of the will. *Ibbetson* v. *Beckwith* was decided upon a manifest intent to pass the inheritance, arising out of the different parts of the will taken together, amongst which is to be found an introductory clause which, the chancellor says, affords evidence that the testator had in view his whole estate. The cases of *The Countess of Bridge-*

water v. *The Duke of Bolton*, and *Bailis* v. *Gale*, only lay down the general principle, which is not denied, that the word "estate" in a will, standing alone, and unqualified by other words, is sufficient to pass the whole of the testator's interest. The words "all my land and estate," in the case of *Barry* v. *Edgeworth*, express so plainly an intention to give a fee, that I only wonder a question could have been made of it. They are quite as strong as if the testator had given the land, and all his interest in the land, where the word estate or interest, unless construed as was done in that case, would have been perfectly nugatory. In *Goodwin* v. *Goodwin*, the Chancellor doubted whether the word estate was not so limited and restrained by strong words of locality and description as to deprive it of the interpretation generally given to it.

*132] *In the case now under consideration, there is no introductory clause, declaratory of an intention in the testator to dispose of the whole of his estate; yet, I admit, that if he had devised all his estate called Marrowbone, without using other words calculated to limit the technical meaning of the word estate, the cases cited by the defendant's counsel would establish, beyond a doubt, that a fee passed. But I cannot read this clause of the will, without feeling satisfied, that the testator did not mean to use the word estate in its technical sense. For he not only varies the description of the tracts of land called Horse-pasture and the Poison-field, so as to show that, with respect to them, he only meant to describe their situation and quantity; but by using the word "other," it is plain, that with respect to the Marrowbone estate, his design was the same. Unless, in the disposition of this latter estate, he had described or intended to describe it, as so much land, he could not, with any propriety, speak of the Horse-pasture estate as another tract of land. It will hardly be said, that the devise of the last tracts passes more than an estate for life, unless the word estate, before used, can be transferred to those tracts, so as to impart to the expressions there used, the technical meaning given to the word estate, where it stands alone. But I cannot perceive how this is to be done, without supplying words not used by the testator, and which there is no necessity for doing, in order to make sense of the clause as it stands. It would, I think, be going too far, to supply more than is necessary to make each devise a complete sentence, and then to introduce the preposition "in" for the purpose of making sense of the whole. Yet, if this be not done, the word estate cannot, in respect to the Horse-pasture and the Poison field tracts, be pressed into the service, and made in any manner to fit the sentence.

If only an estate for life in the Horse-pasture and the Poison-field tracts passed to George Gilmer, it will, I think, be very difficult to maintain that the word estate, in the same sentence, governed by the same verb, and coupled with the words which describe those tracts of land, can be construed to pass a fee.

The testator certainly uses the words estate and tract of land as synonymous expressions; and then the question will be, whether the generality of

*133] the first shall enlarge *the plain and usual import of the latter words, or, the latter restrain the technical meaning of the former? I know of no case, where the word estate is used at all, in which its general import is limited and restrained by so many and such strong expressions descriptive of the land, and totally inapplicable to the interest of the testator, as

in the present. The words, the estate called Marrowbone, lying in Henry county, containing, by estimation, so many acres, excite, at first, no other ideas than such as respect the name and situation of the land, with the number of acres contained in it. The description would be equally accurate, whether the interest of the testator were a fee, or a term for years.

If, then, we are to search after and to effectuate the intentions of men, supposed to be unacquainted with legal phrases, and are, on that account, to construe the words they use, with indulgence, I think, we shall be more likely to fulfil this duty, by limiting the general import of a technical word, which, in its common use, is entirely equivocal, and is rendered particularly ambiguous in this case, by the words which immediately attend it, than by giving to the words "tract of land," a meaning which they do not, in themselves, import, and are seldom, if ever, used to express more than a local description of the thing itself.

As the opinion of a majority of the court is in favor of the defendant, upon the construction of the will, I do not think it necessary to say anything upon the doctrine of alienage, as that question may possibly come on, in some other case, in which it must be decided.

Paterson, J.—The devise in the will of George Harmer was intended to convey some interest in the Marrowbone farm to George Gilmer; and the quantity of interest, whether for life or in fee, is the question now to be considered. It is a fundamental maxim, upon which the construction of every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect, if it be not in contradiction to some established rule of law. In such case, the intention must yield to the rule. This intention is to be collected from the instrument itself, and not from extrinsic circumstances; and therefore, the *will of [*134
A. can afford little or no aid in discovering the intention and expounding the will of B. Indeed, the number of cases which are usually cited in arguments on devises, tend to obscure rather than to illuminate. When, however, a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property. It cannot be questioned, that the word "estate" will carry everything, both the land and the interest in it, unless it be restrained by particular expressions; for estate is *genus generalissimum*, and comprehends both the land and the inheritance. 1 Salk. 236; 6 Mod. 106; Pr. Ch. 264; 2 P. Wms. 524; Cas. temp. Talbot 157; 1 Ves. 226; 2 Ibid. 179; 3 Atk. 486; 5 Burr. 2638; 1 T. R. 411. The word "estate" is the most general, significant and operative that can be used in a will, and according to all the cases, may embrace every degree and species of interest. If the word "estate" stand by itself, as if a man devise "all his estate to A.," it carries a fee, from its established and legal import and operation. Standing thus *per se*, it marks the intention of the testator, passes the inheritance to the devisee, and controls the rule in favor of the heir-at-law. It is true, that this word, when coupled with things that are personal only, shall be restrained to the personalty. *Noscitur à sociis.* The word "estate" may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. Here, uncommon par-

ticularity of description is requisite, so as to leave the mind perfectly satisfied, that the thing only was in contemplation, and nothing more. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words ; and thus making, instead of construing, the will of the testator. But when no words are made use of, to manifest the intention of the testator, that the term "estate" should be taken, not in a general, but in a limited signification, then it will pass a fee; because the law declares, that it designates and comprehends both the subject and the interest. Nay, such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed.

*135] To illustrate this position by apposite and adjudged *cases : If a man, in his will, says, "I give all my estate in A.," it has been held, that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. 2 P. Wms. 524. So, the word "estate" was held to carry a fee, though it denoted locality, "as my estate at Kirby-Hall." *Tuffnel* v. *Page*, 2 Atk. 37; s. c. Barnard. Ch. 9. On which, Lord HARDWICKE observed, that though this is a locality, yet the question is, whether it is such a locality as is sufficient to show the testator's intention merely to be to convey the lands themselves, and not the interest in them. He was of opinion, that the words were descriptive both of the local situation, and the quantity of interest. And in *Ibbetson* v. *Beckwith*, Lord TALBOT observed, that the word "estate," in its proper, legal sense, means the inheritance, and carries a fee. Why, indeed, may not locality and interest be connected, and the same words express and convey both. To exclude interest in the subject, the expressions coupled with the word "estate" must be so restrictive and local in their nature, as to convey solely the idea of locality, and not to comprehend the *quantum* of interest, without doing violence to the words and intention of the testator. Besides, it is a just remark, repeatedly made by Lord HARDWICKE and Lord MANSFIELD, that where a general devise of land is narrowed down to an estate for life, the intention of the testator is commonly defeated, because people do not distinguish between real and personal property; and, indeed, "common sense would never teach a man the difference ;" and therefore, judges have endeavored to make the word "estate," in a will, amount to a devise of the whole interest, unless unequivocal and strong expressions are added, to restrict its general signification. It would be a laborious and useless task, to enter into a minute and critical investigation of the great variety of cases which bear on this subject. They are collected in a note by the editor of Willes' Rep. 296.

From the whole scope and complexion of the will of George Harmer, it is evident to my mind, that the testator intended to dispose of all his property, both with regard to the quantity and quality thereof. He did not mean to die intestate, as to any part of his estate; but on the contrary, it was his manifest intention, to leave nothing undisposed by his will. He

*136] directs that all his negroes, *horses and other property be sold, &c., which plainly indicates what his intention was in regard to the lands which he had previously devised. This last clause evinces and illustrates the meaning of the testator, and removes every particle of doubt from my mind, as to the true construction which ought to be put on the word "estate."

To effectuate this intention, the term "estate" is to be taken in its largest signification, as comprehending both the subject and the interest, the land and the inheritance.

Amidst the great mass of cases arising on wills, it is impossible to select any two that are exactly similar. The variety of expressions is infinite; and it is from the language, that we are to discover the intent. The same word, indeed, may be taken in a different sense in different wills, and even in different parts of the same will, owing to its juxtaposition, its associations, and the manner in which it is placed and used. The case of *Bailis* v. *Gale*, in 2 Ves. 48, may serve to elucidate the devise under review, in more points than one. "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." These expressions seem strongly to mark locality in contradistinction to interest. But, what says my Lord HARDWICKE? "I am of opinion, that both the thing itself, and the estate, property and interest the testator had, pass by the devise. Several questions have arisen in courts of law and equity, on devises of this kind; but all the latter determinations have extended and leaned as much as possible to make words of this kind comprehend, not only the thing given, but the estate and interest the testator had therein. But it is objected, the pronoun "my" is not added; there was no occasion for it. It was necessary, he should use such words as point out the whole interest in the land, which is sufficiently done by the other words; for he bought of Mead, the land and the fee-simple in the land; which is agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest, as it is in the case of all *my* estate."

So, in the present will, the words, "I give all the estate called Marrowbone," contain a description of the land, and the interest in it. The case in Vesey is particularly *applicable, and worthy of attention, in another respect, as it affords a complete answer to the distinction which was [*137 ingeniously raised, and attempted to be sustained between the import of the word "my" and "the" in devises like the present. The counsel for Lambert contended, that the word *the*, "all the estate," was descriptive of the thing; whereas, the word *my*, "all my estate," was descriptive of the interest as well as of the thing. But, in the case of *Bailis* v. *Gale*, Lord HARDWICKE held, with great clearness, that there was no difference between a device of all *my* estate at N., and a device of all *the* estate at N.; and that a fee passed, in either case. Nor ought this opinion to be considered as extrajudicial; for the counsel in *Bailis* v. *Gale* insisted, that the pronoun *my* was necessary to make the devise carry a fee; and therefore, it claimed, very properly, the notice and decision of the court. According to this opinion, a devise of the estate called Marrowbone, in the county of Henry, must have precisely the same construction and effect, as a devise of all my estate called Marrowbone, in the county of Henry; which, it appears to me, would unquestionably give a fee.

Some expressions in a will, as, "I give my farm, my plantation, my house, my land," do, of themselves, contain no more than a description of the thing, and carry only an estate for life, because unconnected with words of inheritance, or other words of a similar import. For we are not permitted to enlarge the estate of a devise, unless the words of the devise itself be sufficient for that purpose. In the present devise, the words, "all the estate

called Marrowbone," are competent to carry the degree of interest contended for on the part of the defendant; and this construction accords with the intention of the testator, as disclosed by his will. Whether it would not have been more beneficial to society, to have observed, from the first, the same technical phraseology and strictness of legal terms in devises, as in conveyances of landed property, is a question which may amuse the theoretical jurist; but which, as judges, we cannot seriously discuss; for it is a leading axiom in our system of jurisprudence, not to be shaken by judicial authority,
*138] *that the intent of the testator, so far as it is consistent with the principles of law, must be attended to, and control the decision. I am, therefore, of opinion, that the words, "I give to George Gilmer all the estate called Marrowbone, in the county of Henry," give a fee, being descriptive equally of the quantity of interest, and locality of the thing devised.

Cushing, J.—The first question in this case is, whether the devise to George Gilmer, in the will of George Harmer, made in 1786, carries a fee, by the words "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land," &c.

Wills are expounded more favorably, to carry the intent of the testator into effect, than conveyances at common law, which take effect in the lifetime of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of counsel learned in the law. Therefore, words not so technical for the purpose, have, in a great variety of cases, for above a hundred years, been construed by the judges, to carry a fee, which would not do so in a deed.

In a number of cases, the word "estate" has been determined to comprehend the whole interest in the land. Among those adduced, there are several which appear to me essentially in point to the present case. In the case, 2 Lev. 91 (a case which has since been held, by good judges, to be good law), a devise of "all my tenant-right estate, at B., in Underbarrow," was determined to import a fee. I see no essential difference between that case and this; except the particle "the" instead of the pronoun "my," which, in common sense, and in the opinion of Lord Hardwicke, makes no difference. "All *the* estate" is, at least, as extensive and comprehensive as "all *my* estate." In 2 P. Wms. 523, the words "all my lands and estate in Upper
*139] Catesby, in Northamptonshire," were adjudged *to carry a fee. That agrees with the case at bar, except that the word "lands," precedes "estate," which I think immaterial. "Estate" is the most operative word. In the case of *Bailis* v. *Gale*, 2 Ves. 48, a devise of "all that estate that I bought of Mead," was determined by Lord Hardwicke to be of a fee. This, I think, is substantially like the case at bar; and by him, that, *the* or *my*, makes no material difference. Add to this, what seems to make the point conclusive, the testator appears to have a design to dispose of his whole estate.

The other cases cited do not appear to contradict these; but, varying in some circumstances, seem not so directly applicable; yet, by the spirit and reasonings attending them, they tend to confirm the rectitude of the other decisions which are more directly in point.

The latter part of the devise in question, of several tracts of land immediately succeeding the devise of "all the estate called Marrowbone, in the county of Henry," &c., if considered as not carrying a fee, I conceive, would

not, however, control or restrict the prior part of the devise of "all the estate called Marrowbone," &c. Rather than that, I should suppose the former part would carry spirit and meaning to the latter. But that is not necessary now to be determined. This first point being determined in favor of the defendant, the former judgment must be affirmed.

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*Hodgson *v.* Butts.[1] [*140

Chattel-mortgage.

A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded.[2]

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action for money had and received, to recover from the defendant, who was master of the schooner Mississippi, the amount of freight received by him, subsequent to the mortgage of the said schooner, by R. & J. Hamilton (the former owners) to the plaintiff.

On the trial of the general issue, the plaintiff took two bills of exception, and the verdict was for the defendant.

The first bill of exceptions stated the following facts: That the plaintiff, to support his claim, produced a deed from R. & J. Hamilton, by which they bargained and sold to the plaintiff, the schooner Mississippi, then in the port of Alexandria, and the cargo of the ship Hannah, then at sea, as security to indemnify and save harmless the plaintiff, as indorser of their notes, to the amount of $10,000. If they should indemnify him within —— days after the arrival of the cargo on the ship Hannah, if it should arrive before the return of the schooner Mississippi from her then intended voyage to New Orleans; or, if the cargo of the Hannah should not arrive, before the return of the schooner, then within —— days after her return, the deed should be void: but, if they should fail to indemnify the plaintiff, within the periods mentioned, then he was to sell the cargo of the Hannah, and the schooner and cargo.

The deed also contained the following covenant: "And we do moreover bind ourselves, our executors and administrators, and also the freight and inward cargo of the said schooner Mississippi, to exonerate the said William Hodgson from," &c. "It being the true intent and meaning of these presents, to bind ourselves, our schooner called the Mississippi, her tackle, *apparel and furniture, her freight and inward cargo, and the cargo of the ship Hannah, to exonerate," &c. [*141

The execution of the deed was in the following form: "In witness whereof, the said Robert and James Hamilton have hereunto set their hands and affixed their seals, this fourth day of May 1800.

Signed, sealed and delivered, in the presence of } Robt. & Jas. Hamilton. (Seal.)

Ch. Simms, James D. Lowry.

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[1] See s. c., in the court below, 1 Cr. C. C. 447, 488.

[2] United States Bank *v.* Lee, 13 Pet. 107; Lee *v.* Huntoon, Hoffm. Ch. 447; Sturtevant's Appeal, 34 Penn. St. 149.

"At a court of hustings, held for the town of Alexandria, the 6th of October 1800, this bill of sale, from Robert and James Hamilton to William Hodgson, was proved to be the act and deed of the said Robert Hamilton for self and for James Hamilton, by the oaths of Charles Simms and James D. Lowry, witnesses thereto, and ordered to be recorded.

G. Deneale, Clerk."

The plaintiff also produced in evidence the register of the schooner, with an indorsement thereon in these words, "At the request of the within named Robert and James Hamilton and William Hodgson, merchants, of the town of Alexandria, I hereby certify, that the within mentioned vessel is mortgaged by the said Robert and James Hamilton to the said William Hodgson, to secure the payment of the sum of ten thousand dollars, as witness my hand, this thirteenth day of May, one thousand eight hundred.

Chas. Page, D'y Coll'r."

It was proved, that the said register, with the indorsement thereon as aforesaid, was delivered to the defendant, previous to the sailing of the said
*142] schooner. That *she sailed from Alexandria to New Orleans, about the 14th of May 1800, from New Orleans to Jamaica, and from Jamaica, she arrived at Alexandria, about the 27th of November 1800; at which time, and not before, she was put into the actual possession of the plaintiff, under a new and absolute bill of sale, executed by Robert and James Hamilton to the plaintiff, at that time. That the defendant received the freight of the cargo carried from New Orleans, at Jamaica. No evidence was adduced to show that the plaintiff had ever given notice to the defendant, that he should look to him for the freight (other than the indorsement on the register).

On the part of the defendant, evidence was adduced, to prove that R. & J. Hamilton, on the 12th May 1800, were indebted to a certain John Haynes, in the sum of $384, for wages as a seaman, previously earned; $184 of which were earned on board the said schooner, and $200 on board another of their vessels. That being so indebted, R. Hamilton, on the 13th of May 1800, gave the said Haynes an order on his brother James, then in New Orleans, stating a balance of $384 to be due to him, with some interest, and requesting his brother to pay it. That on the same day, they were indebted to the defendant, in the sum of $800, for wages due him, as master of, and disbursements on account of, the schooner, on a previous voyage, which sum R. Hamilton requested his brother James, at New Orleans, to pay, by letter of that date. That the defendant received his sailing orders and instructions from R. Hamilton, in the name of R. & J. Hamilton, on the 14th of May 1800, before he sailed from Alexandria. That the vessel was conducted entirely under the directions of R. & J. Hamilton, from the date of the mortgage, on the 4th of May 1800, until the 27th of November 1800, when she was delivered to the plaintiff.

That on the voyage from Alexandria to New Orleans, the defendant met James Hamilton, in the river Mississippi, and showed him the orders in favor of the defendant and of John Haynes, and requested payment. That James Hamilton replied, that he had no money to satisfy the said orders;
*143] that the defendant *must wait until the vessel earned enough to pay them, and desired the defendant to pay them out of the first money

the vessel should earn, by freight or otherwise. That the vessel proceeded to New Orleans, and from thence, with a cargo, to Jamaica, where the freight was received, and out of the same, the defendant paid Haynes the $384, and applied $800 to the discharge of his own claim. That the vessel then sailed from Jamaica, and arrived at Alexandria on the 27th of November 1800. That after her arrival, and after possession delivered to the plaintiff, the latter paid the expenses and disbursements of the voyage, which became due on her arrival, by the orders of the defendant. The plaintiff also insured the vessel for the said voyage, and paid the premium thereon, after her departure for New Orleans. It was also proved, that on the defendant's return to Alexandria with the vessel, and before the plaintiff took possession of her, and received his absolute bill of sale as aforesaid, the defendant rendered to, and settled with, R. & J. Hamilton, an account-current of the expenses and profits on the said voyage, in which they gave credit for the order in favor of himself, and that in favor of Haynes.

Upon this statement of the evidence, the plaintiff prayed the court to instruct the jury, that he was entitled to recover of the defendant the sum of $1184, thus admitted to have been received for freight, and applied to the discharge of the two orders; which the court refused to do, and directed the jury to find a verdict for the defendant, if they found the facts to be as stated.

The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that if they should be of opinion, from the evidence aforesaid, that the defendant received information of the mortgage from Robert Hamilton, before the schooner sailed upon the said voyage, the plaintiff was entitled to recover the said $1184; which the court also refused to do, and directed the jury, as before, that their verdict ought to be for the defendant. This case was first argued at February term 1804.

*February 27th, 1804. *E. J. Lee*, for the plaintiff in error.—The law of mortgages is the same both as to land and personal property. [*144 The case is to be considered, 1st, upon common-law principles; and 2d, upon the statute law of Virginia.

1st. That the mortgagee is the legal proprietor of the mortgaged subject; and as such, he is entitled to receive the rents and profits, after notice of the mortgage, unless the contrary be stipulated.

The mortgagee of lands leased becomes entitled to the rent, from the time of executing the conveyance; for the rents and profits, as well as the land, are liable for the debt. As soon as the conveyance is executed, the estate is, in law, vested in the mortgagee, and his power to take actual possession exists from that moment. For these principles, see Powell on Mortgages, 79, 80, 81. The mortgagee is the absolute proprietor and the true owner. *Ryall* v. *Rowles*, 1 Ves. 361.

If lands be mortgaged to one, the interest in them is in the mortgagee, before forfeiture; for he has purchased the lands upon a valuable consideration, as the law will intend; and though the mortgagor may redeem, by means of an agreement between the parties, if he does not, the estate, in law, is absolute, without any other act to be done, to pass the estate;

although the mortgagor has in him the equity of redemption. 15 Vin. Abr. 44.

A mortgage is defined to be the appropriation of a specific thing to certain purposes. It does not, in the case of a mortgage, require the delivery of the article, in order to transfer the right and title to it.

*145] *A mortgagee of real property may bring an ejectment to get possession, against any person in possession; and may also bring an action for the mesne profits; so he may bring trover for personal property, and in the estimation of his damages, a charge for the intermediate produce or profits of the article converted, would not be rejected, but would be taken into the account. So, he may bring detinue, without any proof of possession in the mortgagee.

2d. Possession, upon common-law principles, is not necessary, in order to give title in the transferree of property. It is true, that possession in the vendor, after the transfer, is *primâ facie* evidence of fraud, and this is the only effect of such possession; but as to the proof of fraud, it is not conclusive. It may be rebutted, by testimony showing the transaction *bonâ fide*. The only use in delivering possession, is to prevent strangers being deceived by a false credit, which the possession in the vendor is calculated to produce. This reason cannot be applicable, in this case, to Butts: 1. Because Butts knew of the mortgage: 2. Because the debt due to him from the Hamiltons was an antecedent debt. If the Hamiltons had been declared bankrupts, their assignees could not have claimed the vessel or the freight; because both were pledged as a security to Hodgson. See the bankrupt law of the United States. Upon common-law principles, the mortgagee must be considered as the legal proprietor of the vessel.

3d. But the act of the legislature of Virginia places the question beyond a doubt, and proves that possession is not necessary to constitute the ownership. See Virginia Laws, 157, Revised Code of 1802; 1 Wash. 177. The legal owner of the vessel is entitled to receive the freight. Marshall on In-

*146] surance, 93. *The mortgagee of a vessel, in a late case, has been considered as the owner, and as such, liable for repairs done to her before he received actual possession. 7 T. R. 306. In this case, the decision in *Chinnery* v. *Blackburne*, 1 H. Bl. 117, is not considered as correct.

The two cases of *Jackson* v. *Vernon*, 1 H. Bl. 114, and *Chinnery* v. *Blackburne*, which will be relied on by the defendant, will, upon examination, be found not to meet the question which arises in this case. In the case of *Jackson* v. *Vernon*, the question was, whether the mortgagee was liable for the repairs to the ship; it was decided, he was not, because, the mortgagor himself ordered the repairs; as the person who makes repairs on a ship, has a claim on the person ordering them, it was supposed, the credit was given to him, and upon this ground, it was held, the mortgagee was not liable.

In the case of *Chinnery* v. *Blackburne*, Merryfield acted as the owner; he navigated the vessel, and made all contracts about her, from London to Antigua. He was on board of her, on the voyage, and at Antigua, gave the command of the vessel to another master; he also insured the vessel; and at Antigua, acted personally in command of the ship. This is not like the case at bar; for in this, Hamilton did not furnish the vessel, nor man her, after the mortgage, nor did he insure her; but Hodgson did the last act.

But both cases are doubted in the case 7 T. R. 306, and by Abbott 16, who says, they do not furnish a case for the decision of the question, who is entitled to the freight, which a case of a contract made by the master in that character will; which is our case.

There is a distinction in a court of equity and a court of law, where the mortgagor acts as the master of the vessel. In the court of equity, he is considered as owner; but not so, in a court of law. Marsh. 452–3. Hamilton never acted as master.

*4th. The contract, in words, binds and includes the freight. To which it is objected, that future freight is too remote an interest to [*147 be transferred; freight, or a hope, or expectation, is such an interest as may be insured; and if insurable, it may be granted. Goods, as well as their expected produce, may be granted. Prec. in Chan. 285. It is not competent for Butts, who claims under Hamilton, to object that the freight is not included or passed by the deed. Cowp. 600.

5th. The objection, that Robert Hamilton exercised authority over the vessel, by giving instructions, is not of any weight, in the mouth of Butts; because Butts had a full knowledge of the lien of Hodgson; and also, because it does not appear that Hodgson authorized this interference. The directions of James Hamilton, that Butts was to wait until the vessel earned enough to pay him, is also without weight; because James Hamilton was ignorant of the arrangement which his partner had made; and of which Butts might have informed him; but not having done so, he is the more culpable.

6th. Hamilton had no right to appropriate the freight to any other person, than that specified in his deed of mortgage. If he had not, Butts, his servant, had not. Butts must be considered, either as the servant of Hamilton, or of Hodgson; if the servant of the former, and undertakes to act as such, he had no right to apply the money in the manner he did. If he undertook the command, as Hodgson's servant, he had no right to apply the freight to the payment of a debt due from Hamilton.

7th. Butts having accepted of the command of the vessel, with a full knowledge of the lien upon her, and her future freight, he tacitly consented to apply the freight according to the agreement between Hamilton and Hodgson; if he intended otherwise, at the *time, he has been guilty [*148 of a fraud which ought not to avail him in a court of law.

8th. The master had no lien for his $800, due for his own wages on the vessel. The mate had no lien on this vessel for $200, they being earned on board of a different vessel, and in a different voyage. The balance of the mate's wages was only $184. The mate, by accepting an order on James Hamilton, for $384, the whole of the wages due him, agreed to accept payment in a different way from the usual one; which destroys the lien on the vessel for the $184. Salk. 131. Besides, for this $184, Butts, as the master of the vessel, when it was earned, was liable; and the moment he paid that sum, the mate's lien was gone. The master has no lien on the vessel, for the wages he pays the seamen, but has on the freight, for the wages of the voyage in which the freight was earned. The mate, by assigning the bill on James Hamilton, could not assign any lien he had on the vessel.

9th. As to the justice of the case. Hodgson has paid the seamen's

wages for the voyage which earned the freight; and Butts is to receive the benefit.

Jones, contrà.—1st. As to the validity of the deed; and 2d. As to its effect, if valid.

1st. The vessel was in port at the time of the deed, and therefore (possession not having been delivered), it is void as to creditors. The possession is dispensed with, only when the vessel is at sea. *Stevens* v. *Cole*, 1 Cooke's B. L. 339; *Hall* v. *Gurney*, Ibid. 357; *Ryall* v. *Rolle*, 1 Wils. 260; and the case of *Russell* v. *Hamilton*, in this court (1 Cr. 309).

As to the act of assembly, if the deed would have been bad, without recording, there is nothing in the act to make it good. From affirmative words, a negative may be sometimes implied, but not *è converso*. The words of the act are, "all deeds of trust and mortgages whatsoever *shall *149] be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved, and recorded according to the directions of this act:" that is to say, a deed, although good in every other respect, yet if not acknowledged or proved, and recorded, shall be void. It cannot possibly be construed, to make good a deed which would have been before fraudulent.

2d. The deed is also void, for want of containing the register according to the directions of the act of congress. (1 U. S. Stat. 294, § 14.) This act is mandatory, and if the construction of the act of assembly contended for is correct, the register is necessary; for the affirmative words of the act of congress imply a negative as strongly as the act of assembly implies an affirmative.

3d. The plaintiff waived this deed, by taking possession under a new and absolute deed of the same property, before the mortgage was forfeited, and before he had exercised any right of ownership. This new deed implies a new consideration, and that a new bargain was made, by which the old contract was waived.

4th. The consideration of the deed was indemnity. A mere possibility of suffering is not a sufficient consideration against third persons. It is only good between the parties.

II. As to the effect of the deed, if valid. The plaintiff, by the terms of the deed itself, could not meddle with the schooner, until — days after her return from her then intended voyage to New Orleans, and a failure on the part of the mortgagors to indemnify him; and his only authority then would be to sell the vessel and cargo, if not previously sold by the mortgagors. If, then, the defendant did know of the mortgage, he must be presumed to know the whole terms, and that the plaintiff could not interfere until long after his return. He also knew that, before a forfeiture of the mortgage, and while the mortgagor holds the possession, the latter is to be considered the owner. *Jackson* v. *Vernon*, 1 H. Bl. 114, and *Chinnery* v. *Blackburne*, Ibid. 117. Even in the case of lands, a mortgagor has been held to *be a freeholder, and entitled to vote at elections. And the *150] mortgagee of a leasehold estate cannot be sued by the lessor, as assignee of the lessee, until the mortgagee is in possession, although the mortgage be forfeited, and he has a right of possession. *Eaton* v. *Jacques*, Doug. 455; *Keech* v. *Hall*, Ibid. 22.

The mortgagors had a right to receive the freight, and if so, they had a right to appropriate it. The freight is not like rent, which is said to grow out of the land. It depends upon a mere personal contract. If they had received the freight, their receipt would have been good against the plaintiff.

As to the payment of the expenses of the voyage by the plaintiff, it was voluntary. He had his reasons. He made a new contract, and paid the money after he had possession under his absolute purchase of the vessel.

The extrajudicial doubts of Lord KENYON and Abbott cannot control the strong and decisive cases of *Jackson* v. *Vernon*, and *Chinnery* v. *Blackburne*.

As to the covenant respecting the freight, it is merely a personal contract, and the plaintiff trusted to the personal security of the mortgagors. Even if they had sold the inward cargo, the plaintiff could not recover against the vendees. But the freight was not even a *chose in action*; it was only a possibility; it was not in being, and therefore, not capable of a legal assignment.

Swann, in reply.—The vessel was of less value when she returned, than when she was mortgaged, by at least the difference of the freight. Hodgson paid the expenses of the voyage. It is equitable, therefore, that he should receive the freight. The defendant had no lien on the vessel or freight.

Two questions seem to arise in this cause. 1. What relation does the mortgagor stand in to the mortgagee? 2. What relation does the defendant stand in to both?

*1. By the English law, possession must accompany the deed, except as to vessels at sea. But here possession is not necessary, if the deed be proved and recorded in a certain manner. It is then as valid, to all intents and purposes, as if possession had been delivered with the deed. [*151

THE COURT said, he need not argue that point: it had been settled.(*a*)

Swann.—What, then, are the rights which it conveys? As to mortgages of lands, the law is settled; but not so in the case of a mortgage of a ship. In England, it is settled, that a mortgagee of a ship in possession, is entitled to all the rights of property: but if a vessel be mortgaged while at sea, some doubts have arisen. But here, by the statute, the deed has the same effect as if possession had been given. The mortgagee, therefore, has all the right of property; and if in the thing itself, he has it also in its profits.

But this is not a mere mortgage. It is also an assignment of the freight itself. It is said to be the general understanding, that the mortgagor shall enjoy the profits, until forfeiture, or possession given to the mortgagee. But if the mortgagor covenants expressly that the mortgagee should receive the profits, this destroys the tacit presumption that the mortgagor should receive them. At best, a mortgagor is only "like a tenant at will," and the mortgagee may put an end to his right of taking the profits whenever he pleases. He has the legal title to the rent. *Moss* v. *Gallimore*, Doug. 282. But it is said, that the freight was not *in esse*, and therefore, could not be the subject of an assignment. But if the covenant does not operate as an assignment of the freight, it is sufficient to destroy the tacit understanding, that the mortgagors were to receive and might dispose of it as they pleased.

(*a*) Probably alluding to the case of Claiborne *v.* Hill, 1 Wash. 177.

2. In what relation does the defendant stand to the other parties? Here was no fraud on him. He had notice of the mortgage, and the appropriation
*152] of the freight to secure *the plaintiff, before the vessel sailed. He took an order for his money on James Hamilton; which shows that when he sailed, he did not depend upon the profits of this voyage, as to his claim of $800. If he had any lien on the freight, it was only for his wages arising during the same voyage. If there was any fraud, it was on his side. He never disclosed his claim to the plaintiff, before he sailed, nor after his return, until the plaintiff had paid the expenses of the voyage. The record of the mortgage was notice to him, even if we had not proved actual knowledge on his part. The mortgagors and the defendant, as their agent, were trustees for the plaintiff. If a mortgagee of lands chooses to lie by, and not demand the rents, and the tenants pay them to the mortgagor, they shall be protected. But why? Because they had not notice. But if they pay the rent to the mortgagor, after notice from the mortgagee, they pay in their own wrong. This is the case of the defendant: he knew that the mortgagors had no right to appropriate the freight.

February 28th, 1804. MARSHALL, Ch. J., mentioned to the counsel, that the court had doubts whether the mortgage was not void, for want of three witnesses, under the act of assembly (Revised Code, p. 165), for regulating conveyances. They, therefore, continued the cause, to ascertain whether any, and what decisions, has been made in Virginia upon that point.

February 25th, 1805. *E. J. Lee*, for the plaintiff in error.—The question now is, is it necessary that the mortgage should be proved by three witnesses? By the second member of the 2d section of the statute to prevent frauds and perjuries, it is declared, "if a conveyance be of goods and chattels, and be not, on consideration, deemed valuable in law, it shall be taken to be fraudulent within that act, unless the same be, by will duly proved and recorded, or by deed in writing acknowledged or proved; if the same deed
*153] include lands *also, in such manner as conveyances for lands are directed to be proved and recorded, or if the conveyance be of goods and chattels only, then acknowledged or proved by *two* witnesses in the general court, or the court of the county in which one of the parties live, within eight months, or unless possession shall really and *bonâ fide* remain with the donee," &c. By this law, if the conveyance is of goods and chattels, for a consideration not deemed valuable in law, and is proved by two witnesses, or possession is with the donee, it gives a title.

From this part of the act, the natural and only inference is, that if a conveyance is for a consideration deemed valuable in law, it must be valid, and transfer property as absolutely as a conveyance for a consideration not deemed valuable, proved by two witnesses.

The latter part of this section includes a mortgage, or any other conveyance with a condition or limitation. The first branch of the 2d section declares, that all conveyances not made with a view to defraud creditors or purchasers, are good, and does not require its being recorded. The 3d section of this act refers to the first branch of the 2d section, both being taken from the statute of Elizabeth. The whole of the 4th section of the act regulating conveyances, relates to four different objects: 1st. An estate of freehold in lands; 2d. An estate of inheritance in lands; 3d. An estate for a

term of years in lands; 4th. Deeds of settlement upon marriage, wherein lands, slaves, money or other personal thing shall be settled or covenanted to be left, or paid at the death of the party, or otherwise, and all deeds of trust or mortgages whatsoever, that is, the consideration of which is marriage, or which relate to lands. These general words are to be construed as referring to the previous subject-matter of this section, and of the previous sections.

*If the act against frauds and perjuries include not this deed, then we are to inquire, what was necessary, at common law, to pass a title to property. Personal property, at the common law, might be acquired, the books say, in twelve different ways. Among them, one is by grant or contract. A contract is an agreement, upon a sufficient consideration, to do, or not to do, a particular thing. No particular form is prescribed as to making the contract, whether it must be in writing or otherwise; it is sufficient, if the contract is proved. And all persons who have notice of the contract are bound by it. If A. sell to B., verbally, in the presence of C., a horse, and C. afterwards buy the same horse of A., will it be said C.'s title is good? No, because the contract with B. transfers the property. 2 Black. Com. 447, 448. [*154

The contract for the freight is good; the law does not require a contract to pay money out of a particular fund to be recorded. The whole tenor of the act for regulating conveyances shows that it relates to real estate only, except in the single case of marriage settlements, which are specially provided for.

But there is another error apparent in the record. The plaintiff paid to the defendant the seamen's wages, upon the faith of receiving the freight. If he was not entitled to receive it, he has paid those wages by mistake, and may recover them back in this action against the defendant, to whose orders they were paid.

Swann, on the same side.—The 4th section of the act for regulating conveyances says, that all deeds of trust and mortgages whatsoever, shall be void, unless they shall be recorded according to the directions of that act; that is, in the county where the "land conveyed lieth." Where, then, is a deed of mere personal property *to be recorded? This shows, that the legislature meant only deeds of trust and mortgages of land. [*155

C. Lee, on the same side, contended, that there was no statute respecting conveyances of personal property on valuable consideration. The statute of frauds speaks only of conveyances made on consideration, not deemed valuable in law. The word good consideration, in the 3d section, means valuable consideration, otherwise it would be repugnant.

Jones, contrà.—It is contended, now, that if the mortgage is void, and the plaintiff had no right to receive the freight, he has paid the expenses of the voyage by mistake, and can recover upon that ground. But there is no evidence that the expectation of the freight was his motive for paying those expenses. On the contrary, he did not pay them, until after he had taken possession of the vessel, under a new contract, as an absolute purchaser. The record does not state how much he disbursed, and therefore, we cannot say, how much he is entitled to recover back, even if he is entitled to recover anything. But the defendant never received the money from the plaintiff

for those disbursements. It is true, he gave orders to the plaintiff to pay, but those orders were not for his own use, and he never actually received the money.

March 2d, 1805. MARSHALL, Ch. J., delivered the opinion of the court. —This suit was instituted to recover the freight of a vessel of which the plaintiff was a mortgagee. Upon inspecting the deed, which is the foundation of the action, it appears to have been admitted to record, on the oath of only two subscribing witnesses. This suggested the preliminary question, whether a deed of mortgage, so recorded, was not absolutely void as to creditors and subsequent purchasers? This question depends on the construction of two acts of the legislature of Virginia. The first is entitled "an act for regulating conveyances:" the 4th section of that act is in these words, *"All bargains, sales," &c. The first member of the sentence *156] relates to lands only; the second to marriage settlements, wherein either lands or personal estate should be settled; and the third relates to deeds of trust and mortgages. Terms descriptive of personal estate are omitted, but the word "whatsoever" would certainly comprehend a mortgage of a personal chattel, as well as of lands, if not restrained by other words manifesting an intent to restrain them.

It is argued, that this intent is clearly manifested. The whole act relates to real estate, except that part of it which respects marriage settlements. Its title is "an act concerning conveyances," and all its provisions are adapted to the conveyance of lands, except in the particular case of marriage settlements; and in that case, the act provides expressly for recording a settlement of chattels. This act, it is said, contains no "directions" for recording a deed of trust or mortgage for a personal thing, and consequently, such deed cannot be within it.

The first section of the act respects conveyances of lands only, and directs, that they shall be acknowledged or proved by the oath of three witnesses in the general court, or court of the district, county, city or corporation in which the lands lie. The second respects marriage settlements, and directs, that if lands be conveyed or covenanted to be conveyed, they shall be proved and recorded in the same manner as had been prescribed in the first section; but if only slaves, money or other personal thing be settled, the deed is to be proved and recorded before the court of the district, county, or corporation in which the party dwells, or as afterwards directed. The third section relates only to the proving and recording of livery of seisin. Then follows the fourth section, which requires, among other enumerated conveyances, that "all deeds of trust and mortgages whatsoever" shall be void as to creditors and subsequent purchasers, if not acknowledged or proved, and recorded *157] "according to the directions *of the act." There being no "directions" which are applied to mortgages, unless lands be conveyed in them, it has been argued, that such mortgages only as convey lands, are comprehended within the act.

The act, it must be acknowledged, is very obscurely penned, in this particular respect, and there is so much strength in the argument for confining it to mortgages of lands, that, if a mortgage of a personal chattel could be brought within the provisions of any other act, the court would be disposed to adopt the construction contended for.

The plaintiff insists, that such a mortgage is comprehended in the 2d section of the "act to prevent frauds and perjuries." That act avoids fraudulent conveyances; and declares, that deeds of personal chattels, not upon a valuable consideration, where the possession remains with the donor; or a reservation of interest in the donor, where possession passes to the donee, shall be fraudulent and void, unless proved and recorded according to the directions of the act. A mortgage made on a valuable consideration would be very clearly excluded from the 2d section, although the act contained nothing further on the subject. But to remove the possibility of doubt, the 3d section declares, that the act shall not extend to any conveyance made "upon good consideration and *bonâ fide*." The meaning of the word "good," in the statute of frauds, is settled to be the same with "valuable."

It is, therefore, perfectly clear, that the case is altogether omitted, or is provided for in the act concerning conveyances. In a country where mortgages of a particular kind of personal property, are frequent, it can scarcely be supposed that no provision would be made for so important and interesting a subject. The inconvenience resulting from the total want of such a provision would certainly be great; and the court, therefore, ought not to suppose the case to be entirely omitted, if there be any legislative act which may fairly be construed *to comprehend it. The act concerning conveyances, although not penned with that clearness which is to be [*158
wished, does yet contain terms which are sufficient to embrace the case, and the best judicial opinions of that state concur in this exposition of it.

Although the point was not directly decided in the case of *Hill* v. *Claiborne*, the court of appeals appear to have proceeded on this construction; and Judge TUCKER, in discussing this subject, avows the same opinion.

Upon a consideration of the acts on this subject, Butts being a creditor, it is the opinion of the court, that the deed of mortgage, in the proceedings mentioned, was void as to him.

The counsel for the plaintiff contends, that, although the mortgage deed be void, yet Hodgson is entitled to recover, because he has paid money to the order of Butts, under the mistaken opinion that he was entitled to the freight. This allegation is not made out, in point of fact. Hodgson was in possession of the vessel, as the absolute purchaser, before he paid for the disbursements he is now endeavoring to recover. It does not appear, that he paid these disbursements, in the confidence of receiving the freight, or that he was not compellable to pay them, as owner of the vessel. The freight had previously been applied by Butts, under the authority of the Hamiltons, to the payment of a debt due to himself. He had a right, as a general creditor, to retain that freight, as against the original owners, or their assignee.

The court is of opinion, that the judgment of the circuit court is to be affirmed, with costs.

*United States *v.* Benjamin More. (*a*)

Jurisdiction in error.

No appeal or writ of error lies in a criminal case, from the judgment of the circuit court of the District of Columbia.

Quære? Whether the act of congress, abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission when the act was passed?

Error to the Circuit Court of the district of Columbia, sitting at Washington, upon a judgment in favor of the traverser, on a demurrer to an indictment for taking unlawful fees, as a justice of the peace for the county of Washington. The indictment was as follows:

"United States, District of Columbia and County of Washington, to wit: The jurors for the United States, for the district of Columbia, and county of Washington aforesaid, upon their oath present, that Benjamin More, late of the county of Washington aforesaid, gentleman, on the 10th day of December, in the year of our Lord, one thousand eight hundred and two, then being one of the justices of the peace of the United States, for the county of Washington aforesaid, at the county of Washington aforesaid, by color of his said office, unlawfully and unjustly did demand, extort, receive and take of and from one Richard Spalding, constable, acting for and on behalf of one Joseph Hickman, the sum of twelve cents and a half cent, lawful current money of the United States, for and as his fee, for executing and doing the duties of his said office, to wit, for rendering and giving judgment upon a warrant for a small debt, in a case between the said Joseph Hickman, plaintiff, and one Joseph Dove, defendant; in contempt of the law, to the great damage of them the said Richard Spalding and Joseph Hickman, and against the peace and government of the United States.

John T. Mason,
United States Attorney, for the district of Columbia."

*160] *To this indictment there was a general demurrer and joinder, and judgment in the court below for the traverser, at July term, 1803.(*b*)

(*a*) Present, Marshall, Ch. J., Cushing, Paterson, Chase, Washington and Johnson, Justices.

(*b*) In the court below, the opinions of the judges were delivered to the following effect.

Cranch, J.—The question to be decided upon this demurrer is, whether the act of congress, for abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission before, and at the time when that act passed, and who accepted their commissions, while those fees were legally annexed to the office.

The points made in the argument of this cause are important, and some of them not altogether clear of doubt. It has been contended, that congress, in legislating for the District of Columbia, are not bound by any of the prohibitions of the constitution. But this is a doctrine to which I can never assent. Can it be said, that congress may pass a bill of attainder for the District of Columbia? That congress may pass laws *ex post facto* in the district, or order soldiers to be quartered upon us in a time of peace, or make our ports free ports of entry, or lay duties upon our exports, or take away the right of trial by jury, in criminal prosecutions. Yet, all this they may do, if, in legislating for the District of Columbia, they are not restricted by the express prohibitions of the constitution. The words must be positive and strong, indeed, to justify such a construction. The only clause from which such an inference can possibly seem to flow, is that

Mason, attorney for the United States for the district of Columbia. The act of congress, February 27th, 1801, *§ 11 (2 U. S. Stat. 107), declares, "that there shall be appointed in and for each of [*162

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which says, "congress shall have power to exercise exclusive legislation, in all cases whatsoever, over such district," &c.

But the whole instrument is to be taken together, and every part is to be made consistent with the residue, if possible. That congress may legislate "in all cases whatsoever, over such district," &c., is the general proposition, and the prohibitions are the exceptions. The true construction is, that congress may legislate for us, in all cases where they are not prohibited by other parts of the constitution. The express commands of the constitution operate as prohibitions of everything repugnant to such commands. In every case, therefore, where congress are not bound, either by the commands or prohibitions of the constitution, they have a discretionary power to legislate over the district. The constitution was made for the benefit of every citizen of the United States, and there is no such citizen, whatever may be his condition, or wherever he may be situated, within the limits of the territory of the United States, who has not a right to the protection it affords.

If congress are bound by the constitution, in legislating for this district, then it becomes proper, to test the validity of their legislative acts, respecting the district, by the provisions of the constitution. The 3d article of the constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, which shall not be diminished during their continuance in office. The act of congress of 27th of February 1801, which constitutes the office of justices of the peace, and empowers them to try personal demands, of the value of $20, ascertains the compensation which they shall have for their services in holding their courts, and trying those causes. This compensation is given in the form of fees, payable when the services are rendered. The causes of which they have cognisance, are causes arising under the laws of the United States, and therefore, the power of trying them is part of the judicial power mentioned in the third article of the constitution, which expressly declares, that the judicial power of the United States shall extend to all cases arising under those laws.

It is difficult to conceive, how a magistrate can lawfully sit in judgment, exercising judicial powers, and enforcing his judgments by process of law, without holding a court. I consider such a court, thus exercising a part of the judicial power of the United States, as an inferior court, and the justice of the peace as the judge of that court. It is unnecessary, in this cause, to decide the question whether, as such, he holds his office during good behavior; but that his compensation shall not be diminished, during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. It has been contended, that the compensation of the justice of the peace is not within this provision of the constitution, because the act of congress has not appointed the stated times at which it shall be paid. It is true, that the act of congress has not said, that the compensation shall be paid on any particular day and month; but it may, perhaps, be a compliance with the clause of the constitution, which requires that it shall be receivable at stated times, to say, that it shall be paid when the service is rendered. And we are rather to incline to this construction, than to suppose the command of the constitution to have been disobeyed.

If, therefore, the constitution of the United States is obligatory upon congress, when legislating for this district; if a justice of the peace is a judge of an inferior court of the United States; and if his compensation has once been fixed by law, a subsequent law for diminishing that compensation (*à fortiori*, for abolishing it) cannot affect that justice of the peace, during his continuance in office; whatever effect it may have upon those justices who have been appointed to office since the passing of the act.

MARSHALL, J., concurred.

the said counties (in the district of Columbia), *such number of discreet persons, to be justices of the peace, as the President of the United States shall, from time to time, think expedient, to continue in office five
*164] *years. And such justices, having taken an oath for the faithful and impartial discharge of the duties of the office, shall, in all mat-

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Kilty, Ch. J.—This is an indictment at common law, against the defendant, a justice of the peace, for having, under color of his office, exacted and taken an illegal fee, as therein described. The demurrer admits his being a justice, and the exaction and receipt of the fee, and rests the defence on the legality of such conduct.

The legality of exacting and taking fees, under color of a public office, must depend on the express authority of law, and, therefore, the question must turn upon the acts which have passed on this subject, as it respects the district of Columbia.

The justices of the peace were allowed, expressly, to receive fees for their services, by the act of February 1801, § 11, and by the 4th section of the act of March 1801, they were, as commissioners, entitled to certain fees and emoluments. It is possible, that if the 11th section had only provided for the appointment of justices, without speaking of their fees, the 1st section, adopting the laws of the two states, might have had the effect of giving them the fees provided by the laws of Maryland. But an inquiry into this part of the subject is not important, because, as it has been observed in the course of the argument, so much of those two acts as provides for the compensation to the justices, is repealed by the act of May 1802; and it is not material, to determine by which of the sections the provision was made. The act of 1802, § 8, having positively declared that this provision was repealed, and having thereby left no power existing to demand the fees before allowed, it remains only to examine into the ground on which the latter act is alleged to be unconstitutional and void.

According to the course which has been pursued by the supreme court, it appears unnecessary to say anything about the power of a court to examine into the constitutionality of a law, until a case has been made out to justify such an inquiry. But, taking the power for granted, we are to inquire how it is called for in the present instance.

In testing an act of the legislature by the constitution, nothing less than the positive provisions of the latter can be resorted to, and without absolute restriction by the constitution, the legislative power is omnipotent over subjects submitted to it. We must, therefore, reject the idea of judging this act on the principles of a contract, and setting it aside as an infraction of such contract.

In support of the position, that the act of May 1802, is unconstitutional and void, the following arguments have been urged: 1. That a justice is a judicial officer. 2. That a justice is a court. 3. That a justice shall receive for his services a compensation, which shall not be diminished, during his continuance in office; and that, therefore, taking away his fees, by repealing the act which gave them, is diminishing his compensation, and is contrary to the constitution.

The nature of some of the duties confided to a justice of the peace may make him a judicial officer; and he might even be admitted to be a court, without bringing him within the provisions of the constitution. The first section of the third article speaks of the judicial power of the United States. It declares what courts it shall be vested in, and then provides, that the judges of such courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

When we consider this instrument as constituting a general government, and defining, amongst others, its judicial power, we must take it in its most extensive sense, as applying to the whole of the United States, and not to a particular territory. I consider, therefore, that the judicial power given to the traverser, as a justice of the peace, is not, in the sense of the constitution, the judicial power of the United States; and that such justice is not such a court as is provided for in the article and section in question. The justice does not, according to that article and section, hold his office

ters, civil and criminal, and in whatever *relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of the said district for which they shall have been respectively appointed; and they shall have

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during good behavior; nor can the power of receiving certain fees, which was given by the act of 1801, be strained to mean "receiving at stated times a compensation for his services."

The second section of the third article declares what subjects the judicial power, given by the first section, shall extend to. And by comparing these subjects with those which are cognisable by the justice in the present case, it will confirm the position, that this judicial power is not that of the United States, and is not provided for by this part of the constitution. Congress, in organizing the judiciary, according to the constitution, have created a supreme court, and inferior courts. Some of the latter extend over certain circuits composed of different states, and others are confined to the respective states; but in all of them, it is the judicial power of the United States which is carried into effect. I consider this judicial power as being different in its object and nature from that which may be the effect of the legislative power given to congress over this territory, or of their power to make rules, &c., for such places as may become their property.

In order to show that the restrictions contained in the first section of the third article of the constitution do not extend to a justice, in the district of Columbia, it may be necessary to make some inquiry into the principles on which the district is erected. Without endeavoring to solve all the difficulties which have been mentioned in the course of the argument, I am persuaded, that the following positions are correct: That the district of Columbia, though belonging to the United States, and within their compass, is not, like a state, a component part, and that the provisions of the constitution, which are applicable particularly to the relative situation of the United States and the several states, are not applicable to this district. That the power of congress to legislate for the district arises from the positive direction of the constitution, in the 8th section of the first article; and it may be here material to attend to the words "exclusive legislation," and to discover their meaning and origin.

By the constitution, the legislative power of congress is confined to certain objects, and leaves to the several states a portion of the legislative power which they before possessed. But it was the intention of the framers of the constitution, to divest the ten miles square of the privileges of a state, and to give to congress the whole and exclusive power of legislation, as well on the subjects which had been left to the states, as on those which had been taken from them and given to the general government; that the ten miles square is not in a situation to become a state, without an amendment in the constitution, and therein differs from the other territories belonging to the United States; that the word "exclusive" meaning only free from the power exercised by the several states, the legislative power to be exercised by congress may still be subject to the general restraints contained in the constitution, though it includes subjects both of a general and local nature. Thus, they are restrained from suspending the writ of *habeas corpus*, unless in the cases allowed; from passing (within and for the district) a bill of attainder, or *ex post facto* law; from laying therein a capitation tax; from granting therein any title of nobility; from making therein a law respecting the establishment of religion, or abridging the freedom of speech, or of the press; and from quartering soldiers therein, contrary to the third amendment. But when congress, in exercising exclusive legislation over this territory, enact laws to give or to take away the fees of the justices of the peace, such laws cannot be tested by a provision in the constitution, evidently applicable to the judicial power of the whole United States, and containing restrictions which cannot, in their nature, affect the situation of the justices, or the nature of the compensation.

cognisance in personal demands to the value of $20, exclusive of costs, which sum they shall not exceed, any law to the contrary notwithstanding; and they shall be entitled to receive for their services, the fees allowed for like services by the laws herein before adopted and continued in the eastern part of said district.

By the 4th section of the act of congress of 3d March 1801 (2 U. S. Stat. 115), the magistrates are constituted a board of commissioners, with certain duties and fees annexed to that office. And by the act of 3d of May 1802, § 8 (2 U. S. Stat. 194) it is enacted, "that so much of two acts of congress, the one passed on the 27th of February 1801, entitled "an act concerning the district of Columbia," the other passed the 3d day of March 1801, supplementary to the aforesaid act, as provides for the compensation to be made to certain justices of the peace thereby created," "shall be, and the same is hereby repealed." The question for the decision of this court is, whether congress had a constitutional right thus to abolish the fees.

Jones, contrà.—By the act of 1801, certain fees were annexed to the office of justice of the peace. The traverser was appointed under that act, and
*166] while the fees *were thus annexed.(a) The principle we contend for is, that he was a judge of an inferior court of the United States, and protected by the third article of the constitution, which declares, that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive a compensation for their services, which shall not be diminished during their continuance in office." A law for the abolishing the fees can only affect those justices who have been appointed since the passage of that law.

It has been decided in this court, in the case of *Marbury* v. *Madison* (1 Cr. 162), that a justice of the peace in the district of Columbia does not hold his office at the will of the president. The power to make laws is expressly given; the power to repeal is not, but necessarily follows. So, the power of appointment necessarily implies the power of removal, according to the maxim, *cujus est dare, ejus est disponere.* This principle was settled in congress, in the year 1789, after long debate upon the tenure of office of secretary of state, and was expressed by means of a clause in the law directing what officer should take charge of the papers in that department, when the secretary of state should be removed by the president. Congress has no power to limit the tenure of any office to which the president is to appoint, unless in the case of a judge, under the constitution. The position for which we contend is justified by principle. The jurisdiction given to a justice of the peace makes him a judge of an inferior court. Judge Coke defines a court to be a place where justice is judicially administered; and this definition is recognised by Blackstone. Certain powers are incident to all courts, as to

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However ingeniously the question has been argued, I cannot feel any doubt in my mind on it.* Nor can I perceive any legal or justifiable ground, under which the direction of the act of 1802 has been disregarded. I am, therefore, of opinion, that the judgment on the demurrer should be for the United States. But the judgment of the court is for the defendant.

(a) This fact does not appear in the record, but it was agreed by the counsel on both sides, that the record should be so amended, as to bring the whole merits of the cause before the court.

commit for contempts in court; for there is a difference between courts of record, and courts not of record, as to contempts out of court.

*By the act of 1801, the justices of the peace are to have the same powers, in all matters, civil and criminal, as were exercised by the justices of the peace in Maryland. In resorting to the Maryland code of laws, we find a very early act of assembly, which gives to justices of the peace the power of punishing contempts in their presence. Indeed, they possess a vast accumulation of powers. They may inflict whipping, imprisonment, and fine as high as 500 pounds of tobacco. They have a much more extensive jurisdiction than many more regular courts. They have cognisance of civil controversies of the value of $20. They hold courts, they try causes, they give judgments, and issue executions. Every one who consults the index to the laws of Maryland, must be satisfied, that the justices of the peace constitute very important tribunals, and it is immaterial by what name they are called; they administer justice judicially; they have, therefore, the power to hold a court. The traverser was appointed, before the repeal: he had a compensation which is taken away by the repeal; it is, therefore, so far, unconstitutional. It is no objection, that the tenure of office is limited to five years. It is not the tenure, but the essence and nature of the office, which is to decide this question. If the limitation of five years makes a difference, it would be an evasion of the constitution. But it is of no consequence, how congress have determined the tenure: it is established by the constitution. [*167

Mason, in reply.—The constitution does not apply to this case. The constitution is a compact between the people of the United States in their individual capacity, and the states in their political capacity. Unfortunately for the citizens of Columbia, they are not in either of these capacities.

The 2d section of the third article of the constitution declares, "that the judicial power of the United States shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to *controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state and the citizens thereof, and foreign states, citizens or subjects." [*168

The judicial power of the United States can only extend to the cases enumerated; but the judicial power exercised in the district of Columbia extends to other cases, and therefore, is not the judicial power of the United States. It is a power derived from the power given to congress to legislate exclusively in all cases whatsoever over the district. And it is under this clause of the constitution, that congress have created justices of the peace, and given them power. Congress are under no control, in legislating for the district of Columbia. Their power, in this respect, is unlimited. If congress cannot limit the tenure of the office, but it must be during good behavior, then a law might be passed, without the concurrence of the legislative will.

I understand the case of *Marbury* v. *Madison* to have decided only that the justices held during good behavior, for five years, under the law; and not, generally, during good behavior, under the constitution.

The general provisions of the constitution do not apply to our case. We are the people of congress. They are to legislate for us, and to their laws we must submit.

Jones.—The executive power exercised within the district of Columbia, is the executive power of the United States. The legislative power exercised in the district, is the legislative power of the United States. And what reason can be given, why the judicial power exercised in the district, should not be the judicial power of the United States? If it be not the judicial power of the United States, of what nation, state or political society is it the judicial power? All the officers in the district are officers of the United States.

*169] *By the 2d section of the third article of the constitution, the judicial power of the United States is to extend to all cases arising under the laws of the United States. All the laws in force in the district are laws of the United States, and no case can arise which is not to be decided by those laws. What judicial power is that, which is exercised by the circuit court of the district? They certainly exercise a very respectable part of the judicial power of the United States. Was it ever contended, that congress could limit the tenure of the offices of the judges of that court? or that the judges were not liable to impeachment under the constitution?

February 13th. The Chief Justice suggested a doubt, whether the appellate jurisdiction of this court extends to criminal cases.

February 22d. *Mason*, in support of the appellate jurisdiction of this court in criminal cases.—By the 1st section of the third article of the constitution, the judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. By the 2d section, it is extended to all cases in law and equity, arising under the laws of the United States. This is a case in law, arising under the laws of the United States, and is, therefore, within that section.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such

*170] exceptions, and under such regulations, as the congress shall make." *Congress has made no exception of criminal cases. I understand it to have been said by this court, that it is necessary that congress should have made a regulation, to enable this court to exercise its appellate jurisdiction. Upon this point, I consider myself bound by the case of *Clarke* v. *Bazadone.* (1 Cr. 212.) It is clear, then, that this court has the jurisdiction, and the only question is, whether congress has made such a regulation as will enable this court to exercise it.

Such a regulation is contained in the 14th section of the judiciary act of 1789 (1 U. S. Stat. 81), which enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas*

corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The writ of error in a criminal case is a writ not provided for by statute, and necessary for the exercise of the appellate jurisdiction given to the supreme court by the constitution, and agreeable to the principles and usages of law. This court has, therefore, the power to issue it.

There is no reason why the writ of error should be confined to civil cases. A man's life, his liberty and his good name, are as dear to him as his property; and inferior courts are as liable to err in one case as in the other. There is nothing in the nature of the cases which should make a difference; nor is it a novel doctrine, that a writ of error should lie in a criminal case. They have been frequent in that country from which we have drawn almost all our forms of judicial proceedings. It is true, that it is expressly given by the act of congress of 1789, in civil cases only, but it does not thence follow, that it should be denied, in criminal.

MARSHALL, Ch. J.—If congress had erected inferior courts, without saying in what cases a writ of error or appeal should lie from such courts to this, your *argument would be irresistible; but when the constitution has given congress power to limit the exercise of our jurisdiction, and to [*171 make regulations respecting its exercise; and congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.

Mason.—When legislating over the district of Columbia, congress are bound by no constitution. If they are, they have violated it, by not giving us a republican form of government. The same observation will also apply to Louisiana.

The act of congress which gives a writ of error to the circuit court of this district, differs, in some respects, from that which gives the writ of error to the other courts of the United States. The words of the judiciary act of 1789, § 22, are, "and upon a like process (that is, by a writ of error, citation, &c.), may final judgments and decrees in civil actions, and suits in equity in a circuit court," &c., "be reversed or affirmed in the supreme court." But in the law concerning the district of Columbia, § 8 (2 U. S. Stat. 106), the expressions are, "that any final judgment, order or decree in said court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be, provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States."

In this section, if the words respecting the value of the matter in dispute were excluded, a writ of error would clearly lie in a criminal case, under the general expression, any final judgment. Then do those words respecting the value, exclude criminal cases? Suppose, *the court below had imposed [*172 a fine of more than $100, the case would have been within the express

words of the act. So it would have been, if a penalty of more than $100 had been imposed by law.

But this court has exercised appellate jurisdiction in a criminal case. *United States* v. *Simms*, 1 Cr. 252.

MARSHALL, Ch. J.—No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.

Mason.—But the traverser had able counsel, who did not think proper to make the objection.

March 2d, 1805. MARSHALL, Ch. J.,(*a*) delivered the opinion of the court as follows :—This is an indictment against the defendant, for taking fees, under color of his office, as a justice of the peace in the district of Columbia. A doubt has been suggested, respecting the jurisdiction of this court, in appeals or writs of error, from the judgments of the circuit court for that district, in criminal cases ; and this question is to be decided, before the court can inquire into the merits of the case.

In support of the jurisdiction of the court, the attorney-general has adverted to the words of the constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of "all cases in law and equity arising under the laws of the United States," and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those *which might be
*173] brought on originally, "with such exceptions, and under such regulations, as the congress shall make," that the supreme court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation make by congress, which should circumscribe the jurisdiction conferred by the constitution.

This argument would be unanswerable, if the supreme court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject. But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

Thus, the appellate jurisdiction of this court, from the judgments of the circuit courts, is described affirmatively : no restrictive words are used. Yet, it has never been supposed, that a decision of a circuit court could be reviewed, unless the matter in dispute should exceed the value of $2000. There are no words in the act, restraining the supreme court from taking cognisance of causes under that sum ; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the circuit court, where the matter in dispute exceeds the value of $2000. This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which, is expressly given by law.

(*a*) JOHNSON, J., was absent, when this opinion was delivered.

On examining the act "concerning the district of Columbia," the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words "matter in dispute," seem appropriated to civil cases, where the subject in contest has *a value beyond the sum mentioned in the act. But in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit. [*174

The writ of error, therefore, is to be dismissed, this court having no jurisdiction of the case.(*a*)

Faw *v.* Roberdeau's Executor.

Statute of limitations.

If an act of limitations have a clause "saving to all persons *non compos mentis*, *femes covert*, infants imprisoned, or out of the commonwealth, three years after their several disabilities removed," a creditor, resident of another state, removes his disability by coming into the commonwealth, even for temporary purposes; provided, the debtor be at that time within the commonwealth.[2]

This was an action in the Circuit Court of the district of Columbia, for the county of Alexandria: and the question arose upon the construction of the act of assembly of Virginia, for "reducing into one the several acts concerning wills," &c. (Rev. Code, p. 169, c. 92, § 56), which is in these words, viz.: "If any suit shall be brought against any executor or administrator, for the recovery of a debt due upon an open account, it shall be the duty of the court, before whom such suit shall be brought, to cause to be expunged from such account, every item thereof which shall appear to have been due five years before the death of the testator or intestate. Saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed."

The declaration was for plank, scantling and foundation-stone, lent by the plaintiff to the defendant; *for the like materials, sold and delivered; and for money had and received. The defendant pleaded the general issue, and a verdict was taken for the plaintiff, subject to the opinion of the court, upon the following facts: [*175

"That the debt found by the verdict was due by the defendant's testator to the plaintiff, in the year 1786. That the testator died in 1794. The plaintiff was a resident of, and in, the state of Maryland, and out of the commonwealth of Virginia, when the articles were delivered for which the suit was brought, and when the debt was contracted; and continued so, in Maryland, and out of the said commonwealth, until the month of June 1795, when he removed to Alexandria to live, and hath lived there ever since. That in the year 1786, after the cause of action accrued, the plaintiff passed through the

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(*a*) See the case of United States *v.* La Vengeance, 3 Dall. 297, where it seems to be admitted, that in criminal cases, the judgment of the inferior court is final.[1]

[1] And see Ex parte Kearney, 7 Wheat. 38; Ex parte Watkins, 3 Pet. 193; s. c. 7 Id. 574.

[2] See Bond *v.* Jay, 7 Cr. 350; Chomqua *v.* Mason, 1 Gallis. 342; Dorr *v.* Swartwout, 1 Bl. C. C. 179; Richardson *v.* Curtis, 3 Id. 385; Thurston *v.* Fisher, 9 S. & R. 288.

town of Alexandria, and was for a short time therein, but not as a resident thereof."

Upon this statement of facts, the judgment of the court below was for the defendant; and the plaintiff brought the present writ of error.

E. J. Lee, for the plaintiff in error.—The plaintiff was not a citizen of Virginia, when the debt was contracted. It does not appear, that he did not commence his action within the limited time after his becoming a citizen.

WASHINGTON, J.—Does it not appear, that Faw was in Virginia, after the cause of action accrued?

E. J. Lee.—Only as a traveller. It does not appear, that the testator lived in Virginia at that time. The plaintiff had three years to bring his action, after removal into Virginia. The writ is no part of the record, unless made so by a bill of exceptions, and it is not stated, when the action was brought.

Swann, contrà.—The act of limitation begins to run from the time the plaintiff passed through Alexandria, after the cause of action had accrued. *176] His disability *(according to the expression of the act of assembly) was then removed, and he ought to have brought his action, within three years from that time.

The plaintiff came to reside in Alexandria, in 1795. The suit was tried in 1802; hence, the presumption is, that it was commenced at that time, and the plaintiff can only show the contrary, by producing his writ.

The state of the case negatives the idea of a loan. The claim, therefore, was upon the open account, and the court had a right to expunge all the articles charged five years before the death of the testator.

MARSHALL, Ch. J.—That act has nothing to do with the lapse of time, after the death of the testator. The five years are before his death. The three years are also three years, during the life of the testator, and the plaintiff must, therefore, have been in the state three years, during the life of Roberdeau, to make the limitation attach to his claim. The court will hear you upon that point, if you think this opinion not correct.

Swann said, that no objection occurred to him at present.

MARSHALL, Ch. J.—The court is satisfied with that opinion, unless you can gainsay it.

WASHINGTON, J.—There is another point. Did not the plaintiff's coming into the state, in 1786, after the cause of action accrued, cause the limitation to attach?

Swann.—The words of the act are, "saving to persons out of this commonwealth," not persons residing out of this commonwealth. Being "out of the commonwealth" is the disability; coming into the commonwealth, therefore, is a removal of that disability. If the saving had been to persons residing out, &c., then, possibly, a mere coming in, without residing, would not have been a removal of the disability. *Strithorst* v. *Græme*, 3 Wils. 145.

*E. J. Lee.—Under the British stat. of 1 Jac. I., c. 16, § 3, the plaintiff must have been a resident in England; and he then has six years, after his return. Here, the plaintiff was not a resident of Virginia, at any time during the life of the testator. *Perry* v. *Jackson*, 4 T. R. 516.

Marshall, Ch. J.—Beyond sea, and out of the state, are analogous expressions, and are to have the same construction. The whole case turns upon the question, whether the plaintiff's being in the state, in 1786, after the cause of action had accrued, takes him out of the saving clause?(*a*)

E. J. Lee.—The casual coming into the state is not within the meaning of the act. It means the coming in to reside. The "act for the limitation of actions," &c. (Revised Code, p. 116, § 13), speaks of persons residing beyond seas, or out of the country. If, in such case, the plaintiff has a factor in this country, the statute runs against him; but if no factor, then it does not. Suppose, the plaintiffs should be foreign partners, and one of them should be driven, by stress of weather, into a remote part of the state, he may be ignorant of the place of residence of his debtor. Shall the plaintiffs, in such case, be barred by the act of limitation? The case in 2 W. Bl. 723, turned upon the question of residence. I can find no positive authority. I believe the point has never been expressly decided.

March 2d, 1805. Marshall, Ch. J., after stating the case, delivered the opinion of the court.—There being a general verdict for the plaintiff, it is necessary, in order to justify a judgment for the defendant, that the statement of facts, upon which he relies, should contain all the circumstances necessary *to support such a judgment; otherwise, the judgment must be rendered upon the verdict for the plaintiff. [*178

The five years mentioned in the 56th section of the act of assembly, must have elapsed, before the death of the testator. If they did not, no lapse of time, after his death, can bring the case within the purview of this act. In the present case, the five years had elapsed. But there is a saving clause, in the following words, "saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed." It is one of the facts stated, that the plaintiff was within the commonwealth of Virginia, in the year 1786, after the cause of action accrued: and hence, it is argued, that he is not within the saving clause of the section, and that, to exclude him from the benefit of that clause, it is not necessary, that he should have become a resident of that state.

The court has not been able to find any case in which this question has been decided. We are, therefore, obliged to form an opinion from a consideration of the act itself. The words of the act are, "out of this commonwealth," and such persons may bring their actions within three years after their "disability" removed. The court is of opinion, that the disability is removed, at the moment when the person comes into the commonwealth; and he must bring his action within three years from that time.

(*a*) See the case of Durouré *v.* Jones, 4 T. R. 300, which seems decisive as to that point.

But something further than this was necessary, to authorize a judgment for the defendant. It ought to have appeared, that Roberdeau was a resident of the state of Virginia, at the time the plaintiff came into that state in 1786; and that fact is not in the case stated. The judgment, therefore, ought to have been for the plaintiff, and not for the defendant. Judgment reversed, with costs, and judgment entered for the plaintiff on the verdict.

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*179] *Ray *v.* Law.

Appeal.—Final decree.

A decree for a sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal will lie.[1]

Law having a mortgage on real estate in the city of Washington, and Ray having a subsequent mortgage on the same estate, Law had filed his bill in chancery in the Circuit Court of the district of Columbia, for a foreclosure and sale of the mortgaged property, and made Ray a defendant. The bill having been taken for confessed against Ray, a decree was obtained by Law for a sale. The sale had been made under the decree, and notice given, that on a certain day, the sale would be ratified, unless cause was shown. On that day, Ray appeared, but not showing good cause, in the opinion of the court, the sale was confirmed. Ray prayed an appeal to this court, on the decree for the sale, which the court refused, on the ground, as it is understood, that the decree for the sale was not a final decree in the cause.

Ray, on this day, presented a petition to this court, setting forth those facts, among others, praying relief, and that this court would direct the court below to send up the record. At the same time, he produced sundry papers, purporting to be the substance of that record, but not properly authenticated.

Marshall, Ch. J.—The act of congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree.

C. Lee, for the petitioner, contended, that this was a final decree as to Ray, and cited 2 Fowler's Exchequer Practice 195, to show that such a decree would, in England, be considered such a final decree as would authorize an appeal.

March 5th, 1805. Marshall, Ch. J.—We can do nothing, without seeing the record, and the papers offered cannot be considered by us as a record.

*180] *The court, however, is of opinion, that a decree for a sale under a mortgage, is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies.

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[1] Whiting *v.* United States Bank, 13 Pet. 6; Bronson *v.* La Crosse and Milwaukee Railroad Co., 2 Black 524. And see French *v.* Shoemaker, 12 Wall. 86.

Levy *v.* Gadsby.[1]

Usury.

If A. lend money to B., who puts it out at usurious interest, and agrees to pay to A. the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B., and an indorser of B.'s note to A. may avail himself of the plea of usury.[2]

If the usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea.

The court has the exclusive power of deciding whether a written contract be usurious.[3]

Error to the Circuit Court of the district of Columbia, sitting at Alexandria.

This was an action of *assumpsit*, by Levy, the indorsee of a promissory note, against Gadsby, payee and indorser of McIntosh's note. The declaration consisted of three counts. The 1st, in addition to the common averments, alleged, that the plaintiff had brought suit upon the note against McIntosh, in Maryland, and recovered judgment, but that before execution made, McIntosh died insolvent. The 2d count was in the usual form, excepting that it alleged that Gadsby became liable by the custom of merchants. The 3d count was for money had and received.

The defendant pleaded, 1st. *Non assumpsit;* 2d. As to the first count, usury between McIntosh and Levy, stating the transaction as a loan by the latter to the former; 3d. As to the first count, usury between the same parties, stating the transaction as a forbearance of an antecedent debt. The 4th and 5th were like pleas of usury to the second count. The 3d and 5th pleas, by mistake, alleged the note given, in pursuance of the corrupt agreement, to be a note made by Gadsby to McIntosh, and by him indorsed to Levy; whereas, the note in the declaration mentioned, was a note made by McIntosh to Gadsby, and by him indorsed to Levy.

To the pleas of usury, there were general replications and issues, and a general verdict for the defendant. *On the trial, three bills of exception were taken by the plaintiff. [*181

1. The first stated that the plaintiff gave in evidence a promissory note in the usual form, dated November 1st, 1797, whereby McIntosh, six months after date, promised to pay to Gadsby, or order, $1436.62, for value received, negotiable at the bank of Alexandria. And it was proved, that Levy and McIntosh carried on trade and commerce in copartnership, under the name and firm of Levy & McIntosh, at Alexandria, Levy residing at Georgetown, about eight miles distant from Alexandria. That they so continued to carry on trade and commerce, from some time in the year 1796, until the 12th day of November 1797, on which day, the partnership was dissolved; and that the dissolution was advertised in the public papers, on the 19th of October 1797, to take place on the said 12th day of November 1797. And the defendant, to support the issues on his part, offered in evidence a paper in the handwriting of the plaintiff, and by him subscribed, as follows:

"Georgetown, November 9th, 1797. Received of Mr. John McIntosh, his

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[1] In Oates *v.* National Bank, 100 U. S. 249, Judge Harlan says, this case is so meagerly reported, that it is difficult to see the precise ground upon which the conclusion of the court was placed.

[2] And see Gunther *v.* Farmers' and Mechanics' Bank, 1 Pet. 37.

[3] Walker *v.* Bank of Washington, 3 How. 62; And see Goddard *v.* Foster, 17 Wall. 142.

two notes, one payable to John Gadsby, for $1436.62, dated the first instant, negotiable at the bank of Alexandria, at six months after date, indorsed by said Gadsby ; the other to Thomas J. Beatty, of same date, at three months after date, for $1270.87, negotiable at the bank of Columbia, and indorsed by said Beatty. The two notes making the sum of $2707.49, which, when paid, is on account of money due me from the firm of Levy & McIntosh, equal to $2210.24, as by their account, handed me by the said McIntosh, dated October 23d, 1797 ; and as the said McIntosh agrees he is receiving an interest equal to the difference twixt the sum due me, as *per* their account-current, and the notes payable, he, therefore, allows me the same interest, as the one he is receiving for my money. Therefore, on a settle-
*182] ment of accounts, I am *only to stand debited for $2210.24, due as *per* account-current ; $497.25, interest ; $2707.49. N. Levy."

The plaintiff's counsel objected to the said writing being given in evidence by the defendant, on the pleas of usury, and the court refused to permit it to go in evidence on those pleas. The plaintiff's counsel then objected to its going in evidence on the general issue of *non assumpsit*, but upon that issue, the court admitted it.

2. The 2d bill of exceptions, after repeating the same facts, stated that the plaintiff's counsel prayed the opinion of the court, and their instruction to the jury, whether the circumstances given in evidence as aforesaid, amounted to proof of a usurious contract between Levy and McIntosh ; and the court, thereupon, instructed the jury, that those circumstances did amount to proof of a usurious contract between those parties.

3. The 3d bill of exceptions was to the opinion of the court, that the agreement mentioned in the receipt given by Levy to McIntosh, having been read in evidence, and having been, by the court, declared a usurious agreement, the note given in pursuance thereof, is void, and that the plaintiff is not entitled to recover thereon, against the defendant in the present action.

Swann and *Simms*, for plaintiff in error : *C. Lee*, *Mason* and *Jones*, for defendant.

The questions arising in this case were, 1st. Whether the court below was correct in instructing the jury, that the agreement contained in Levy's receipt was usurious. 2d. Whether that receipt was admissible in evidence upon the issue of *non assumpsit ;* and 3d. Whether it was admissible upon either of the other issues.

*183] *Swann*, for the plaintiff in error.—1. As to the usury. The court below undertook to say that the agreement and other circumstances amounted to conclusive proof of usury, when it ought to have been left to the jury, under all the circumstances of the case, to say, whether the contract was usurious or not.

There appears to have been a partnership in usury between Levy and McIntosh. During that partnership, McIntosh had loaned Levy's money at usury, and on the 23d of October 1797, was indebted to Levy in the sum of $2210.24, for money thus lent out at three and six months. And being satisfied that he should receive that money at those periods, he was willing to bind himself absolutely to pay it over to Levy, whose money it, in truth,

was. This, we say, is the true construction of the receipt. It is no more than the case of an agent binding himself to pay over, at a particular time, the money of his principal which shall at that time be in his hands.

To constitute usury under the act of assembly (Rev. Code of Virginia, p. 37), there must be either a loan of money, or forbearance of a debt already due. In this case, there was neither a loan from Levy to McIntosh, nor a debt due from McIntosh to Levy. *Floyer* v. *Edwards*, Cowp. 115. A note given without consideration, is not usurious. McIntosh was to receive the money, at a certain time, and pay it over to Levy. This is the whole of the contract. He only bound himself expressly to do what in equity and conscience he ought to do. At the time the notes were given, if Levy had sued McIntosh for the money, it would have been a sufficient answer to say, that McIntosh had not received it.

If I authorize a man to lend $1000 of my money, on usury, for my benefit, and he does so, and has received $500 for such usury, can I not compel him to pay it over to me? This is really the only question upon the merits of this case; and this seems to be decided by the case of *Faikney* v. *Reynous*, 4 Burr. 2069, and that of *Petrie* v. *Hannay*, 3 T. R. 418, in which it was held, that if two be engaged in a transaction illegal, but not *malum in se*, and one of them pay the whole money, he *may recover a proportion from the other, if this other has expressly promised to pay it. From [*184 hence it may be inferred, that although the original transaction between McIntosh and the person to whom he lent the money on usury was illegal, and although Levy knew all the circumstances, and assented to the transaction, yet, inasmuch as it was not *malum in se*, and McIntosh agreed to pay over the money to Levy, when received, the illegality of the original transaction shall not discharge McIntosh from such agreement, or render it void.

Simms, on the same side.—An objection was made in the court below, to allowing usury to be given in evidence on the plea of *non assumpsit*, but it was overruled by the court. If there had been no other plea, perhaps, the question would be doubtful; but when the defendant has pleaded usury in a particular way, he ought not to be permitted to resort to a different kind of usury. *Tate* v. *Wellings*, 3 T. R. 538. It tends to surprise and entrap the plaintiff.

C. Lee, contrà.—1st. Whether usury can be given in evidence on *non assumpsit*. Everything which goes to show that the contract is void, may be given in evidence, on that plea; for if the promise was void, when made, then, in law, it was no promise. *Bernard* v. *Saul*, 1 Str. 498; *Burrows* v. *Jemino*, 2 Ibid. 733; 1 Esp. Rep. 178. There being two special pleas of usury makes no difference, the court having been of opinion, that the evidence did not support those pleas.

2d. As to the construction of the agreement. If the usury is reserved for forbearance of a debt already due, it is the same thing as if reserved on an original loan. *Gibson* v. *Fristoe*, 1 Call 74, 81. And it makes no difference, whether the usurious interest is stated to be received from others or not. Usury is not to be covered by such devices as that. It is only an indirect way of receiving the usury. *No argument can make the [*185 transaction plainer than it is stated in the receipt itself. *Res ipsa loquitur.*

Mason, on the same side.—There can be no ground for the plaintiff to allege surprise in the admission of the receipt as evidence, on the general issue. The special pleas set forth precisely the same facts, and nothing but a blunder in copying the pleas, and inserting the name of McIntosh for Gadsby, prevented the evidence from being admitted on those pleas.

The agreement is, that as McIntosh is receiving usury from others, therefore, he will pay it to the plaintiff. If the debtor receives usury from his debtors, it is no justification of the creditor in demanding from him. There is no evidence that the partnership of Levy and McIntosh was a partnership in usury. The receipt does not directly aver that McIntosh is receiving the rate of interest mentioned. It only states that he agrees he is receiving it. A man may agree to a false statement of facts; and, indeed, that is always the case, when usury is attempted to be covered.

Jones, on the same side.—The evidence offered was not only applicable to the general issue, but to the first special plea of usury. The agreement shows it to be a loan in the sense of the statute. No precedent can be found of a plea of usury, which does not state it as a loan.

The cases cited do not apply. The agreement itself does not state it to be accounting for profits received. But McIntosh gives an absolute note for the payment of money, although it is agreed that it is outstanding.

The question is upon a written agreement, and the construction of all such agreements is exclusively with the court.

*186] *March 4th, 1805. MARSHALL, Ch. J., delivered the opinion of the court.

It was slightly contended by the counsel for the plaintiff in error, that when usury has been specially pleaded, and the evidence adduced to support such plea has been adjudged by the court to be inapplicable to the facts so pleaded, the same evidence cannot be admitted upon the plea of *non assumpsit*. No cases in support of this position have been cited, and it does not appear to be supported by reasoning from analogy. In cases where there are special and general counts in a declaration, and the evidence does not support the special counts, the plaintiff is allowed to apply the same evidence in support of the general counts. On a parity of reasoning, the defendant should be permitted to give in evidence, upon the plea of *non assumpsit*, the same facts which were adjudged inapplicable to the special pleas, but which might have been received on the general plea, if the special pleas had not been pleaded.

The counsel for the plaintiff has also contended, that although the paper writing produced would, on the face of it, import a usurious contract, yet, as the jury might possibly have inferred from it certain extrinsic facts, which would have shown the contract not to have been within the act, the jury ought to have been left at liberty to infer those facts. But in this case, the question arises upon a written instrument, and no principle is more clearly settled, than that the construction of a written evidence is exclusively with the court.

This court is of opinion, that the court below has correctly construed the instrument upon which the question arose, and that, therefore, there is no error in the judgment.

Judgment affirmed, with costs.

*Marine Insurance Company of Alexandria *v.* Wilson. (*a*)

Marine insurance.—Seaworthiness.—Survey.

If a policy upon a vessel have a clause "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors, that she was unsound and rotten, but not referring to the commencement of the voyage is not sufficient to discharge the underwriters.

Quære? Whether such report, even if it related to the commencement of the voyage, would be conclusive evidence?[1]

This was an action of covenant in the Circuit Court of the district of Columbia, sitting at Alexandria, brought by Wilson, the defendant in error, against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brig George, from Alexandria to Havre de Grace, &c.

One of the clauses in the policy was in the following words, viz: "If the above vessel, after a regular survey, shall be condemned for being unsound or rotten, the underwriters shall not be bound to pay the subscription on this policy." The declaration was for a total loss, and averred that the brig sailed from Alexandria on the 24th of October 1802, upon the voyage insured. The defendants pleaded:

1st. "That on the 24th day of October 1802, the said brigantine, called the George, was unsound in her timbers, and by reason of the said unsoundness, was not capable of performing the voyage in the policy mentioned, viz., at and from Alexandria aforesaid, across the Atlantic ocean to Havre de Grace, Rotterdam or Bremen, with liberty to call at Falmouth for orders; and this they are ready to verify," &c.

2d. "That after the said brigantine had gone from Alexandria aforesaid, upon the voyage aforesaid, and while she was proceeding upon the voyage aforesaid, upon the high seas, she sprung a leak, viz., on the 31st day of October, in the year aforesaid, in consequence of her not having been tight, staunch and strong enough for performing the voyage aforesaid, on the said 24th day of *October, in the year aforesaid, at Alexandria [*188
aforesaid, and, at the instance of her crew, her voyage was interrupted upon account of her incapacity to perform the same. And the said brigantine was put back and conducted into a convenient port to be examined and repaired, viz., into Norfolk, in Virginia, and that a regular survey of the said brigantine was made at Norfolk, on the ——— day of ———, in the year ———, and thereupon, the said brigantine was condemned for being unsound to that degree as not to be worthy of being repaired, and rendered fit and able to perform the voyage aforesaid, whereof the plaintiff, afterwards, to wit, on the day and year last mentioned, at the county of Alexandria aforesaid, had notice; and this they are ready to verify," &c. To this

(*a*) Present, Marshall, Ch. J., Cushing, Paterson and Washington, Justices.

[1] See Dorr *v.* Pacific Insurance Co., 7 Wheat. 581; Watson *v.* Insurance Co., 2 W. C. C. 152; Steinmetz *v.* United States Insurance Co., 2 S. & R. 93. It has been determined, that, under the clause in question, a regular survey, finding unsoundness, without more, is conclusive upon the parties. Brandegee *v.* National Insurance Co., 20 Johns. 328; Griswold *v.* National Insurance Co., 3 Cow. 96. Otherwise, if it do not appear, that such unseaworthiness arose *solely* from rottenness or unsoundness. Haff *v.* Marine Insurance Co., 8 Johns. 163; Innes *v.* Alliance Mutual Insurance Co., 1 Sandf. 310; Amroyd *v.* Union Insurance Co., 2 Binn. 394. And see Janney *v.* Columbian Insurance Co., 10 Wheat. 411, as to what is a regular survey.

last plea there was, at first, a general demurrer, which was afterwards withdrawn, and general replications and issues to both pleas.

On the trial, two bills of exception were taken by the defendants. The first stated, that the defendants moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony, that the George, on the 24th of October 1802, after a regular survey, was condemned as being unsound or rotten, by the surveyors, whose report is as follows, to wit:

"The brig George, of Alexandria, Caspar Hayman, master, having put into this port in distress, we, the subscribers, at the request of said master, did this day attend on board, for the purpose of ascertaining and reporting the situation of the said vessel, and the circumstances of said distress. We found, from the report of said master and others, that they sailed from Alexandria, on the 24th of October last past, with a cargo of tobacco, coffee and staves, bound on a voyage to Falmouth in England; that on the 31st of the same month, in consequence of having met with heavy gales of wind, the vessel sprung a leak, and that with much difficulty and continued labor at the pumps, having seldom less than three feet water in the hold, they gained this port. Considering the foregoing circumstances, and the appearances which, in our minds, confirm the same, we think proper to recommend, that the vessel be haled to some convenient wharf, the *cargo
*189] landed, and the hull carefully examined. Given under our hands, at Norfolk, Virginia, 17th November 1802.

JAMES HUNTER,
PAUL PROBY."

"The cargo of the brig George, of Alexandria, having been unladen, pursuant to a recommendation contained in a report, dated the 17th instant, and signed by two of the present subscribers, we, the undersigned, at the request of Caspar Hayman, master of said brig, did this day attend on board for the purpose expressed in said report. We find, on a minute examination of the hull of said vessel, that without going into an extensive repair, the intended voyage cannot be prosecuted; and considering the heavy expense that must necessarily attend such a measure, and which, in our opinion, would exceed the value of the vessel, when completed, we are clearly of opinion, that the vessel and materials, in their present state, should be immediately sold, on account of those concerned. Given under our hands, at Norfolk, Virginia, this 26th Nov. 1802.

JAMES HUNTER, Merchant
PAUL PROBY, Ship-Master,
JOHN JARVIS, } Master Carpenters."
THOS. NASH, }

But the court refused to give the instruction as prayed.

The second bill of exceptions stated, that the defendants' counsel moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony, that the brig George, after a regular survey, was condemned as having been unsound or rotten, on the 24th day of October 1802, by the surveyors, whose report is as follows (here was inserted the same report): and shall also be satisfied by the evidence, that the said vessel, while she was performing the voyage insured, upon the high

seas, sprung a leak on the 31st day of October, in the year aforesaid, and at the instance of her crew, the said voyage was interrupted *upon account of her incapacity to perform the said voyage; and that the [*190 said brigantine was put back, and conducted into a convenient port to be examined, namely, into Norfolk, in Virginia, where the survey herein before mentioned was made. But the court refused to give such instruction.

C. Lee, for the plaintiffs in error.—Three points arise in this cause. 1st. That the report of the surveyors is conclusive upon the question of seaworthiness, unless partiality, corruption or misbehavior on the part of the surveyors, in making the survey, can be shown. 2d. That it is competent for the defendant to explain, by parol testimony, the grounds upon which the surveyors condemned the vessel. 3d. That it was not necessary for the insurers to plead specially the report of the surveyors, and their condemnation of the vessel, but that it might be given in evidence.

1st. If the parties have agreed upon a tribunal to decide a particular question, they must be bound by the decision of that tribunal. So, in the case of an award: it is binding upon the parties, all over the world. But, it may be said, how are the surveyors to ascertain the condition of the vessel on the 24th of October? The answer is, that they might examine witnesses; they might judge from the universal decay of the timbers, &c. The covenant in the policy does not say at what time the vessel must be proved to have been unsound. But we admit, that she must be proved to have been unsound at the time the voyage commenced.

We pleaded, that she was unsound on the 24th of October, when the voyage commenced; and we prayed the court to instruct the jury, that if they should be satisfied by the evidence, that she was condemned *as [*191 being unsound and rotten on the 24th of October, after a regular survey, they ought to find a verdict for the defendants. This instruction, we contend, the court ought to have given; for the report of the surveyors is like an award of arbitrators, which cannot be set aside, unless partiality, fraud or misbehavior be proved on the part of the arbitrators. In the case of *Shelton* v. *Barbour*, 2 Wash. 64, it was held, that a former verdict and judgment between the mother of the plaintiff, who sued for his freedom, and the defendant, by which it was adjudged, that the mother was a slave, were conclusive evidence that the plaintiff, her son, was a slave. And this was in a question where freedom was concerned, and where the natural leaning of the court is presumed to be in favor of freedom. The judgment of a court is to be admitted as conclusive evidence, without being specially pleaded. So is an award, and the judgment of a foreign court, which has jurisdiction over the subject-matter and the parties.

2d. If the report of the surveyors does not refer to the 24th of October, as the time when the vessel was unsound, it was competent for us to explain the report by testimony not inconsistent with it. There is, however, enough in the report to induce a presumption that she was not sound on the 24th. The unsoundness was in the hull, not in the rigging, masts, &c. To show that parol testimony might be admitted to explain any ambiguity of the report, the following cases were cited: *Doe dem. Freeland* v. *Burt*, 1 T. R. 701; *Gregory* v. *Setter*, 1 Dall. 193; *Field* v. *Biddle*, 2 Ibid. 171; *McMinn* v. *Owen*, Ibid. 173; *Ross* v. *Norvell*, 1 Wash. 15.

March 5th, 1805.—Marshall, Ch. J., declined giving an opinion, conceiving himself to be, in a remote degree, interested in the stock of the insurance company.

*192] *The other three judges delivered their opinions *seriatim*, as follows:

Washington, J.—It does not appear upon the record, that any other evidence was offered, to prove the vessel unsound on the 24th of October, than the report of the surveyors. No parol testimony appears to have been offered, to explain the report, or to apply it to the time of commencing the risk. The bill of exceptions is repugnant. It asks an opinion, predicated upon the unsoundness of the vessel on the 24th of October, and relies upon the report of the surveyors, which applies only to the 31st of October. If it was intended to bring before this court, the propriety of admitting parol evidence to explain the report, that question does not appear to arise from the record. I see no reason for reversing the judgment.

I do not, however, mean to be understood, that if parol evidence had been offered, it would have been proper to receive it. I give no opinion upon that point.

Paterson, J.—No parol evidence appears upon the record to show that the report of the surveyors referred to the 24th of October. The conclusiveness of the report, therefore, did not come before the court. It is not a point in the cause.

Cushing, J.—This is an action on a policy of insurance. The defence set up is, that the vessel was unsound and rotten on the 24th of October, when the risk commenced; and it is alleged, that the report of the surveyors is conclusive evidence of that fact. But the report does not apply to that time. Let the judgment be affirmed, with costs.

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*193] Wilson *v.* Codman's Executor. (*a*)

Pleading—Set-off.—Death of party.

In a declaration, the averment that the assignment of a promissory note was for value received is an immaterial one, and need not be proved.

If the defendant plead the bankruptcy of the indorser in bar, a replication, stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration, which alleges the note to have been given by the defendant, for value received.

Claims against an agent cannot be set off against the principal.

Upon the death of a plaintiff, and appearance of his executor, the defendant is not entitled to a continuance.[1]

But he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria.

This was an action of debt, originally brought by John Codman, as as-

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(*a*) Present, Marshall, Ch. J., Cushing, Paterson and Washington, Justices.

[1] Alexander *v.* Patten, 1 Cr. C. C. 338.

signee of a promissory note, made by the defendant, Wilson, to Andrew and William Ramsay. (*a*) The declaration was as follows, viz:

"John Codman, assignee of Andrew Ramsay and William Ramsay, complains of William Wilson, in custody, &c., of a plea that he render unto him the sum of $1038.80, which to him he owes, and from him unjustly deains, &c., for this, to wit, that whereas, the said defendant, on the 26th. day of June, 1799, at Alexandria, in the county aforesaid, by his certain note in writing, subscribed with his proper hand and name, and to the court now here produced, the date whereof, &c., did promise to pay to the said Andrew and William Ramsay, or order, forty-five days after date, $1038.80, for value received, negotiable in the bank of Alexandria; and the said Andrew and William Ramsay, afterwards, to wit, on the 23d day of October, in the year of our Lord 1802, at the county aforesaid, by their certain writing indorsed on the said note, and subscribed with their proper hands and names, assigned the said note to the said plaintiff, for value received, of which assignment the said defendant, afterwards, to wit, &c., had notice; by means whereof, and by force of the act of assembly of Virginia in such case made and provided, before the year 1801, action accrued," &c.

There was an office judgment against the defendant, and his appearance bail, *to set aside which, the latter pleaded *nil debet* for his principal, at June term 1803. At December term 1803, the suit was entered [*194 abated by the plaintiff's death. Afterwards, at the same term, on the motion of Stephen Codman, by his attorney, it was ordered, "that the said Stephen Codman, executor of John Codman, deceased, be made plaintiff in this suit, with leave to prosecute the same." At June term 1804, the defendant gave special bail, and "moved the court for a rule upon the plaintiff to grant *oyer* of his letters testamentary, to enable the defendant to answer the plaintiff, which was opposed by the plaintiff's attorney, and the motion was refused by the court;" whereupon, the defendant took a bill of exceptions.

The plea put in by the appearance bail, for the principal, was withdrawn, and the latter pleaded, 1st. *Nil debet*, upon which issue was joined: and 2d. That before the 23d day of October 1802, the time stated in the declaration, when A. & W. Ramsay are supposed to have assigned the said note to the said John Codman, the said A. & W. Ramsay had been declared bankrupts, &c., and on the ——— day of March 1802, had duly obtained their final discharge, &c.

To this plea, the plaintiff replied, that on the 20th of June 1799, the defendant was justly indebted to John Codman, the testator, in the sum of $1038.80, and in consideration thereof, on that day, made and executed the promissory note in the declaration mentioned, for that sum, to A. & W. Ramsay, as the agents of, and in trust for the use of, the said John Codman, the testator; and concluded with a verification.

To this replication, the defendant demurred specially; 1st. Because it is a departure from, and is inconsistent with, the declaration, in this, that the declaration affirms that the said note was payable to Andrew and William Ramsay, for value received, and was by them assigned, for value received,

(*a*) An act of assembly of Virginia authorizes an assignee of a promissory note to maintain an action of debt, in his own name, against the maker of the note.

to the said John Codman; and the replication affirms, that the said note was executed and delivered to the said A. & W. Ramsay, as the agents of, and in trust for the use of, the said John Codman: 2d. Because the plaintiff, in
*195] his replication, ought to *have traversed the plea, and tendered an issue thereupon, and ought not to have replied the said special matter, and concluded with a verification: 3d. Because the said replication is informal and insufficient, &c. Upon this demurrer, the court below adjudged the issue in law for the plaintiff.

Upon the issue in fact, the jury found a verdict also for the plaintiff; and on the trial, four bills of exception were taken by the defendant. The 1st was to the refusal of the court to instruct the jury, that the plaintiff ought to produce in evidence his letters testamentary, to enable him to maintain the issue on his part.

The 2d bill of exceptions stated, "that the defendant produced testimony to the following facts, viz., that A. & W. Ramsay, on the 13th of August 1799, when the note in the declaration mentioned became due, were indebted to him, on their own account, in a large sum of money, to wit, in the sum of $8000, and continued indebted to him always thereafter, to that or a greater amount, until they became bankrupt, in November 1801. That they had taken the said note, for the use and benefit of John Codman, and not for their own, and were authorized, as his agents, to receive payment of the said note, for his use, from the date thereof, until the —— day of May 1800. That the said John Codman urged payment to be made; and during this period of time, sundry payments in money were made to the said A. & W. Ramsay, by the defendant, who, at the time of making such payments, did not mention any definite purpose or use for which they were made. That the said Andrew & William Ramsay, during the period aforesaid, viz., from the 13th of August 1799, to the time of their bankruptcy, had authority to receive no other debt from the said William Wilson, except the debt due on the note aforesaid, and on another note, for about the same sum, due for the use of said John Codman. And the defendant moved the court to direct the jury, that if they should be of opinion, that, at the times respectively, when Wil-
*196] liam Wilson, the defendant, made payments in money to *Andrew & William Ramsay, of sundry sums, after the note became due upon which this action is brought, they, the said A. & W. Ramsay, were indebted to him on their own account, always after the said note became due, to an amount exceeding $8000, and were not authorized, during the whole of the time, from the 13th August 1799, until their bankruptcy, to receive any other debt due from W. Wilson, the defendant, for the use of any other person, except the debt due on the note, which is the ground of this action, and another note for about the same sum, which they held as the agents of John Codman, and in trust for his use; in such case, those payments of moneys may be applied to the discharge of those two notes; unless the jury shall be satisfied by testimony, that the said defendant did make those payments, or any of them, for some other purpose or purposes respectively.

"The plaintiff had offered to prove, by the testimony of Andrew Ramsay, that the payments or advances of money to him and William Ramsay, charged in the account offered by the defendant, William Wilson, in the words and figures following:" [here was inserted an account-current made out by the defendant against A. & W. Ramsay, containing among others,

sundry debits and credits of cash, subsequent to the time when the notes became payable, and before the bankruptcy of the Ramsays; by which it appeared, that they had paid to the defendant, during that time, more cash than he had paid to them, without specific appropriation; but the balance of the whole account (which commenced in April 1797, and continued to October 15th 1801) was against the Ramsays, to about the sum of $10,000] "were not made on account of the notes due to John Codman, or either of them, and that they were not received by the said A. & W. Ramsay on account of the said notes, or either of them; and had also offered in evidence two letters from the defendant, admitted to be in his handwriting, in the words and figures following:" [here were inserted two letters from the defendant to John Codman, the first dated 21st January 1800, saying, that he had paid a small part of the notes to A. & W. Ramsay, and would gladly settle the remainder, if it was in his *power; the second dated 25th February 1800, offering to pay the notes in real estate or to give a mortgage] [*197 "whereupon, the court refused to give the instruction as prayed;" to which refusal the defendant excepted.

The 3d bill of exceptions was to the opinion of the court, that it was necessary for the plaintiff to prove the assignment of the note, but that it was not necessary for him to prove that the same was made for value received, by the said A. & W. Ramsay from the said John Codman.

The 4th bill of exceptions was to the admission of the note and indorsement in evidence to the jury, the indorsement being in these words: "We assign this note to John Codman, without recourse," and signed by A. & W. Ramsay, the payees of the note; inasmuch as the indorsement varied from that set forth in the declaration; the former being "without recourse," and the latter "for value received."

E. J. Lee, for the plaintiff in error, made the following points: 1st. That the defendant below was entitled to *oyer* of the letters testamentary at the time he demanded it. 2d. That the plaintiff was bound to produce them on the trial, upon the issue of *nil debet*. 3d. That the plaintiff was bound to prove the assignment to have been made for value received, according to the averment in the declaration. 4th. That the defendant below had a right, at any time, to apply the payments of money made to A. & W. Ramsay, to the account of the notes in question; the Ramsays being, at that time, personally his debtors, and having no right to demand of him money upon any other account. 5th. That the replication to the second plea was bad upon special demurrer.

*1st. The executor was bound to produce his letters testamentary, and the defendant was entitled to *oyer*, at any time. In Virginia, if [*198 the plaintiff dies before office judgment, the suit abates, and the executor must proceed *de novo*. If the plaintiff dies after judgment, the executor must take out a *scire facias*, in which he must make a *profert* of his letters testamentary. When the *scire facias* issues, the cause goes to the rules, and the defendant has a month to plead. In the present case, the change of parties was made in court, and the defendant had not yet appeared; he had, therefore, time until the next term to appear and plead, and had then a right to demand *oyer*. *Adams* v. *Savage*, 6 Mod. 134; *Smith* v. *Harman*, Ibid. 142. By the act of congress (1 U. S. Stat. 90, § 31), a *scire facias* is to issue

in case of the death of a party before judgment. The law of Virginia (Rev. Code, p. 117, § 20) is nearly the same. The act of congress does not do away the necessity of an executor's showing his letters testamentary, nor deprive the defendant of his right of *oyer*.

PATERSON, J.—Under the act of congress, do not the proceedings go on of old? Are there to be any proceedings *de novo?*

E. J. Lee.—There is no doubt, that the executor must show his letters testamentary, on admission to prosecute, and the defendant has a right to demand *oyer* at some time.

MARSHALL, Ch. J.—The question is, whether, under the act of congress, a *scire facias* is necessary?

WASHINGTON, J.—There is another question, whether the defendant did not crave *oyer* in due time?

E. J. Lee.—The plaintiff ought to produce his letters testamentary, at the time he is admitted, or when *oyer* is prayed, or at the trial, to support his title.

*199] *MARSHALL, Ch. J.—No doubt, the defendant was entitled to *oyer*, but the question is, has he demanded it in proper time?

E. J. Lee.—3d. The plaintiff ought to have proved that the note was assigned, for value received. The assignment on the note is expressed to be "without recourse." There was, therefore, a variance between the assignment on the note, and that set forth in the declaration. The court, therefore, ought either to have prevented the assignment from being produced in evidence, or have compelled the plaintiff to prove it was really for value received. By thus admitting the assignment to go in evidence, they have prevented the defendant from his right to set off his payments to A. & W. Ramsay, before the assignment.

If there be a variance between the evidence and the declaration, it is fatal, how trivial soever it may be. If the plaintiff undertakes to recite an instrument, although he is not bound so to do, and misrecites it, he must fail. Thus, in trover for a debenture, the plaintiff must prove the number of the debenture, as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited But he need not set out the number (any more than the date of a bond for which trover is brought), for being out of possession, he may not know the number, and if he should mistake, it would be a failure of his suit. Buller's N. P. 37. So, in the case of *Bristow* v. *Wright*, Doug. 665, it was held, that in an action against the sheriff, for taking goods, without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit.

MARSHALL, Ch. J.—You consider the declaration as setting forth the indorsement *in hæc verba.*

E. J. Lee.—I do.

MARSHALL, Ch. J.—The only question upon this point is, whether the

plaintiff has undertaken to set forth the indorsement *in hæc verba;* for if so, and there is a variance, there is no doubt, it would be fatal.

**E. J. Lee.*—4th. The defendant below had a right to apply all the cash paid by him to A. & W. Ramsay, to the discharge of the notes. [*200 They had no right to say it was a gift or a loan, and they had no other right to demand money of him, than for those notes. If the appropriation was not made, at the time of the payment, yet it could not be applied to the single debt due.

5th. As to the demurrer. 1st. The declaration states the assignment to be "for value received." The replication, instead of fortifying the declaration, states, that it was not for value received, which, being repugnant, is a departure in pleading. Thus, if the plea be conditions performed, and the rejoinder shows matter in excuse for not performing, it is a departure. 4 Bac. Abr. 123, Departure in Pleading, L. If a note is given to me, as agent for another, it is not given to me for value received. 2d. There is no traverse, denial or confession of the matter of the plea. 4 Bac. Abr. H. 70.

C. Lee, on the same side.—If the plaintiff is not the true executor, a judgment in this suit would be no bar to an action by the rightful executor. Hence, it is necessary, that he should produce his letters testamentary. It does not appear, that he ever produced them in the court below, at any time. He ought to have been compelled to produce them at the trial, on the issue of *nil debet*, to support his title. The plea of *nil debet* put the plaintiff on the proof of everything necessary to entitle him to recover. It has been considered as law in Virginia, that, on that plea, the defendant may give in evidence the statute of limitations, which he could not do on *non assumpsit;* because the latter plea is in the past tense, and the statute does not prove that he never promised. But the plea of *nil debet* is in the present tense, that he does not now owe, and therefore, if the debt is barred by the statute, the plea is well supported. If an executor bring an action of *assumpsit*, the defendant pleads *non assumpsit* in manner and form as the plaintiff has declared, that is, he did not assume to pay to the testator in his lifetime. The plaintiff, in such case, is only bound to prove that the defendant promised to pay the testator, and his own title as executor does not come in question. But if an executor bring an action of debt, and the defendant *pleads [*201 *nil debet*, he says, that he owes nothing to the present plaintiff, who sues as executor, and if the plaintiff be not the true executor, the plea is supported; the defendant, in truth, owes him nothing. Hence arises the difference, between the necessity of producing letters testamentary in evidence on the trial, in actions of *assumpsit*, and in those of debt on simple contract.

Simms, contrà.—In this case, there was an office judgment against Wilson and his appearance bail. The bail came in and set aside the office judgment, by pleading for his principal (as he had a right to do, under the act of assembly of Virginia), in the lifetime of John Codman, and the issue was made up. Afterwards, John Codman died, and Stephen Codman, his executor, appeared, and had leave to prosecute the action.

We differ from the opposite counsel as to the construction of the act of congress. They seem to think, that the pleadings must be *de novo*. But it

is in the discretion of the court, what pleas to admit, after the issue had been made up.

It is said, Wilson was not in court. But it was his own fault to suffer judgment to go against him. No man can take advantage of his own neglect. It was a matter of discretion with the court, to admit the principal to appear and plead, after the issue had been made up by the bail. It is to be presumed, that the executor produced his letters testamentary, and that the court was satisfied, when they admitted him to prosecute as plaintiff. If the defendant did not then pray *oyer*, it was his own neglect. He can only demand *oyer* at the term when the letters were produced. *Wymark's Case*, 5 Co. 74 *b*. But letters testamentary need not remain in court, even during the whole of that term. *Roberts* v. *Arthur*, 2 Salk. 497.

As to the demurrer, two causes are assigned. 1st, that the replication is a departure; and 2d, that it does not traverse the matter of the plea.

*202] *1st. Unquestionably, if it is a departure, it is bad. But if it is the only fortification of the declaration against the plea, it must be good. Co. Litt. 304 *a*. The replication is not repugnant to, nor inconsistent with, the declaration. It is the same, in substance, with that in the case of *Winch* v. *Keely*, 1 T. R. 619, which was adjudged good on demurrer.

2d. It is said, that the replication ought to have traversed the matter of the plea. What part could the plaintiff have traversed? The bankruptcy is impliedly admitted in the replication.

Washington, J.—Part of the objection is, that the replication does not confess the matter of the plea.

Simms.—That is not set down as a cause of demurrer, and it is but matter of form. But it is no cause for demurrer, even if it had been specially shown. In a plea of the statute of limitations, the defendant does not confess that he ever promised at all. So, in a replication to such a plea, that the plaintiff was out of the country, he does not confess, that the five years have elapsed. So, in pleading a release, it is not necessary to admit the execution of the bond, &c. No authorities can be produced in support of such an objection.

As to payments of money, it appears from the account itself, that Wilson, after the notes became due, received more cash from A. & W. Ramsay than they received from him; and it is evident, that the cash transactions were mere matters of mutual accommodation, by loans of small sums, for short periods of time.

As to the first bill of exceptions, it is said, that the plaintiff ought to have produced his letters testamentary on the trial; and that a judgment in this suit, would not be a bar to an action by the rightful executor. This we deny. In a suit brought by the name of John, it is not necessary, on the trial of the

*203] general issue, *to prove that the plaintiff was baptized by that name. So, if the plaintiff sue as executor, when he is only administrator, and no advantage taken by plea in abatement, it is not necessary, on the trial, to produce letters testamentary.

The 3d and 4th bills of exception raise two questions. 1. Whether the assignment ought to have been proved, on the trial, to be for value received. 2. Whether the assignment on the note varies from that stated in the declaration.

It is said, that the *probata* and the *allegata* must precisely agree. This is not the law. It is sufficient, if they agree in substance. In an action of assault and battery, the declaration, alleging it to be done with sticks, staves and swords, is sufficiently supported by evidence that the defendant pulled the plaintiff's nose. So, if the declaration allege that goods were sold and delivered at the request of the defendant, it is sufficient to prove, that the defendant reluctantly received them at the solicitation of the plaintiff. It is only necessary to prove the material averments to be substantially true.

The substance, in the present case, is the note and the assignment. The manner is totally immaterial. No form of assignment is prescribed by the act of assembly; and it is not necessary, under the act, to state the precise words of the assignment. If the assignment had been in consideration of a horse received, it would have been sufficient to have stated, generally, that it was for value received. The words "without recourse" do not imply "without value," nor do they alter the effect of the assignment, as it regards the defendant. The declaration does not pretend to set forth the assignment *in hæc verba;* and therefore, the case from Doug. 665, does not apply. *Holman* v. *Borough*, 2 Salk. 658; *The King* v. *May*, Doug. 159.

*Marshall, Ch. J.—Does not your defence rely on there being no value received? [*204

Simms.—I contend not. I shall presently take the distinction.

Washington, J.—The departure is alleged upon that ground.

Simms.—A moral obligation upon the part of A. & W. Ramsay is a sufficient consideration for the assignment. They were bound, in honesty and good faith, to assign, and that is sufficient to support the allegation of value received. The maker of the note has no right to inquire into the consideration which passed between the assignor and assignee. If the note had not been, from the first, held in trust for Codman, the defendant might have set off all his claims against the Ramsays, which were due before notice of the assignment. No set-off against the trustee can be set up against *cestui que trust.* The authorities cited in *Winch* v. *Keely* can be produced, if the court should require it.

Marshall, Ch. J.—There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot set off, against the debt due from him to the principal, claims against the agent. It cannot be contested. No man ever thought that a person who employs an agent to collect his debts, by this agrees to take on his hands the debts owing by his agent to his debtors, instead of looking to the original debtors themselves.

C. Lee, in reply.—1st. As to the letters testamentary. *The act of congress does not take away the necessity of giving notice to the other party. [*205 It does not essentially alter the law on that subject. By that law, a *scire facias* must have issued, and would have been returnable to the next term. One of the clauses of each act is in the same words. The act of congress is equally applicable to the death of plaintiffs and defendants. A *scire facias* must issue in both cases. And if it had issued, the defendant would have been in time.

2d. The plaintiff ought to have produced his letters testamentary, at the trial, to support his title, on the issue of *nil debet*. This has been spoken to before.

3d. As to the demurrer. It is an answer to the case of *Winch* v. *Keely*, 1 T. R. 619, that in our case, the demurrer is special, in the other, it was general. It will also appear, that in that case, the facts of the pleas were expressly admitted in the replication. The demurrer there was for the purpose of bringing into consideration an important question of law.

The 1st cause of demurrer assigned is, that the replication is a departure. It is only necessary to know what the declaration is. The expression, for value received, means value received by the defendant of the Ramsays, and by them of the plaintiff. The declaration states it to be Ramsay's debt; the replication alleges it to be Codman's debt.

4th. The variance between the declaration and the note offered in evidence is material. If they had produced a note, assigned for value received, the plea of bankruptcy of the Ramsays would have been good. If they had proved their declaration, they would have defeated their action. It is admitted, however, that it would be a question of some doubt, whether the variance would be absolutely fatal, if the action were on a *parol agreement, upon the authority of the note at the end of the case of *Bristow* v. *Wright*, Doug. 669 (3d edition), which confines this strictness of pleading to records and written contracts. But the present action is upon a written contract, and therefore, according to all the authorities, a misrecital is fatal.

*206]

5th. As to the bill of exceptions respecting the testimony, it is only necessary to read the prayer of the defendant to the court (without intermixing the testimony offered by the plaintiff, which only confuses the question), to show the impropriety of the court's decision. The amount of the prayer is, that the payments ought to be presumed to be made on the notes, unless it is proved that they were made for some other purpose, or on some other account; it having been proved that the Ramsays had no right to demand money from the defendant, except on account of those notes.

March 6th, 1805. MARSHALL, Ch. J., delivered the opinion of the court.—The first question which presents itself in this case is, was the defendant entitled to *oyer* of the letters testamentary at the term succeeding that at which the executor was admitted a plaintiff in the cause?

It is contended, on the part of the defendant, that on the suggestion of the death of either plaintiff or defendant, a *scire facias* ought to issue, in order to bring in his representative; or, if a *scire facias* should not be required, yet, that the opposite party should have the same time to plead and make a proper defence, as if such process had been actually sued.

The words of the act of congress do not seem to countenance this opinion. They contemplate the coming in of the executor, as a voluntary act, and give the *scire facias* to bring him in, if it shall be necessary, and to enable the court "to render such judgment against the estate of the *deceased party," "as if the executor or administrator had voluntarily made himself a party to the suit." From the language of the act, this may be done *instanter*. The opinion that it is to be done, on

*207]

motion, and that the party may immediately proceed to trial, derives strength from the provision that the executor or administrator, so becoming a party, may have one continuance. This provision shows that the legislature supposed the circumstance of making the executor a party to the suit, to be no cause of delay. But as the executor might require time to inform himself of the proper defence, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him.

There is, then, nothing in the act, nor is there anything in the nature of the provision, which should induce an opinion, that any delay is to be occasioned, where the executor makes himself a party, and is ready to go to trial. Unquestionably, he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute; but if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor. If the court has unguardedly permitted a person to prosecute, who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means.

The second point in the case is the demurrer of the defendant to the plaintiff's replication. Two causes of demurrer are assigned. 1st. That it is a departure from the declaration: 2d. That the plea ought to have been traversed, and an issue tendered thereon.

On the first cause of demurrer, some difference has existed in the court, but the majority of the judges concur in the opinion, that the replication fortifies, and does not depart from the declaration. *The averment, [*208
that the assignment was for value received, is an immaterial averment. The assignee, without value, can as well maintain his action as the assignee on a valuable consideration. It is, therefore, mere surplusage, and does not require to be proved; nor does it affect the substantial part of the declaration. It is also the opinion of a part of the court, that the duty created by the trust, and which was discharged by the assignment, may be considered as constituting a valuable consideration to support the averment, and prevent the replication from being a departure from the declaration.

2d. The second case of demurrer is clearly not maintainable. The matter of the replication does not deny, but avoids the allegations of the plea, and consequently, the conclusion to the court is proper. It has, indeed, been argued, that the replication is faulty, because it does not confess the matter alleged in the plea; but this is not assigned as a cause of demurrer, and it is, therefore, not noticed by the court.

The demurrer having been overruled, several exceptions were taken at the trial to the opinion of the court. The first was to the admission of the note as evidence. This was objected to, because the declaration averred the note to be assigned for value received, and the assignment contained no expression of a valuable consideration, but was declared to be made "without recourse." As the assignment is not set forth *in hæc verba*, this exception is so clearly unmaintainable, that it will require only to be mentioned.

The 2d exception requires more consideration. It is, that although the averment that the assignment was made for value received, was immaterial, yet the plaintiff, having stated the fact in his declaration, is bound to prove

it. In support of this position, *Bristow* v. *Wright*, Doug. 665, has been quoted and relied on. The strictness with which, in England, a plaintiff is *209] bound to prove the averments of his declaration, although *they may be immaterial, seems to have relaxed from its original rigor. The reasons stated by Lord MANSFIELD, in the case reported by Douglas, for adhering to the rule, do not apply in the United States, where costs are not affected by the length of the declaration.

Examining the subject, with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument, which, by being untruly described, may, by possibility, mislead the opposite party. Where, then, the averment in the declaration is of a fact *dehors* the written contract, which fact is in itself immaterial, it is the opinion of the court, that the party making the averment, is not bound to prove it.

In this case, the averment, that the assignment was made for value received, is the averment of a fact which is perfectly immaterial, and which forms no part of the written assignment ; nor is it averred to be a part of it. It is an extrinsic fact, showing how the right of action was acquired, but which contributes nothing towards giving that right of action. The party making this useless averment ought not to be bound to prove it. No case which has been cited at bar, comes up to this. The averments of the declaration, which the plaintiff has been required to prove, are all descriptive of records, or of written contracts ; not of a fact, at the same time, extrinsic and immaterial. The court is, therefore, unanimous in the opinion, that this exception cannot be maintained.

In the progress of the trial, the counsel for the defendant in the court below, also required that court to instruct the jury, that unless the plaintiff *210] could show that the Ramsays, who were his agents, had the power *to collect some other debt from the defendant, the payments made by him, to them, should be credited on the notes given to them in trust for Codman, which instruction the court very properly refused to give.

Independent of the proof made by the plaintiff, that the sums of money received by the Ramsays from Wilson, were really on their own account, the instruction would not have been proper, as this case actually stood. There was a running account between the Ramsays and Wilson, who had large transactions with each other, and who reciprocally advanced large sums. This running account is not stated by the defendant, in the proposition for the opinion of the court. The effect it produces is to make it proper for Wilson to prove, that advances made by him to the Ramsays were not designed to satisfy their particular engagements with each other, but were intended to discharge the debt due to Codman. Terms are improperly used in the bill, which imply a fact contradicted by the testimony. The word " payment " is used instead of the word " advance," and this, at first view, may produce an obscurity, which is dissipated on investigating the record.

The judgment is to be affirmed, with costs.

Hallet & Bowne *v.* Jenks and others.

Marine insurance.—Illegal voyage.

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo, in order to make repairs, and prevented by the officers of the French government from relading her original cargo, and from taking away anything in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the non-intercourse act of 13th June 1798. And such voyage was not illegal, so as to avoid the insurance.

Hallett *v.* Jenks, 1 Caines Cas. 43; s. c. 1 Caines Rep. 64, affirmed.

This was a writ of error to the "Court for the Trial of Impeachments, and the Correction of Errors, in the state of New York," under the act of congress of the 24th September 1789, § 25 (1 U. S. Stat. 85), which gives the supreme court of the United States appellate jurisdiction upon a judgment in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the construction of any clause of a *statute of the United States, and the decision is against the right, [*211 privilege or exemption, specially set up or claimed by either party, under such statute.

The action was upon a policy of insurance, and the only question to be decided by this court was, whether the risk insured was illegal, under the act of congress (commonly called the non-intercourse law) of the 13th June 1798 (1 U. S. Stat. 565). For although another question appears to arise upon the record, viz., whether a condemnation in a foreign court, as enemy's property, be conclusive evidence of that fact, yet this court is prohibited by the same 25th section of the act of 1789, to consider any other question than that which respects the construction of the statute in dispute.

On the trial of the general issue, a special verdict was found, containing the following facts:

That on the 27th day of April 1799, the defendants, for a premium of 25 per cent., insured for the plaintiffs against all risks, $1000, upon 25,000 pounds weight of coffee, valued at 20 cents per pound, on board the sloop Nancy, from Hispaniola to St. Thomas. That in the margin of the policy was inserted a clause in the following words, "warranted the property of the plaintiffs, all Americans," but that the words "all Americans," were added, after the policy was subscribed; that the sloop Nancy was built at Rhode Island, and belonged to citizens of the United States, resident in Rhode Island, as well when she left that state, as at the time of her capture, and being chartered by the plaintiffs, sailed from Newport, in Rhode Island, on the 12th day of December, in the year 1798, on her first voyage to the Havana; that in the course of the said voyage, she was compelled, being in distress, to put into Cape François, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th day of January 1799; that the master and supercargo of the sloop were part owners of the cargo, and two of the plaintiffs in this suit; that having so put into Cape François, the cargo was landed to repair the vessel; that the public officers acting under the French government there, *took from them nearly [*212 all the provisons on board the sloop, and the master and supercargo were permitted to sell, and did sell, the remainder, to different persons there; that the master and supercargo made a contract with the public officers, by which they were to be paid for the provisions in

thirty days, but the payment was not made ; that, with the proceeds of the remaining parts of the cargo, they purchased the whole of the cargo which was on board, at the time of the capture, and also seventeen hogsheads of sugar, which they sent home to New York, on freight ; that the said officers forbade the said master and supercargo of the sloop, from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof they were compelled to sell the same, and to take the produce of that country in payment. That the sloop, with 30,000 weight of coffee on board, 25,000 pounds weight of which was intended to be insured by the present policy, sailed from Cape François, on the 23d day of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel ; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great Britain, as for being the property of American citizens, trading contrary to the laws of the United States ; that, at the time of the capture of the sloop, besides the documents aforesaid, the following paper was found on board :

"Liberty—Safe Conduct—Equality.

"At the Cape, 11th Termidor, sixth year of the French Republic, one and indivisible. The general of division and private agent of the executive directory at St. Domingo, requests the officers of the French navy and privateers of the republic, to let pass freely the American vessel called the ———, ——— master, property of Mr. E. Born Jenks, merchants at Providence, state of Rhode Island, in the United States, arrived from the said place to the Cape François, for trade and business. The citizen French consul, in the place where the said vessel shall be fitted out, is invited to
*213] fill with her name, and the captain's, *the blank left on these presents ; in attestation of which, he will please to set his hand hereupon.

(Signed) J. Hedouville.
Gauthier,
the general secretary of the agency."

Which paper was received on board the sloop, at Cape François, and was on board when she left that place ; that the property insured by the policy aforesaid was claimed by the said Zebedee Hunt, and was condemned by a sentence of the said court of vice-admiralty, in the following words : "that the said sloop Nancy, and cargo on board, claimed by the said Zebedee Hunt, as by the proceedings will show to be enemy's property, and as such, or otherwise, liable to confiscation, and condemned the same as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

That part of the act of congress, which the underwriters contended had been violated by the defendants in error, is as follows :

§ 1. "That no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the first day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government

of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction, or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue," &c.

*The 2d section enacts, that after the first of July 1798, no clearance for a foreign voyage shall be granted to any ship or vessel owned, [*214
hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, in a sum equal to the value of the vessel and cargo, "with condition, that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not, be employed, during her intended voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof." June 13th, 1798. (1 U. S. Stat. 565.)

Mason, for the plaintiffs in error.—If the insurance was upon an illegal transaction, the defendants in error have no right to recover. The only question for the consideration of this court is, whether it be a transaction prohibited by the act of congress. If the purchase of this cargo in Cape Francois was lawful, the policy is good.

The first section of the act has two branches, and contemplates two separate offences: 1st. That no vessel shall be allowed to go to a French port. But this prohibition must be subject to the general principle, that the act of God, or of the public enemy, shall be an excuse. 2d. That if driven into such port by distress, or involuntarily carried in, yet, there shall be no trade or traffic. The words are, "if any vessel shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid." The going in must be voluntary, but the legislature carefully omit the word voluntarily, when speaking of the offence of trading for all trading must be voluntary; it cannot *be by compulsion. The [*215
object was to prevent intercourse, and the statute only makes the same saving of the forfeiture which a court would have made without such a saving clause.

The condition of the bond mentioned in the 2d section confirms this construction of the 1st. It is divided into two clauses, agreeable to the two offences to be provided against. The proviso "unless by distress of weather," &c., is annexed only to the offence of going into the port, but there is no saving or exception as to the offence of trading. If she had not been driven in by distress of weather, she would have been liable to forfeiture, under the first offence. But having been employed in traffic with persons resident, &c., she is equally liable to forfeiture, under the second, and the condition of the bond has been substantially broken.

The special verdict states, "that the master and supercargo were per-

mitted to sell, and did sell, the residue of the cargo, to different persons there." Here was no compulsion. This selling was a violation of the law; but it is not that which avoids this policy. The fault was, that with the proceeds of those sales, the plaintiffs below purchased the cargo insured. There was no compulsion to do this, except what I shall presently notice, as stated in the verdict. It will probably be contended, that the following words of the verdict show a compulsion, viz., "that the said officers forbade the said master and supercargo from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof, they were compelled the sell the same, and to take the produce of that country in payment." But this is only the reasoning of the jury, and the words, by reason whereof, show what kind of compulsion it was, and that it was not that inevitable necessity which can excuse the express violation of the law. The owners ought to have said to them, if you forbid us to take away our property, we must leave it, and look to our government for an indemnification; for they have forbidden us to sell it to you, or to purchase a new cargo. The forbidding them to relade their goods, and *216] to take *away specie, was no compulsion to purchase produce. The verdict does not state that the master or supercargo attempted to resist the force; it may be wholly a colorable transaction.

The act of the 27th February 1800 (2 U. S. Stat. 7), shows what the construction of that of 1798 ought to be. The 3d section of the former provides, that in case the vessel shall be compelled, by distress or superior force, to go into a French port, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, the master may receive payment in bills of exchange, money or bullion, and not otherwise, "and shall not thereby be understood to contravene this law." This is a clear implication, that if there had not been such an express permission to receive payment in bills of exchange, money or bullion, it would have been a contravention of the law; and that law, excepting this provision, is substantially the same as the law of 1798.

Harper, contrà.—I might safely agree to the first position taken by the opposite counsel, that the 1st section of the act of 1798 creates two distinct offences. But this is not so. The whole constitutes but one offence. How is a ship to be employed in traffic? She must bring and carry. If she did not go voluntarily, she was not employed in trafficking. If the master sell the cargo, under such circumstances, the vessel is not employed in traffic. But if the act creates two separate offences, how is the vessel employed in the traffic? She did not carry the cargo there voluntarily. But it being there, and landed, necessarily landed, how is the vessel concerned in the sales and purchases made by the master? The necessity of repairing the vessel is as much an excuse for landing the cargo, as stress of weather was for going in. The master was forbidden to relade it. But a difference is taken between prohibition and prevention. It is said, that the forbidding is not preventing. But by whom was the prohibition? By the officers of the Government, having authority and power to carry the prohibition into effect. It was, therefore, actual prevention.

*What was the mischief intended to be remedied by the act of *217] congress? Not such a sale as this. It was to prevent a voluntary

intercourse, not to prevent citizens of the United States from rescuing their property from impending loss. What is traffic? A contract by consent of both parties. If one is under compulsion, it is no contract, no traffic. The transaction disclosed by the verdict, is only the means of saving property from a total loss. The owners were not obliged to abandon, as the gentleman contends, property thus put in jeopardy. The master and supercargo were not free agents. They were not obliged to take bills, which they knew would not be paid. If I could have had a doubt upon this case, it would have been removed by the decisions of the circuit courts of the United States. In a case before one of your Honors,(*a*) in Baltimore, a vessel had brought home from the French West Indies, a cargo of the produce of those islands, after having been compelled to go in and sell her outward cargo; and it was decided, that the case was not within this act of congress. A similar case is understood to have been decided by another of your Honors,(*b*) in New York. If those cases were not within the law, I am warranted in saying, this is not.

Those decisions produced the 3d section of the act of 1800, which the gentleman has cited, and which was introduced, to shut the door that had been left open. It was perceived, that the law, as it stood before, would give an opportunity of fraud. The 3d section was enacted to take away the temptation; because, although there might be cases, clear of fraud, it was thought best to sacrifice these particular cases, that fraud might be prevented in others. This section, therefore, has given a sanction to the decisions of the circuit courts.

Key, in reply.—It is clear, that there are two distinct prohibitions in the act. The two parts of the section are connected by the disjunctive "or," and not by the copulative "and." This is rendered still more evident, by the form of the condition of the bond described in the second section.

*Whenever you rely on the necessity of the case, to justify your acts, you must not go beyond the necessity. All beyond is voluntary. In this case, it might go to the landing, and to the seizure of part, but not to the sale of the residue. The probability of loss is not necessity. If they took produce, it was only to avoid a greater loss. It was not an inevitable necessity. Another fact shows that it was trading; not merely taking on board, to bring home, property which they were compelled to receive. She was not coming home with the property, when she was captured, but going on a trading voyage. And the French pass states that she came to Cape Francois for trade and business. The intention of the act was to prevent all trading and intercourse with France or her dependencies. [*218

In the case at Baltimore, before his Honor Judge WASHINGTON, the vessel returned directly home to Baltimore, with produce, which she had been compelled to take or abandon.

Mason, on the same side.—It is said, there must be a pre-existing intention to go to a French port. If the sloop had arrived safe at the Havana, and been there sold to an agent of the French government, it is clear, she

(*a*) Judge WASHINGTON.

(*b*) Judge PATERSON, in September 1799, in the case of Richardson and others, cited in 1 Caines' Rep. p. 63.

would have been liable to forfeiture. So, if the French agent, who signed the passport, had freighted the vessel. These cases show that a pre-existing intention is not necessary. The construction contended for would, indeed, open a wide door to fraud, as the gentleman has contended. It would only be necessary to start a plank, in sight of the port, and then go in to stop the leak, and the whole law is evaded.

March 6th, 1805. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The court is of opinion, according to the best consideration they have been able to give the subject, that this *case is *219] not within the act of congress of 1798, usually called the non-intercourse law.

It is contended by the counsel for the defendant, that the circumstances stated in the special verdict, do not show an absolute necessity for the trading therein described. And it is said, the plaintiff might have abandoned the property, and sought redress of his government; and that it was his duty to do so, rather than violate the laws of his country. But the court is of opinion, that the act of congress did not impose such terms upon a person who was forced by stress of weather to enter a French port, and land his cargo, and was prevented by the public officers of that port to relade and carry it away. Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of opinion, that it would not have been deemed such a traffic with the enemy, as would vitiate the policy upon such new cargo. The terms of the act of congress seem to imply an intentional offence on the part of the owners.

The case put, of a French agent going to the Havana, and there purchasing the cargo for the use of the French government, under a preconcert with the owners, would certainly be an offence against the law; but when there is no such intention; when the vessel has been absolutely forced, by stress of weather, to go into a French port, and land her cargo; when part has been seized for the use of the government of France, and the master has been forbidden by the public officers of the port to relade the residue, and to sell it for any thing valuable, except the produce of the country; the mere taking away such produce, cannot be deemed such a traffic as is contemplated by the act of congress.

Judgment affirmed, with costs.(*a*)

(*a*) See the opinion of the supreme court of New-York, in this case, in 1 Caines' Rep. 64, and that of the High Court for the Trial of Impeachments and Correction of Errors, in the State of New York, delivered by LANSING, Chancellor, in 1 Caines' Cases in Error, p. 43.

*Milligan, Administrator of Milligan, *v.* Milledge and Wife. (*a*)

Equity pleading.— Want of parties.

A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.[1]

The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.

The want of proper parties is not sufficient ground for dismissing the bill.

Error to the Circuit Court for the district of Georgia, in chancery sitting.

The object of the bill was to recover from the defendants, as legatees and devisees of George Galphin, deceased, a debt due by him to the complainant's intestate, as surviving partner of Clark & Milligan.

The bill charged, that Clark & Milligan were merchants in London; that Milligan survived Clark, and that the complainant was the administrator of Milligan, the survivor; that in the year 1770, they supplied George Galphin with goods; that in 1773, George Galphin requested them, by letter, to supply goods to his three sons, Thomas, George and John, his nephew, David Holmes, and John Parkinson, under the firm of Galphin & Holmes; that on the credit of G. Galphin, the elder, they shipped goods, &c., to the said company. That in 1776, G. Galphin, the elder, wrote to Clark & Milligan to furnish goods to the said company, at their store in Pensacola, and that he would see them paid; that relying on the said engagement, they shipped further goods to the said company, at Pensacola, and on the 31st of December 1780, G. Galphin, the elder, owed—

	sterling.
For himself,	£1120 1 2
For Galphin, Holmes & Co.	1206 5 3
And Jan. 1st, 1784, for the Pensacola firm,	3959 15 9

all of which was due and unpaid. *That G. Galphin, the elder, died testate in 1781 or 1782, and duly appointed James Parsons, John Graham, Laughlin McGillvray, John Parkinson, William Dunbar, and his sons, John, George and Thomas Galphin, his executors; and left real and personal estate sufficient to pay all his just debts. [*221

That all the executors declined the trust, excepting the three sons; that the copartnership of Galphin, Holmes & Co. was dissolved on the —— day of ——, without any funds for the payment of their debts; that John and George Galphin, two of the executors, never meddled with the deceased's estate, having been long insolvent, were not within reach of the process of this court, were unknown to the complainant, and gone to places out of his knowledge. That William Dunbar was dead, leaving no assets of the deceased's estate. That David Holmes was dead, and left no property, to the knowledge of the complainant. That Thomas Galphin and John Parkinson

(*a*) Present, Marshall, Ch. J., Cushing, Paterson and Washington, Justices. This cause was called for argument on the 2d of March, but the counsel not having prepared statements of the points for the court, agreeable to the rule, the court refused then to hear it.

[1] It is the office of a plea, to set up new matter in evidence; a mere denial of the facts stated in the bill, must be by answer. Bailey *v.* Le Roy, 2 Edw. Ch. 514. And see Sims *v.* Lyle, 4 W. C. C. 301; Piatt *v.* Oliver, 1 McLean 295.

were out of the jurisdiction of the court, and not possessed of any property, to the knowledge of the complainant.

That John Milledge, and Martha, his wife, who was daughter of G. Galphin, the elder, and a principal legatee and devisee under his will, had received, and were possessed of, lands, negroes and assets of the estate of her father, which came to them by descent, devise or distribution, and liable to the claim of the complainant. That Thomas, who resided in South Carolina, held no property of the deceased, in South Carolina; that the assets in that state had all been exhausted in satisfying prior judgments, or otherwise. That all the assets were in Georgia, in the hands of Milledge and wife, who must be considered as the agents and trustees of the executor, Thomas Galphin, or of the creditors, and liable to account for the same.

*222] *Milledge and wife, the only persons made defendants in the bill, pleaded in bar, as follows:

"The plea of Martha Milledge, one of the defendants to the bill of complaint of William Milligan. The end of the complainant's bill is to render liable to the payment and satisfaction of an unliquidated demand on an open account, said to be due by the estate of George Galphin, in his own right, and as security and guaranty for Galphin, Holmes & Co., certain property, real and personal, which is charged by the complainant to have come into the hands and possession of this defendant, as one of the devisees and legatees of the said George Galphin, deceased. This defendant, by protestation, not confessing all or any of the matters contained in the said bill to be true, in such manner and form as the same is therein set forth and alleged, doth plead in bar of the same, and for plea saith, that the complainant states that David Holmes, late copartner in the house of Galphin, Holmes & Co., and David Holmes & Co., is dead, and left no property or legal representatives, at his decease, within the state of Georgia; that neither John Parkinson nor William Dunbar have ever qualified on the will of George Galphin, and have never come into the possession of any of the estate of the said George Galphin, or if they have, that it is disposed of and exhausted: that Thomas Galphin holds no property or estate of the said George Galphin, and that the assets of the said estate in the state of South Carolina, have all been exhausted in satisfying prior judgments, or otherwise.

"But this defendant avers, that the said David Holmes died possessed of considerable estate, real and personal, part of which, if not all, must be in possession of his legal representatives; that William Dunbar qualified on the will of the said George Galphin, and died, leaving in the possession of his executors, administrators or legal representatives, considerable estate, real

*223] and personal, which he got, either by being *one of the qualified and acting executors on the said will, or by his intermarriage with Judith Galphin, one of the devisees and legatees under the will of the said George.

"And this defendant further avers, that Thomas Galphin and John Parkinson, charged and stated to be two of the surviving copartners of Galphin, Holmes & Co., and David Holmes & Co., of which, this defendant knoweth not, and said Thomas Galpin, being now the only acting and qualified executor of the last will and testament of the said George Galphin, are, and this defendant is ready to show, that they must be, in possession of considerable real and personal estate, derived from the estate of the said George Galphin, deceased; that they are the proper persons liable and interested to contest,

and who can with safety contest, the complainant's demands, if any he has, and the relief prayed in the said bill.

"And this defendant doth further aver, that the debt or demand of the complainant, if any doth exist, originated in the state of South Carolina; that all material necessary and indispensable and requisite parties, to wit the said Thomas Galphin and John Parkinson, and the executors, administrators or legal representatives of William Dunbar, live, and notoriously and openly reside, in the state of South Carolina, and in possession of estates, real and personal, sufficient to pay the complainant's demand, if any he has, and which estates and property are more particularly liable to the said demand, if any he has; and that the said parties are also amenable and compellable to appear to any suit or bill brought against them by the said complainant, for his said demand, if any he has, in the state aforesaid. All of which facts were in the knowledge of the complainant, and to him well known, before the filing of his said bill; for that the complainant also lives and resides in the state of South Carolina; that this defendant is an entire stranger to, and ignorant of the merits and justice of the claim set up by the complainant, not being named as executrix in the will of the said George Galphin, or ever having intermeddled with the concerns of the said estate, or any ways *interested in the copartnership aforesaid. All which matters this defendant doth aver and plead, in bar of the complainant's said bill, and of his pretended demands, for which he seeks to be relieved by his said bill. And this defendant prays to be hence dismissed, with her reasonable costs, in this behalf most wrongfully sustained." This plea was sworn to, before a justice of peace. The plea of John Milledge was the same, in substance, as that of his wife. [*224

There was also a joint and several answer of Milledge and wife, which stated no other facts than the following, viz: "That there never did exist any secret or special trust, promise, covenant or understanding between these defendants and the executors of George Galphin, the elder, deceased, as charged in the bill of complaint, nor did these defendants, or either of them, ever give any bond of indemnity, or other security whatever, to be accountable to Thomas Galphin, or John Parkinson, or any or either of the executors of the said George, for any property, real or personal, which might have come into the possession, or held by either of these defendants. That there does not now exist any secret or special trust, promise, covenant or understanding between these defendants and the executors aforesaid. And these defendants do, jointly and severally, deny all manner of unlawful combination," &c., "without that, that any other matter or thing in the said bill of complaint contained material or necessary for these defendants to answer unto, not herein answered unto. All which matters and things these defendants are ready to aver and maintain," &c.

At May term 1803, of the circuit court, holden by his Honor Judge Moore, the only entries on the transcript of the record which came up, are as follows: "Bill and amended bill." "Plea and answers." "On argument, the plea sustained." There was no entry of a demurrer, or motion, or of any other proceeding, except the continuances, after filing the pleas and answers, until the May term 1804.

*At May term 1804, of the circuit court, holden by his Honor Judge Johnson, the following decree was made: "This cause came on to be [*225

heard, this 14th day of May, in the year of our Lord 1804, upon the bill and exhibits, and the pleas and answers of the defendants; whereupon, it appearing, that in the term of May 1803, before the Honorable Alfred Moore, one of the judges of the said court, the cause was heard upon the bill and the pleas, and that, after argument, it was adjudged by the court, at the term of May 1803, that the said plea be sustained; and it appears that the complain ant hath not replied to the said plea. It is, therefore, ordered and decreed that the bill of complaint be dismissed, in pursuance and conformity of the decision of the court at the said term, upon the said plea, the same appearing to the court to be conclusive on the merits of the complainant's bill. Dated at Savannah, the day and year before written.

William Johnson, jun."

The complainant sued out his writ of error, and assigned for error:

1st. That by the said decree it is adjudged and decreed, that the plea in bar aforesaid, and the matters therein contained, are sufficient to debar the complainant from the discovery and relief sought after by his said bill of complaint, and are conclusive on the merits thereof, and that, therefore, the said plea should be sustained as a valid and sufficient answer to the bill of the complainant. Whereas, the said plea is altogether irrelevant and insufficient, and contains no matter which, in law or equity, ought to bar the discovery and relief sought after by the bill aforesaid.

2d. That by the said decree, it is adjudged, that the bill be dismissed, whereas, by the law of the land, and the rules of equity, a decree ought to have been made in favor of the complainant, for want of a sufficient *answer upon the merits of the said bill, as to the relief prayed thereby.

*226]

Key, for plaintiff in error, contended, that the pleas in bar were insufficient and informal, and contained matter not proper for a plea. The defence proper for a plea must be such as reduces the cause to a particular point and from thence creates a bar to the suit; and is to save the parties expense in examination. It is not every good defence in equity, that is likewise good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea; the examination must still be at large; and the effect of allowing such a plea will be, that the court will give their judgment on the circumstances of the case, before they are made out by proof. *Chapman* v. *Turner*, 1 Atk. 34. A plea cannot be a mere denial of facts charged in the bill; for such matter is only proper for an answer. But such a plea may be permitted to stand for an answer, with leave to except to its insufficiency. 1 Brown's Ch. Ca. 408, 409, 410.

The plea in this case sets forth five several distinct and independent matters, each of which is a denial of some allegation in the bill, and is, therefore, not proper for a plea, but for an answer. Nor do they go to make up one defence. The most that can be said of the plea is, that it shows that there are other persons who ought to be made parties in the cause. Considered in this view, it may be supposed, perhaps, as requiring that Thomas Galphin, J. Parkinson, the representatives of David Holmes, and those of W. Dunbar, should have been made parties.

There can be no ground for requiring the representatives of Holmes to be made parties, because we seek relief only against the estate of G. Galphin,

the elder, and not against that of Holmes. As to the representatives of Dunbar, even if it be true, that he qualified *as executor, yet we are [*227 not bound to proceed against them, as there is an executor surviving. We ask no relief against Parkinson, and therefore, we need not make him a party. And as to Thomas Galphin, he is expressly alleged in the bill, and admitted in the plea, to be out of the jurisdiction of the court, and therefore, we were not bound to make him a party. This is expressly laid down by Mitford, in his Treatise of Pleading, p. 93, who says, "if a want of proper parties is not apparent on the bill, a defendant may plead it; and a plea of this nature goes both to the discovery and the relief. But where a sufficient reason is suggested by the bill, for not making the necessary party; as, where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court; or where a necessary party is resident abroad, out of the jurisdiction of the court, and the bill charges that fact; or where the bill seeks a discovery of the necessary parties, a plea for want of parties will not be allowed. A plea for want of parties to a bill, for a discovery merely, will not hold; for the plaintiff in that case seeks no decree." *Cowslad* v. *Cely*, Prec. Ch. 83; *Darwent* v. *Walton*, 2 Atk. 510.

So far as our bill seeks for relief, we could recover at law against the defendants, as executors in their own wrong. It is true, that in equity, an executor *de son tort* is not known, but whenever a person would, at law, be executor *de son tort*, he will, in equity, be considered as a trustee for the creditors.

Real estate is in Georgia considered as assets. (See the case of *Telfair* v. *Stead's Executors*, in this court, at this term, 2 Cr. 407.) The bill charges that the defendants have assets. All the facts charged in the bill, and not denied in the plea or answer, are to be considered as admitted. The bill also charges, that there are no assets in South Carolina. We were, therefore, obliged to go against the assets in Georgia.

*It is no bar to say, that there is an executor in South Carolina, [*228 who has no assets; and it was not necessary that we should make such an executor a party.

Marshall, Ch. J.—The only question is, whether it is not necessary that you should bring a suit against the executor in South Carolina, to establish the debt? because, as to that, he is the proper person to defend. After having obtained such a judgment, the complainant would be at liberty to follow the estate, in the hands of the defendants, in Georgia. It is not necessary to consider them as executors in their own wrong; for you may proceed against devisees or legatees, if the executor has no assets.

Key.—If the bill is against the heir, it is not necessary to make the executor a party.

Marshall, Ch. J.—But that is, where the heir is the proper person to defend.

Key.—It is not necessary to make the executor a party, when we can have no relief against him. 2 Eq. Cas. Abr. 167. But if he ought to be a party, yet it is no cause for dismissing the bill.

MARSHALL, Ch. J.—No doubt of that. The bill might have stood over to make new parties.

March 6th, 1805. MARSHALL, Ch. J.—The court is of opinion, that the court below erred in admitting the pleas, and dismissing the bill.

Judgment reversed.(*a*)

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*229] *COOKE *v.* GRAHAM'S Administrator. (*b*)

Variance.—Condition of bond.

A variance in date between a bond declared upon, and that produced on *oyer*, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.[1]

The court may depart from the letter of the condition of a bond, to carry into effect the intention of the parties.

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria.

The declaration was in debt, on a bond, dated the 3d of October 1799, in the penalty of $5000. On *oyer*, the bond appeared to be dated the 3d of January 1799, and the condition was as follows: "Whereas, the said Stephen Cooke did lend to Josiah Watson, of the town of Alexandria, $2500 of the said William Graham's money; and the said Josiah Watson having failed, but before he failed, paid $500; and whereas, the said Stephen Cooke hath instituted a suit against the said Josiah Watson, for the recovery of the said money: Now, the condition of the above obligation is such, that if the said Stephen Cooke shall well and truly pay the whole sum so lent, if it can be recovered from the said Josiah Watson, or his indorser; or in case it cannot be wholly recovered, will lose the one-half of that sum which cannot be recovered, then the above obligation shall be void, otherwise, to remain in full force and virtue."

After *oyer* granted, the defendant had leave to imparl, but not pleading at the rule-day, judgment was rendered at the rules, for want of a plea. At the next term, the defendant set aside the office judgment, by demurring generally to the declaration, which demurrer was joined by the plaintiff. Afterwards, on motion, the defendant had leave to withdraw his demurrer, and pleaded general performance of the condition of the bond. To which the plaintiff replied, and assigned a breach in this, that the defendant had
*230] not paid the sum of money mentioned in the condition, *or any part thereof. The defendant rejoined, that the sum of money in the condition mentioned, lent by him to Watson, could not be recovered from the latter, or his indorser.

(*a*) The decree of reversal was as follows: This cause coming on to be heard and considered, and counsel on the part of the appellant being heard, and the bill, pleas, and answers being read and considered, it is adjudged, ordered and decreed, that the decree of the circuit court be reversed, with costs of this appeal; that the pleas of the defendants be overruled, and that they be ordered and decreed to answer the bill exhibited against them.

(*b*) Present, MARSHALL, Ch. J., CUSHING, PATERSON and WASHINGTON, Justices.

[1] Dixon *v.* United States, 1 Brock. 177; Clark *v.* Phillips, 1 Hempst. 294. See Wilson *v.* Irwin, 14 S. & R. 176.

To this rejoinder, the plaintiff demurred specially: 1st. Because the defendant doth not state, in his rejoinder, that he used all legal means for the recovery of the said $2500 of Watson, and his indorser. 2d. Because the defendant does not state that he has not recovered any part of the said $2500 of the said Watson, or his indorser, or how much of the $2500 remains unrecovered of the said Watson, or his indorser. 3d. Because the defendant is bound to pay one-half of the sum that is not recovered of the said Watson, or his indorser; and if the defendant has not received any part of the $2500 of the said Watson, or his indorser, then he is bound, by the condition of the said bond, to pay one-half of the sum of $2500 to the plaintiff. 4th. Because the defendant does not give any answer as to the sum of $500, stated in the condition of the said bond to have been received by him of the said Watson, before the execution of the said bond. 5th. Because the rejoinder is a departure from the plea of conditions performed.

Upon this demurrer, the judgment of the court being in favor of the plaintiff, the defendant, upon motion, had leave to file an additional plea, whereupon, he pleaded, that the whole sum lent to Watson could not be recovered of him or his indorser, nor could any part thereof be recovered, except the sum of $500 mentioned in the condition of the bond; by means whereof, the defendant became liable and bound to pay to the plaintiff only one-half of the said sum which could not be so recovered, and that the defendant paid to the plaintiff's intestate the said one-half of the said sum of money which he was liable and bound to pay as aforesaid. To which plea, there was a general replication and issue, and verdict for the plaintiff for $2032.75.

*On the trial of this issue, a bill of exceptions was taken by the defendant below, to the opinion of the court, that the plaintiff was [*231 entitled, by the said bond, to recover of the defendant the sum of $500 at all events; and that he was also thereby entitled to recover of the defendant the residue of the said $2500, if the jury should be of opinion, that the defendant could have recovered the same of the said Watson, or his indorser. And if they should be of opinion, that no part of the said residue could have been so recovered, then the plaintiff is thereby entitled to recover of the defendant one-half of the said residue, in addition to the said sum of $500. Other exceptions were taken at the trial, but were abandoned by the plaintiff in error in this court.

Simms, for the plaintiff in error, contended, 1st. That the judgment of the court below, upon the demurrer, ought to have been for the defendant, inasmuch as there was a material variance between the bond produced on *oyer*, and that stated in the declaration; the former bearing date on the 3d day of January 1799, and the latter being alleged to bear date on the 3d day of October, in the same year. 2d. That the court erred in their construction of the condition of the bond, in supposing that the sum of $500, mentioned to have been received from Watson, was covered by the penalty, and in instructing the jury, that the plaintiff was entitled to recover that sum, at all events; and in addition thereto, a moiety of the balance, if the whole balance could not be recovered by the defendant of Watson, or his indorser.

1st. On a demurrer, the court must go to the first error in the plead-

ings: in this case, although the rejoinder is bad, yet the declaration is bad also. If the plaintiff declares on a bond of different date from that produced on *oyer*, advantage may be taken of the variance on demurrer. The plaintiff need not wait until it is produced in evidence. The variance may also be pleaded in abatement. *Holman* v. *Borough*, 2 Salk. 658. In the *232] case of *Hole* v. *Finch*, 2 Wils. 394, the court said, "that formerly, *when the whole original writ was spread in the same roll with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage thereof, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer." But afterwards, it was determined, that if the defendant will take advantage of a variance between the writ and count, he must demand *oyer* of the writ, and show it to the court.[1] By the act of *jeofails* of Virginia (Rev. Code, p. 118, § 26), no judgment, after verdict, shall be stayed for the omission of the day, month or year, in the declaration or pleading (the name, sum, quantity or time being right in any part of the record or proceeding). This shows, that before that act, such omission might have been taken advantage of, by motion in arrest of judgment.

WASHINGTON, J.—Will the principle of going up to the first error, apply to a special demurrer by the adverse party?

Simms.—Certainly.

MARSHALL, Ch. J.—Can the variance be taken advantage of, on a general demurrer?

Simms.—Yes: it is matter of substance.

2d. As to the construction of the bond. By the opinion of the court, the plaintiff was entitled by the bond, to recover the $500 at all events. The $500 are only mentioned in the preamble of the condition, which, like that of a statute, has no obligatory effect. It is no part of the condition of the bond, that the defendant should pay that sum. It might have been paid over before, or the intestate may have been satisfied with relying on the defendant's simple acknowledgment that he had received it. The condition is in the alternative, and only one of two things is to be done. 1st. Either to pay over the whole $2500, if he could recover it from Watson, or his indorser; or 2d. If he could not recover the whole sum, to pay over one-half *233] of such sum as he could not recover. There is no obligation, *under the bond, to pay over what he had already received. Perhaps, the plaintiff may bring an action for money had and received for the $500. But it is not material, how he is to recover it. It is sufficient, in the present case, that its payment is no part of the condition of this bond.

The sum which could not be recovered is capable of being ascertained; and it is now ascertained to be $2000. One-half of that, is the sum which the defendant agreed to lose. It is, therefore, the same as if the condition of the bond had been to pay the sum of $1000.

But if no part of the money lent could be recovered of Watson, or his indorser, then the defendant could not be bound to pay more than the one-

[1] A variance between the writ and declaration cannot be reached by a demurrer. Wilkinson *v.* Pomeroy, 10 Bl. C. C. 524.

half of the whole sum, which is only $1250. In no case is he bound, by the bond, to pay more than that sum ; and yet the jury have given the plaintiff $1500, with interest thereon, from the date of the bond.

E. J. Lee, contrà, admitted the general rule, that upon a demurrer, the court is to look for the first error, and give judgment accordingly ; but that, in this case, the state of the pleadings makes a difference. The declaration was filed in due time, and a *profert* made. A judgment was obtained against the defendant, in the office, for want of a plea. This judgment was set aside by the defendant's appearance and entering a general demurrer, which was afterwards withdrawn, and a general performance of the condition of the bond pleaded. By this plea, after *oyer*, he had admitted, that the bond declared on is the same as that produced on *oyer*. And having thus admitted it to be the same bond, the omission of its true date, in one part of the declaration, can only be matter of form. He has not pleaded it in abatement, nor demurred specially. On the plaintiff's special demurrer, the defendant cannot take advantage of a formal variance ; he can only avail himself of it, by demurring specially himself. Everything is form, without which a right of action appears to the court. Everything which the court may amend, without altering matter of substance, is aided by a general demurrer. Sav. 88. So, everything which may be amended *under the statute, or which would be cured by a verdict, is cured by a general demurrer. [*234

2d. As to the second point, there can be no doubt. The condition of the bond is, that the defendant shall pay the whole sum so lent, viz., $2500, if it could be recovered by the defendant from Watson. But at the time the bond was executed, the defendant could recover only $2000 of Watson, in any event, because Watson had already paid $500. In this case, the $500 is covered by the penalty.

But it is said, that these $500 were not to be paid over, unless the defendant recovered the whole sum from Watson ; or in other words, that the $500 were a premium to the defendant for losing $2000 of the plaintiff's money. But the whole was to be paid over, when recovered ; the whole includes all its parts ; hence, every part was to be paid over, when recovered.

Simms, in reply.—1st. When a man demurs, he puts everything to hazard in his own pleadings ; and his adversary may take the same advantage, as if he himself had demurred.

Marshall, Ch. J.—As if he had demurred generally?

Simms.—There is a difference between what a court would amend, and what can be amended under the statute.

2d. As to the condition of the bond. No man can be compelled, by his bond, to pay more than he expressly agreed to pay. The defendant has only bound himself to pay the whole, in case the whole could be recovered. It does not appear that the $500 were not paid or settled in some other way.

*March 6th, 1805. Marshall, Ch. J., delivered the opinion of the court to the following effect :— [*235

The plaintiff declares upon a bond, dated the 3d of October ; and upon

oyer, the bond appears to bear date the 3d of January preceding. By the *oyer*, the bond is made a part of the declaration. There were several pleadings, and among the rest, a bad declaration, a bad rejoinder, and a special demurrer by the plaintiff to this bad rejoinder. When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon a general demurrer.[1] The variance between the date of the bond declared upon, and that produced on *oyer*, is fatal.

Upon the second point, the court is of opinion, that there is no error in the construction given by the court below to the condition of the bond. There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties. But for the first error, the judgment must be reversed, and judgment entered for the plaintiff in error on the demurrer.

Judgment reversed, with costs.

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[1] On a demurrer, judgment will be rendered against him who commits the first fault in the pleadings; yet the fault in the prior pleadings must be one that is fatal on general demurrer, and not cured by a verdict. Jackson *v.* Rundlett, 1 W. & M. 381; Aurora City *v.* West, 7 Wall. 94; Railroad Co. *v.* Harris, 12 Id. 65. And see United States *v.* Gurney, 4 Cr. 341; United States *v.* Arthur, 5 Id. 257; United States *v.* Linn, 1 How. 104; Townsend *v.* Jemison, 7 Id. 706.

*FEBRUARY TERM, 1806.

General Rule.

All causes, the records in which shall be delivered to the clerk, on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered, after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be a *supersedeas* to a judgment rendered in any circuit court of the United States (except that for the district of Columbia), at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error, to lodge a copy of the record with the clerk of this court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial, in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the district of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or *so soon thereafter as the record shall be filed with the clerk, and the [*240 cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them, when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

*Dobynes and Morton *v.* United States.

Summary judgment.

To support a judgment on a collector's bond, at the return-term, it must appear by the record, that the writ was executed fourteen days before the return-day.

This writ of error came up at last term from the District Court of the United States for the Kentucky district, which, by law, has the jurisdiction of a circuit court of the United States.

The suit was originally brought by the United States against Lewis Moore, as principal, and Dobynes and Morton, as sureties, in a bond given by Moore, as a collector of the revenue. The writ of *capias ad respondendum* was issued on the 12th of February 1803, returnable to the 2d Monday of March following; and judgment was recovered by default, at the return-term, on motion.

The error insisted upon was, that it did not appear by the record that the writ had been "executed fourteen days before the return-day thereof," according to the 14th section of the act of congress of July 11th, 1798. (1 U. S. Stat. 594.)

The record contained a copy of the bail-bond given by Morton, dated the 11th of March 1803; and a receipt from the jailer, for the body of Dobynes, dated the 12th of March 1803. The 2d Monday of March could not have been later than the 14th of the month.

*242] *Mason*, for the United States, suggested diminution in this, that the writ was served on Dobynes and Morton, on the 20th of February, as appeared by the record of the district court; and obtained a *certiorari*. But now, at this term, the return of the *certioriari* not showing anything more than what appeared on the first transcript—

Breckenridge, Attorney-General, admitted, that the judgment could not be supported, as there was nothing in the record by which the return of the marshal could be amended, so as to show that the writ had been executed fourteen days before the return-day.

C. Lee, for the plaintiffs in error.

Judgment reversed.

Hannay *v.* Eve.

Illegal contract.

The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war.

The duty of a master of a vessel to his owners, will not oblige him to violate the good faith even of an enemy, in order to preserve his ship, nor to employ fraud, in order to effect that object.

This was a writ of error to the Circuit Court of the United States for the district of Georgia, sitting in chancery, to reverse a decree, which dismissed the complainant's bill, on a demurrer.

The complainant, as assignee of Cruden & Company, alleged in his bill, that on the 24th of December 1782, during the war between the United States and Great Britain, the British armed ship Dawes, owned by Cruden

& Company, who were British subjects, and commanded by Oswell Eve, the defendant, sailed with a cargo, the property of Cruden & Company, from Kingston, in Jamaica, for New York, then in possession of the British troops. That on her passage, the ship met with much tempestuous weather, by which she was rendered incapable of reaching her port of destination; in consequence of which, the defendant, after *consultation with the crew and passengers, came to the determination, to sail for the nearest port in [*243 the United States, thereby to save the lives of the crew and passengers, which were in imminent danger, and also to save as much as possible to the owners. That the vessel and cargo were liable to be captured by the cruisers of the United States, or if she went into any port of the United States, without being captured, she would become a *droit* of admiralty to the United States, or some of them. That the defendant stated to the crew and passengers, that as congress, by their resolve of the 9th of December 1781, had enacted and declared, "That all ships and vessels, with their cargoes, which should be seized by the respective crews thereof, should be deemed and adjudged as lawful prize to the captors," as the vessel was incapable of reaching New York, and as she would be totally lost to the owners, to himself, and the crew, if captured by the cruisers of the United States, the best mode would be, to seize and capture the vessel and cargo, make the passengers, who were military men of high rank and distinction, prisoners of war, and sail for the nearest port, and there obtain a condemnation of the vessel and cargo, for the benefit and compensation of the crew, who would lose their wages, if she was regularly captured, and that the residue should remain in the defendant's hands, as agent and trustee, and for the sole use and benefit, of the owners. That this plan was agreed to and executed; and an agreement, signed by the defendant and the crew, ascertaining what share each man was to be allowed, and which was to be the basis of the judge's decree, as to the distribution of the prize money. That the crew consented to the defendant's having a larger share than they would, if he had not declared his intention to act in the whole as the agent and trustee, and for the benefit, of the owners. That the vessel was accordingly carried into a port in North Carolina, libelled, condemned and distribution made, according to the proportion fixed by the agreement. That the defendant afterwards purchased a number of the shares of the seamen, for the benefit of his owners; that he also purchased part of the cargo, at the marshal's sales, and shipped it to Charleston, where he sold it to great profit, for the benefit of the [*244 owners. *The bill then prayed a discovery, and that the defendant might account, and be decreed to pay, &c.

To this bill, the defendant demurred, and assigned two causes of demurrer. 1. That it appears by the complainant's own showing, that the ship and cargo were regularly condemned under the resolve of congress, of the 9th of December 1781, as lawful prize, and the proceeds decreed to the defendant and others, as lawful captors, the legality of which decree ought not now to be called in question. 2. That the bill contains no matter of equity, but what is cognisable at law.

Upon argument, the judge (STEPHENS) sustained the demurrer, and dismissed the bill, but without costs.

P. B. Key, for the plaintiff in error.—The principal question is, whether

the complainant has equity. If Eve had given up the ship for his own benefit, it would have been an act of barratry, a breach of trust, and the owners would have had a right of action at law against him for his misfeasance. But they may, if they please, affirm his surrender of the vessel, and oblige the defendant to account. If there is any impediment to the relief sought, it must be grounded on the resolve of congress; for if the owners had a right of action at law, it was saved by the treaty of peace.

The master was always under a moral obligation to account, whatever protection he might derive from the resolve of congress, which gave the whole ship and cargo as prize. There being, then, a moral obligation, sufficient to support a promise, so as to prevent it from being *nudum pactum*, and an express promise charged in the bill, and confessed by the demurrer there is nothing wanting to entitle the complainant to the relief he asks. It is true, that the promise was made to the crew, yet it inures to the benefit
*245] of the owners. Should *it be said, that the promise was *in fraudem legis*, the answer is, that it was a stratagem of war, and therefore, justifiable. In *foro conscientiæ*, it was as justifiable to evade, as to enforce such a law; and if it was a fraud against the law of congress, to receive the proceeds of the ship and cargo, for the use of the owners, it was equally a fraud against the owners, to persuade the crew to carry the vessel into a port of the United States, under a pretence of saving the property to the owners, and afterwards, to take the whole proceeds to his own use.

Harper, contrà.—The ordinance of congress of 4th December 1781 (Journals of Congress, vol. 7, p. 243), it is true, authorized mutiny and treachery, but it was only a law of retaliation. The British had adopted a similar provision; and congress found it necessary to retaliate.

The facts stated by the complainant, in his bill, are such as to show the necessity of delivering up the vessel, and that she was absolutely lost to the owners. The bill states, expressly, that she was incapable of reaching her port of destination; that she must either founder or be captured, or voluntarily run into an enemy's port. It justifies the conduct of the master, in giving up the vessel, but grounds its claim to relief, either upon a supposed moral obligation of the defendant (resulting from his duty as master of the vessel) to do everything in his power for the benefit of the owners; or upon an express promise made to the crew, which, it is contended, inures to the benefit of the owners; or upon an allegation of an imposition upon the crew, to induce them to consent to deliver up the vessel.

As to the first ground, the master's duty did not oblige him to violate the laws of another country, especially of that country to whose laws he applied for protection and relief. His duty to his owners ceased, when he could no longer preserve the property, by fair and honorable means. His duty could never oblige him to commit a fraud upon the good faith even of an enemy.

*246] *The second ground is, that of an express promise to the crew. This is liable to three objections. 1st. That it is a promise without consideration, and therefore, *nudum pactum;* 2d. That it is not made to the owners; and 3d. That it was *in fraudem legis.*

The third ground of claim is, that of imposition upon the crew, to induce them to give up the vessel. This, if it can be the ground of claim by any

person, must be that of a claim by the crew, or some of them, to set aside the agreement for the division of the prize-money, and cannot be a ground of claim by the complainant. It is also liable to the objection, that the courts of the United States can never sanction a claim grounded upon a fraud upon the laws of the United States. The owners, by affirming the transaction, and calling upon the defendant to account, have made themselves a party to the fraud; and the maxim of law applies, *in pari delicto melior est conditio possidentis.*

To show the extent of the principle that contracts *in fraudem legis* were void, he referred the court to the following authorities: 1 Plowd. 75; 1 Domat 145; 2 Bac. Abr. 582; Cowp. 39, 342; 1 T. R. 734; 1 Atk. 352; 2 Ibid. 136; Bull. N. P. 146; 2 P. Wms. 134, 347, 350; 3 T. R. 454.

Key, in reply.—The foundation of this bill is the original trust, before the agreement with the crew. It was a violation of that trust, to give up the ship. The defendant was bound to do all in his power to protect the property. If he has been guilty of a fraud upon the United States, the owners were not a party. The fraud of which the plaintiff complains is, that the defendant induced the crew to give up the ship, under the idea of doing it for the benefit of the owners, and then turning round, and pleading the resolve of congress against the claim of the owners. But if that resolve was a bar, a subsequent acknowledgment of the original trust, and a promise to account, will again set it up.

*February 13th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—The essential difficulty in this cause arises from the consideration, that under the resolution of congress, by which the vessel and cargo mentioned in the proceedings were condemned, a sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice. [*247

It has been correctly argued by the plaintiff in error, that the master was under obligations to the owners, from which, in a moral point of view, he could not be completely absolved. He was bound to save for them the ship and cargo, by all fair means within his power; but he was not bound to employ fraud, in order to effect the object. The situation of the vessel, unquestionably, justified her being carried into the port of an enemy, and, perhaps, in the courts of England, the libelling of the vessel by the master and crew, might be construed to be an act which would inure solely to the benefit of the owners; but war certainly gives the right to annoy an enemy by means such as those which were employed by congress, and courts are bound to consider them as legitimate, and to leave to them their full operation.

The agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a stratagem which the laws of war would authorize, but it was certainly a fraud upon the resolution of congress, and no principle can be more clear, than that the courts of the United States can furnish no aid in giving efficacy to it. Congress having a perfect right, in a state of open war, to tempt the navigators of enemy-vessels to bring them into the American ports, by making the vessel and cargo prize to the captors, the condemnation of a vessel

so brought in, amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the
*248] owners, and of their *claim upon the master. Had no communication taken place between the master and his crew, whereby a portion of the prize-money was allotted to him, in trust for the owners, which would not have been allotted to him as a captor, in virtue of his station in the vessel, it would have been a plain case of prize, under the resolution of congress, and any intention under which the capture was made, whether declared or not, would have been, like other acts of the will, controllable and alterable by the persons who had entertained it. But if, by a contract with the crew, stipulating certain advantages for the owners of the ship and cargo, the vessel has been carried in, when she would not otherwise have been carried in, or a larger proportion of the prize has been allowed to the master than would have been allowed to him, for his own use, a plain fraud has been committed by him, and the question, whether the trust which he assumed upon himself, and under which he obtained possession of the property, can be enforced in this court, is one of more difficulty, upon which a difference of opinion has prevailed. It has been thought, by some of the judges, that the contract being, in itself, compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation, which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion, that the contract being clearly in fraud of the law, as existing at the time, a law to which, under the circumstances attending it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. The person in possession must be left in possession of that which the decree of a competent tribunal has given him.

This opinion seems completely to decide the point made under the treaty of peace. According to it, a debt never existed, to which the treaty could apply. No debt was due from the master to his owners, but in virtue of the confiscation of the ship and cargo; and it has never been alleged, that the treaty extended to captures, made during the war, of property in the actual possession of the enemy, whatever might be the means employed in making them.

*If the allegations of the bill had stated any contract, subsequent
*249] to the condemnation, by which Captain Eve had made himself a trustee, the previous moral obligation might have furnished a sufficient consideration for that contract. But the allegations of the bill are not sufficiently explicit on this point: they do not make out such a case. His declarations appear to have been contemporaneous with the transaction, and only to have manifested the intention under which he acted, an intention which he was at liberty to change.

Judgment affirmed.

Montalet *v.* Murray.

Practice in error.

If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record, and go for an affirmance.

Marshall, Ch. J., stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance.

P. B. Key, for the defendant, had the plaintiff called.

Dismissed.

The Chief Justice also stated, in answer to a question from the clerk, that, in such cases, costs go, of course.

Sarah and Abigail Silsby *v.* Thomas Young and Enoch Silsby.

Construction of will.—Abatement of legacy.

D. devised all his estate to his executor, in trust to convert the same into money, and after payment of debts, to invest the surplus in the funds, or put it out on interest. He then bequeathed 1500*l.* to E., to be paid at the age of 21, subject to the subsequent provisos; and directed 1000*l.* to be set apart, and the interest to be paid to S., during her life, and after bequeathing other pecuniary legacies, said, provided "that in case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case, I direct, that the said annuities and legacies so by me bequeathed, shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the 1500*l.* bequeathed to E.," whom he also made his residuary legatee. The estate was more than sufficient at the time of the testator's death, to pay all debts, annuities and legacies, but afterwards, by the bankruptcy of the executor, became insufficient: *Held*, that E.'s legacy of 1500*l.* should be liable to S.'s annuity.[1]

This was a writ of error to the Circuit Court of the United States for the district of Georgia, to reverse the decree of that court, which dismissed the bill of the complainants, Sarah and Abigail Silsby.

Daniel Silsby, the brother of the complainants, and uncle of the defendant, Enoch Silsby, being seised and possessed *of real and personal [*250
estate in England and in the state of Georgia, by his will, made in England, on the 11th of January 1791, devised all his estate to his executor, W. Gouthit, of London, in trust, to turn the same into money, or securities for money, and after payment of his debts, to place out the surplus upon any public or private securities, upon interest, or to invest it in the public funds.

He then bequeathed to his nephew, Enoch Silsby, 1500*l.* sterling, to be paid to him at twenty-one years of age, "subject to the provisos hereinafter mentioned," and directed the interest to be paid to his guardian, during his minority, to be applied to his maintenance and education. He then directed his trustees to set apart 1000*l.* sterling, and pay the interest thereof to his sister Sarah, during her life, for her sole and separate use and disposal, and in case of her death, without issue, the principal was to be paid over to

[1] See Murdock's Appeal, 31 Penn. St. 47.

Enoch. A similar provision was made for his sister Abigail, the other complainant. And after bequeathing several other pecuniary legacies, he used the following words: "Provided always, and I do hereby expressly declare it to be my will and meaning, that in case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case, I direct that the said annuities and legacies, so by me given and bequeathed, shall not abate in proportion; but that the whole of such deficiency (if any there shall be) shall be deducted out of the said sum of 1500*l.* herein before by me bequeathed to my said nephew, Enoch Silsby. And in case the personal estate, and the produce arising from the sale of the real estate, which I shall die seised and possessed of, shall be more than sufficient to answer and satisfy the several annuities or legacies herein before by me bequeathed, then and in such case, I give and bequeath the surplus and residue which shall so exceed the purposes of this my will, unto my nephew, Enoch Silsby, subject to such conditions as are herein before, in this my will, mentioned and contained, touching and concerning the said sum of 1500*l.* sterling, so by me bequeathed as is herein before particularly mentioned."

*251] *The testator died at Ostend, on his way to the United States, in February 1791, leaving real and personal estate more than sufficient to pay all the debts and legacies, and which came to the hands of Gouthit, the executor, who paid all the debts and all the legacies, excepting those bequeathed to the complainants, and to the defendant, Enoch Silsby, and another legacy of 500*l.* to Daniel Silsby Curtain; but upon these, he regularly paid the interest, until the year 1796, when he became bankrupt.

The testator, in his will, mentioned, that he had in the hands of Harrison, Ansty & Co., of London, 5000*l.* sterling, for which they allowed him an interest of five per cent. per annum.

Gouthit, in his letter to the complainants, of September 9th, 1791, said, "I have an excellent offer; a mortgage for 2000*l.* which, if you think well, I will take it; for if I should, at any time, see well to place it anywhere else, by giving six months' notice, it would be paid. It is on an estate in Manchester, one of the greatest trading towns in this kingdom, and I can make you five per cent. sterling on it, which will, you know, be 50*l.* a year for each of you, and you may have it paid as you please, but every six months, I think, would be best. The gentleman I mean to lend the money to, is an old acquaintance of your brother's, and the estate is worth 5000*l.* He does but want 2000*l.*, so, you know, nothing can be safer on earth, and I will have the deed so recited as to set forth the money is for your use, &c. This, I doubt not, but will meet your approbation. I have taken no money out of Harrison's hands, nor even interest, as I have no doubts of its safety, and the interest is going on."

In answer to which, the complainants wrote him, on the 1st of February 1792, "Yours of September the 7th, you mention an old friend of our dear brother's wanting to hire the 2000*l.* on mortgage. We would willingly oblige him, but cannot. We choose to let it remain, just as our brother left it, and shall draw on you every six months for our interest."

*252] *Gouthit, before his bankruptcy, drew all the money out of the hands of Harrison, Ansty & Co., who were, and always had been,

solvent and in good credit. He never placed out in any specific funds the 2000*l.* from which the complainants' annuities were to arise.

On the 20th December 1791, Gouthit sent a power of attorney to the defendant, Thomas Young, of Savannah, in Georgia, to collect the effects of the testator in that state, under which power, Young obtained letters of administration with the will annexed, and took into his possession all the property there, some part of which he paid over to Gouthit. He also in the year 1800, paid the legacy due to Daniel Silsby Curtain, and part of the 1500*l.* legacy to Enoch Silsby. Considerable debts due to the estate were still outstanding in Georgia.

At the time of Gouthit's bankruptcy, he was indebted to the estate of his testator in the sum of 5380*l.* 12*s.* 2*d.* sterling, but the commissioners refused to admit him, as executor of the testator, to prove the same as a creditor of his own estate, whereupon, the legatees, who had not been paid, petitioned the Lord Chancellor of England, that Gouthit might be so admitted to prove the debt for their benefit, which his Lordship decreed accordingly; and a dividend of 403*l.* 10*s.* 10*d.* sterling was received by the accountant-general of the court of chancery, but no part of that sum had been received by the complainants.

Enoch Silsby filed a bill in equity, in the circuit court of the United States for the district of Georgia, against Young, to compel him to account and pay over to him, as residuary legatee, all the estate remaining in the hands of Young.

The complainants, Sarah and Abigail, filed the present bill in equity, in the same court, against both Thomas Young and Enoch Silsby, praying that Enoch's legacy of 1500*l.* might abate in favor of their legacies, and that they might charge the residue of the estate for the balance, and have their 2000*l.* placed out on good security, according to the will, and that they might be paid the arrearages of their annuities out of the 1500*l.* legacy, *and [*253
out of the residue of the estate which came to the hands of Young.

The judge below (Judge Stephens) dismissed the present bill, and decreed that Young should account to Enoch Silsby, upon the other bill in which Enoch Silsby was complainant, and Thomas Young, defendant.

Morsell, for the plaintiffs in error.—1st. If the plaintiffs have not discharged the general funds, they are entitled to the relief they pray for. 2d. They have not discharged those funds, nor relinquished their claim upon the whole estate of the testator.

It is true, that if one legatee, by diligence, has got his legacy, he shall not be obliged to refund, in case of a subsequent waste of effects by the executor; but that is only where all the legacies are payable at one time, and the legatees are in a capacity to compel the payment of their legacies. In the present case, the principal of the legacies to the complainants was not to be paid to them. The testator had directed his executor to set apart 2000*l.* sterling, and to pay the interest only to the complainants, during their lives. It was, therefore, a bequest of an annuity merely. There was nothing for the complainants to do. They had no right to designate the funds which should be set apart by the executor, in whom alone was vested the right and the power to make the appropriation. By the words of the will, if the estate should not be sufficient to pay all the legacies, yet the complainants were

not to suffer. But the defendant, Young, having paid some of the legacies in full, has thereby admitted assets for all. The complainants having regularly received their annuities to the year 1796, when Gouthit, the executor, became bankrupt, had no right to complain, and had no reason to press for a specific appropriation of the money, from which their annuities were to be paid. They knew that the whole estate stood chargeable to them,
*254] *until their 2000*l.* were set apart, according to the directions of the will. The residuary legatee cannot avail himself of a breach of trust by the executor, to the injury of the complainants, who claim under the same trust. The executor was not bound, by the will, to give any security, nor could the complainants call upon him therefor.

The time at which the estate should be insufficient to pay all the legacies, so as to enable the complainants to call upon the residuary legatee, is not designated by the will, in express terms ; but it is clear, that the time of the death of the testator was not the time he contemplated ; because, after directing his executor to sell his real estate, he says, "in case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient," &c.; thereby contemplating a period after his death, and sufficiently distant, to enable his executor to sell the real estate. The words of the will are, "sufficient to answer the said annuities." How long? The answer is obvious ; so long as the annuities are to be paid, which was during the lives of the complainants. The residuary legatee was, therefore, to answer for the insufficiency, if it happened at any time during their lives.

The case of *Marsh* v. *Evans*, 1 P. Wms. 668, is very similar to the present. The testator gave to each of his two sons, and to his daughter, 2000*l.* a piece, "with a proviso, that if his assets shall fall short for the payment of these legacies, still, the daughter shall be paid her full legacy, and that the abatement shall be borne proportionably out of the sons' legacies only." "The testator left sufficient to pay all the legacies, but the executrix wasted the assets, and by that means only a deficiency happened." The Master of the Rolls decreed, that the daughter should abate equally with the sons. But the Lord Chancellor reversed the decree, and directed, that the daughter should have her full legacy, and that the abatement should be out of those of the sons only.

*255] *It is unimportant to the complainants, by what means the assets became insufficient, inasmuch as the testator intended to secure their annuities, at all events. It was the testator, and not the complainants, who trusted the executor. The legacy of 1500*l.* to Enoch is (so far as the complainants are concerned) to be considered as a residuary legacy ; because, by the express words of the will, it is placed upon the same ground ; and nothing can be taken by the residuary legatee, until all the debts and particular legacies are paid. *Spendlove* v. *Aldrich*, 2 Ld. Raym. 1320.

The case of *Orr* v. *Kaines*, 2 Ves. 193, shows, that it is an established rule, that if an executor pays one legatee in full, he thereby admits assets to pay all the others.

2d. The complainants have not, by any act, waived their right to come upon the whole estate, nor forfeited their right by any *laches*. The letter of February 1792, is a mere refusal to sanction anything not required or directed by the will. The complainants say, that they choose to let it (*i. e.*

the 2000*l.* provided by their testator as a fund for the payment of their annuities) remain just as the testator left it. It is not even a hint, that they meant to rely on the money in the hands of Harrison, Ansty & Co., and if it was, yet they had no power to prevent the executor from drawing those funds out of the hands of that house; nor did it have that effect, for Gouthit did actually withdraw them, and apply them to other purposes.

The complainants were not bound to call upon the executor to designate the funds set apart for the payment of their annuities; and so long as they were regularly paid, they had no cause to suspect the solvency and the honesty of Gouthit, on whom their testator had chosen to bestow his confidence. They cannot, therefore, be charged with *laches*.

**Harper*, for the defendant, Enoch Silsby, contended, 1st. That as the estate was sufficient at the time of the testator's death, and became insufficient long afterwards, by the default of the executor, the contingency had not happened upon which the will renders Enoch Silsby's legacy of 1500*l.* liable solely to abatement; and that he was, therefore, entitled to receive the whole; or, at most, was liable only to an abatement, *pro rata*, with the other legatees. 2d. That the complainants, by their acts, made their election to depend on the estate in England, and on the security of Gouthit, and therefore, could not resort to the residue in this country. 3d. That if their acts did not amount to such an election as would preclude them from resorting to the residue, yet their *laches*, in omitting to take steps for compelling the executor to place out their legacies on public or private securities, according to the will, ought to have that effect. [*256

The complainants were of full age, at the time of making the will. The defendant, Enoch Silsby, was an infant, for a long time after the testator's death. There is a limitation over to Enoch of the principal sum of the complainants' legacies. By their conduct, he has lost the reversion of the 2000*l.* and of 1200*l.*, the surplus. It is not just, that the loss should fall upon him who was then an infant. The claim of the complainants would sweep everything from Enoch, who was the peculiar object of the testator's bounty. The defendant, Young, must take the consequences of his own act, if he has paid any of the legatees in full. He is solvent, and having, by his act, admitted assets, the complainants cannot resort to the residuary legatee.

But the testator died possessed of estate enough to pay all the debts and legacies; and therefore, Enoch's legacy of 1500*l.* by the terms of the will, is not bound to abate. *If the testator meant to give the complainants their legacies, at all events, he would havesaid so. He knew that he had enough to pay all, at the time of making his will, but accidents might happen before his death, and it was to guard against those only, that he provided for the case of insufficiency. [*257

There is a great difference between this case and that of *Marsh* v. *Evans*, cited from 1 P. Wms. 668. In that case, the proviso was, that "if his assets should fall short." The word assets is technical, and refers to the estate after his death. The legacies were not payable, until his children should be of full age, and the whole expression evidently alludes to a state of things, which might happen at any time between his death and the time when the legacies would become not payable. But in the present case, the testa-

tor meant to refer to the time of his death; if there should then be an insufficiency to pay all, Enoch's 1500*l.* should abate, but not otherwise.

The anonymous case in 1 P. Wms. 495, establishes the rule, that if one legatee, by diligence, obtains his legacy, and the executor, having had sufficient assets, wastes them and occasions a deficiency, the legatee shall not be obliged to refund. In the case of *Walcot* v. *Hall*, 23d February 1788, Supplement to Viner, vol. 3, p. 432, the distinction is taken between a deficiency at the time of the death, and that which arises afterwards. The case of *Orr* v. *Kaines*, 2 Ves. 194, shows that where there was an original sufficiency of assets, and the executor remains solvent, the legatees shall not refund. As Young is solvent, the complainants cannot oblige the other legatees to refund, unless there was an original deficiency of assets.

*258] *2d. As to the acts of the complainants. Their letter to Gouthit prevented the 2000*l.* from being put out on security. It is, therefore, the same thing, in effect, as if the executor had, at their request, put it out on a security which had failed. But they have actually made choice of the security. They knew the money was in the hands of Harrison, Ansty & Co., and in their letter, they say, "we choose to let it remain, just as our brother left it;" that is, in the hands of Harrison, Ansty & Co. After having done that, Gouthit remained their agent for the purpose of drawing and remitting the interest. They were the only legatees who were of age, and capable of assenting to such a disposition of their legacies: the other legatees were infants. If the complainants had directed the 2000*l.* to remain in the hands of the executor, and he had failed, they must have sustained the loss. By refusing his offer to place it out on mortgage, they have, in effect, assented to his retaining it, and he having failed, they must submit to the consequence. If they had assented to his offer, the money would have been safe, and the defendant, Enoch, would not have lost his chance of the reversion. If the executor himself had placed it out on security, and set it apart, according to the directions of the will, and it had been lost, they could never have called upon the residuary legatee.

3d. But the complainants have been guilty of *laches*, in not compelling the executor to place out the money on security. They had early notice of the will, and took no measures to have their legacies secured, until the failure of Gouthit, which was six years after the testator's death. By this neglect, Enoch has lost his reversion: he was a minor, and therefore, no *laches* can be imputed to him.

*259] *P. B. Key*, for the defendants.—1st. As to Young. *He considers himself as a stakeholder only. If the complainants are entitled to be first paid, he holds for them; if not, then he holds for the defendant, Enoch. If there is an original deficiency of assets, and one legatee receives the whole of his legacy, the others may compel him to refund, and the executor will not be obliged to pay the other legatees in full. So, if an executor pay one in full, by mistake, it shall not preclude him from alleging a defect of assets. There is no case in which an executor has been thus precluded, by a payment in full to one of the legatees. The case from 2 Ves. 194, was, where the executor had not only paid one in full, but had neglected to make an inventory.

2d. As to the defendant, Enoch Silsby. The general principle is admitted, that specific pecuniary legatees are to be first paid; and that, if there is

not sufficient to pay the whole, they must abate in proportion. This will appears to have been drawn by able counsel. If the testator meant that the particular legacies should have been paid out of the whole estate, he would have said so; but he has directed a particular fund to be set apart, out of which the annuities of the complainants were to be paid. If this fund had been set apart, as directed by the will, the defendant, Enoch, would have been entitled to the residue, and exonerated from all liability to refund. The complainants were the only legatees of competent age to compel the executor thus to set apart the fund; or, at least, they were the only legatees to whom *laches* can be imputed. They not only neglected to do this, but by their letter prevented the executor from doing it.

The *residuum* was to abate, upon the same contingency only upon which the legacy of 1500*l.* was to abate; and that contingency never happened. "The personal estate, and the produce arising from the real estate, of which the testator died seised and possessed," *was "sufficient to answer all [*260 the debts, annuities and legacies." If the time of the testator's death was not the time when the sufficiency of the estate was to be ascertained, yet, if at any time afterwards, the personal estate, and the produce of the real estate, which came to the hands of the executor, was sufficient, the right of the complainants to come upon Enoch's legacy of 1500*l.* and upon the *residuum*, ceased. It was then incumbent upon the complainants, to look to their own legacies, and get them properly secured; if they did not, they gave personal credit to the executor, and if he wasted the estate, and became insolvent, they must suffer the loss. They had a right to require security in chancery. It is a part of the regular chancery jurisdiction, to compel such security, and no suggestion of a *devastavit* was necessary. The funds in England were more than sufficient to pay all the debts and legacies; it was not necessary to wait for the settlement of the estate in Georgia. Young, the administrator in Georgia, never had a sufficiency of assets; and therefore, his payment of one legacy in full, if that is the fact, cannot bind him to pay all the rest.

Martin, in reply.—The question is, whether, if upon an account against the defendants, any funds shall be found in their hands, we are entitled to recover?

They contend, that we are not entitled to an account. The will speaks of the produce of the estate, and not of the estate itself; contemplating the intermediate acts of the executor; looking forward to subsequent events, and negativing the idea that the testator was contemplating only the situation of his estate, at the time of his death. He directs all his estate to be turned into cash, and his debts to be collected, and the whole invested in funds.

The principle of abatement was not to take place, until the legacies were to be paid. *The complainants were not bound to elect any particu- [*261 lar fund. They had a right to look to the whole estate. The word "it," in their letter to the executor, evidently refers to their legacy of 2000*l.* and not to any particular sum in the hands of Harrison, Ansty & Co. That letter did not influence the conduct of the executor, for he did not leave the money in the hands of those merchants. If he had done so, and they had failed, there might have been some plausibility in the argument.

The complainants were not bound to apply to chancery to compel the

executor to give security. Until the year 1796, they had no reason to complain, and no cause for suspicion. The testator had placed confidence in the executor, and had left it entirely to his discretion when, and in what manner, he should place the money out on security; consequently, there were no *laches* on the part of the complainants.

February 13th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—This being a suit in chancery, brought by legatees, claiming an account, in order to the payment of their legacies, and their bill having been dismissed, without an account, the decree can only be supported, by showing that there are, in the hands of the administrator, no assets which ought to be applied to the purposes prayed in the bill.

The testator having bequeathed to each of his two sisters, Sarah and Abigail, who are the complainants, the interest on 1000*l.* sterling, and that being in arrears, and assets having come to the hands of his representative, the complainants are certainly entitled to an account, unless they have forfeited all pretensions to their legacies. *The defendants say they
*262] have forfeited their rights, 1st. By a letter, selecting a particular debt in satisfaction of their legacy, which debt is lost. 2d. By their *laches*.

The better to understand the correspondence which is relied upon, it must be recollected, that by the will, the whole estate, real and personal, of the testator, was devised to executors and trustees, who were directed to place it out on public or private security, in such manner as should, in their judgment, best promote the interests of the legatees. The testator then directs, among other bequests, that his trustees shall set apart 1000*l.* sterling for each of his sisters, the interest of which shall be paid to them, during their natural lives, after which the principal is to be divided between the children of each, if they should marry and have children, but is given to his nephew, Enoch Silsby, in the event of the first legatees dying unmarried, or without children.

This duty of the executor and trustee being thus plainly marked, he addressed a letter to the legatees, in September 1791, in which he mentions an offer which had been made him, of a mortgage of 2000*l.*, the amount of the sums to be set apart for them, which he will take, if it meets their approbation. If the plaintiffs had taken this mortgage, and the title had proved defective, or the mortgaged property had been destroyed, they would, most probably, have forfeited all claims upon the estate of their testator, and would have been, at least, censured by the legatee in remainder, for having destroyed, by an improvident intervention in the management of the estate, his right to the principal sum, on their dying unmarried. Such an interference, on their part, was unnecessary, because the executor was authorized, by the will, to place the estate, either on private or public security, as he should think most advantageous, and would have been particularly indiscreet, because they could neither judge of the validity of the title, nor of the value of the premises proposed to be mortgaged. To have intermeddled
*263] *with the subject would, therefore, have been in them a departure from propriety and common prudence, not to be accounted for, nor justified.

Under these circumstances, they say, "You mention an old friend of our dear brother's wishing to hire the 2000*l.* on mortgage. We would willingly

oblige him, but cannot. We choose to let it remain, just as our brother left it." To the court, it seems, that this letter will admit of but one construction. It is a plain declaration, that they do not mean to intermeddle with the duties of the executor, but to leave him to perform them according to the directions of his testator. "We choose to let it" (the legacy of 2000*l.*) "remain just as our brother left it," is plainly saying, that the legacy must remain on the foundation on which the will placed it. The construction which would convert these words into a declaration, that they chose the debts of their testator not to be collected, and that they chose to take upon themselves the hazard of the solvency of any particular debtor, whose debt should remain outstanding, or of the executor, if he should happen to collect it, is really too violent a distortion of them, to be tolerated for an instant.

As little foundation is there, for the allegation, that the rights of the complainants have been forfeited by their *laches*. The court can perceive no *laches* on their part. It was not particularly incumbent on them, to incur the expense of inquiring into the manner in which the executor performed his trust, with respect to the estate at large. They received their interest regularly, and there was no circumstance to awaken a suspicion that they were in danger. On the residuary legatee, and on his father and natural guardian, it was more particularly incumbent, to examine into the conduct of the executor, and though he may be perfectly excusable for not having done so, he cannot throw the loss on others, whose conduct has been perfectly faultless. *The court is, therefore, clearly and unanimously of opinion, that the complainants have not forfeited their rights; and consequently, that [*264 the decree must be reversed, and an account directed.

In considering the principles on which the account is to be taken, the court think it perfectly clear, that the specific pecuniary legacies must be set apart, before the defendant, Enoch Silsby, can be entitled to the *residuum*. The words annexed to the bequest of the residuary estate, which subject it to the same conditions with the bequest of the 1500*l.* are understood by the court, to relate to the condition of payment, at the age of twenty-one, and to the limitations over, in case of the death of the residuary legatee, not to the question of abatement; and a *residuum, ex vi termini*, is that which remains after particular legacies are satisfied.

The court is also of opinion, that if there be not sufficient assets to satisfy all the specific legacies, the loss must fall exclusively on the 1500*l.* given to Enoch Silsby, until that fund be exhausted.

It has been argued, that the words of the will limit this charge on that legacy to the contingency of an insufficiency of assets, at the death of the testator. The words are, "It is my will and desire, that if the personal estate, and the produce arising from the real estate, of which I shall die seised and possessed, shall not be sufficient to answer the several annuities and legacies herein before by me bequeathed, then and in such case, I direct, that the annuities and legacies shall not abate in proportion, but that the whole of such deficiency, if any there be, shall be deducted out of the said sum of 1500*l.* herein before by me bequeathed to my said nephew, Enoch Silsby."

These words have undergone a very critical examination, and it has been contended, that the time at which the sufficiency mentioned in the will is to be determined, is fixed by the testator, at his death, in like manner as if the

expression had been, "if my estate shall not, at the time of my death, be insufficient," &c. But the words do not appear to the court to demand such an interpretation. The words, "the personal and real estate of *which I shall die seised and possessed," are no more, in substance, than the words "all my real and personal estate" would have been. They describe the subject, on the insufficiency of which an abatement of a particular legacy is to take place, but not the time when that insufficiency is to be tested. In the opinion of the court, that time is, when the will is carried into execution, by the application of the funds to their object. If, when that application is made, a deficiency appears, "then and in that case" it is, that the abatement is to take place in the specific legacy to Enoch Silsby.

*265]

This specific pecuniary legacy being given to the same person to whom the *residuum* is given, and on the same terms, assumes completely the character of a residuary bequest, and the testator does not appear to have intended to give it any preference over the *residuum*. He seems to have intended certain provisions to his relations, the extent of which were apportioned to his opinion of their necessities, and which he did not leave in a situation to be enlarged or diminished by any incident which might affect the state of his affairs. Should his property be merely sufficient to pay those annuities and legacies, they were to sustain no deduction; should it be ever so much enlarged, they were to receive no increase; but all he might possess, exceeding those specific donations, was to be given to his nephew. His bounty to his other legatees was measured; that to his nephew, was not defined. As in every case where specific legacies are first given, so in this, it is the intent of the testator to prefer the specific legatees. There would have been no motive for giving a specific legacy, subject exclusively to abatement in case of deficiency, to the residuary legatee, but for the purpose of providing a fund for his education and maintenance during his infancy. For every other purpose, this particular legacy to Enoch Silsby is to be considered as a part of the *residuum*.

It is not easy to assign a motive in the testator for intending a preference to his specific, over his residuary legatee, in the event of an insufficiency of assets, at his death, which would not equally apply to an insufficiency which would take place afterwards. The only motive for this preference which could possibly have existed, *was his wish, that if the fund should not be adequate to pay all his legacies, yet, no deduction should be made from those which were particularly bequeathed. This wish originated in his particular feelings towards his relations, and could not depend on the insufficiency which he provided against taking place, at the time of his death, or a few months or years afterwards. If, at the time of his death, his estate had been sufficient, but before it could be collected and applied, according to his will, bankruptcies, or any other casualties, had occasioned a deficiency, no reason can be perceived by the court for supposing that the contemplation of such a deficiency would have induced him to make a different arrangement of his affairs, from what he would have made had he contemplated a deficiency at his death. And between such a deficiency, and one occasioned by the fault or misfortune of an executor, chosen, not by his legatees, but by himself, the court can perceive no distinction.

*266]

It is, therefore, the opinion of the court, that the decree of the circuit

court be reversed, and that the cause be remanded to the circuit court, that an account may be taken, in order to a final decree.

Reversed.

DECREE.—This cause came on to be heard, on the bill, answers, exhibits and other testimony in the cause, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the decree of the circuit court, in directing the bill of the complainants to be dismissed, and that the same ought to be reversed and annulled. And this court doth farther direct and order, that the said cause be remanded to the circuit court, that accounts may be taken of the assets which are in the hands of the defendant, Thomas Young, of the payments which have been made to Enoch Silsby, and of the sums which are due to the complainants, and of such other matters as may be necessary to a final decree.

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*STRAWBRIDGE *et al. v.* CURTISS *et al.* [*267

Jurisdiction.

If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.[1]

THIS was an appeal from a decree of the Circuit Court for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction. Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont, and upon whom the *subpœna* was served in that state.

The question of jurisdiction was submitted to the court, without argument, by *P. B. Key*, for the appellants, and *Harper*, for the appellees. On a subsequent day—

MARSHALL, Ch. J., delivered the opinion of the court.—The court has considered this case, and is of opinion, that the jurisdiction cannot be supported.

The words of the act of congress are, "where an alien is a party, or the suit is between a citizen of a state where the suit is brought, and a citizen of another state." The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, *and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States. [*268

Decree affirmed.

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[1] New Orleans *v.* Winter, 1 Wheat. 91; Coal Co. *v.* Blatchford, 11 Wall. 172; Bissell *v.* Horton, 3 Day 281; Ward *v.* Arredondo, 1 Paine 410; Anderson *v.* Bell, 2 Id. 426; Ketchum *v.* Farmers' Loan and Trust Co., 4 McLean 1; Bargh *v.* Page, Id. 10; Tuckerman *v.* Bigelow, 21 Law Rep. 208.

Gordon *v.* Caldcleugh *et al.*

Error to a state court.

Th's court has not jurisdiction upon a writ of error to a state court, under the 25th section of the judiciary act of 1789, if the decision of the state court be in favor of the privilege claimed under an act of congress.[1]

This was a writ of error to the judges of the Court of Equity of the state of South Carolina, holden in and for the eastern district of the said state.

James Gordon, "of the city of Charleston, in the state aforesaid," filed a bill in equity, against Caldcleugh & Boyd, "of London, in the kingdom of Great Britain," William Muir, "of Hamburg," and John Gillespie, George McKay and Joseph Reid, whose residence was not mentioned in the bill. At the return of the *subpœna*, Caldcleugh, Boyd and Reid appeared, and filed a petition, stating themselves to be aliens, and subjects of the King of Great Britain, and that the complainant was a citizen of the state of South Carolina, and praying that the cause might be removed to the circuit court of the United States, according to the 12th section of the judiciary act of 1789. To which petition, Gordon, the complainant, answered, that the prayer thereof ought not to be granted, because Gillespie and McKay, two of the defendants, were citizens of the state of South Carolina. But the court, "after observing that the parties, defendants to the suit, residing in this state, were stakeholders, and not materially concerned in the determination of the cause, ordered that it be transferred to the federal court, agreeable to the prayer of the petition.

The complainant, immediately, in the same court, assigned errors, in the following form: "Whereupon, the said James Gordon comes and says, that *269] in the *giving of the final judgment, in the cause aforesaid, upon the construction of the 12th clause or section of the statute of the United States, entitled an act to establish the judicial courts of the United States, passed the 24th day of September 1789, and 2d section of the 3d article of the constitution of the United States, and the 12th article of the amendment of the constitution, there is manifest error in this, to wit, that the judgment aforesaid was given in form aforesaid, for the said Caldcleugh, Boyd and Reid, upon their petition, for the removal of the said cause for trial, into the circuit court of the United States, to be held for the district of South Carolina, whereas, judgment should have been given for the said James Gordon, against the removal aforesaid; and this he is ready to verify. Caldcleugh, Boyd and Reid joined in error; and thus the case came up.

The writ of error did not state that the Court of Equity of the state of South Carolina, to the judges of which it was directed, was "the highest court of equity of the state in which a decision in the suit could be had," so as to bring the case within the provisions of the 25th section of the judiciary act of 1789, nor did that fact in any other manner appear.

E. J. Lee, for the plaintiffs in error.

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[1] Strader *v.* Baldwin, 9 How. 261; Linton *v.* Stanton, 12 Id. 423; Reddall *v.* Bryan, 24 Id. 420; Roosevelt *v.* Meyer, 1 Wall. 512; Ryan *v.* Thomas, 4 Id. 603.

McFerran v. Taylor.

February 13th, 1806. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court.

This court has no jurisdiction under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is *against* their validity, &c., or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission *held under, the United States, and the decision is *against* the title, right, privilege or exception, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission. [*270

In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not *against* the privilege claimed under the statute; and therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.

MCFERRAN *v.* TAYLOR and MASSIE.

Implied warranty.— Verdict.

He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.[1]

Quære? If the mistake be of a matter deemed perfectly immaterial by both parties, at the time of the contract, and of a matter which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?

A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded.

ERROR to a decree of the District Court of the district of Kentucky, in chancery.

McFerran, in his bill, alleged, that on the 19th of March 1784, the defendant, Taylor, for a valuable consideration, executed his bond to the complainant, for the conveyance of 200 acres of land out of 1000 acres located by him on Hingston, or out of 5000 acres which Taylor then had for location. The condition of the bond was as follows: "that if the said Richard Taylor, his heirs, &c., shall well and truly make, or cause to be made, to the said Martin McFerran, his heirs or assigns, a good sufficient title in fee-simple to two hundred acres of land in the county of Kentucky, out of 1000 acre tract, located by the said Richard Taylor on Hingston's fork of Licking; or 200 acres out of 5000, which the said Taylor has now for location, provided he obtain the same, at such part or place thereof as the said McFerran shall choose, not to exceed more than twice the breadth in length thereof, so soon as the lands can, in any degree of safety, be surveyed; *then this obligation to be void, otherwise to remain in full force and virtue." [*271

[1] See Smith *v.* Richards, 13 Pet. 26.

The bill further alleged, that on the 25th of September, in the same year, the defendant, Taylor, executed another bond to the complainant for 300 acres of land adjoining the former tract of 200 acres. That the said 5000 acres of land alluded to by the bonds, was granted to Taylor, for his military services, by a warrant numbered 1734, which issued for 6000 acres; but that Taylor did not inform the complainant that it contained more than 5000 acres. That 1000 acres of the 6000 had been located on Paint Creek, and 2000 on Brush Creek, in the north-western territory, and 3000 on the Green River, in the district of Kentucky. That Taylor had not any lands on Hingston, so that the complainant could not make his choice there, where he averred the general quality of the land was equal to any in Kentucky, and was worth from $8 to $10 an acre. That Taylor has sold the 1000 acres on Paint Creek to the defendant, Massie, who, before he paid for the land, and obtained a title from Taylor, had notice of the complainant's claim to 500 acres from Taylor, as before stated.

That before the sale to Massie, Taylor had sold the 2000 acres on Brush Creek, to Abraham Buford, or to some one else, and in consequence thereof, assigned the certificate of survey to John Brown. That in 1796, the complainant applied to Taylor, to show him his lands, that he might make his choice, but Taylor neglected and refused to show them. That the complainant *chooses* to have the 500 acres laid off, and conveyed to him from the land on Paint Creek, and had given notice of his choice to Taylor, who refused to convey the same from out of that tract, and refused to accompany the complainant to have the same laid off; and that Massie also refused to convey.

The bill concluded with a prayer, that the complainant might be permitted to make choice of 500 acres of land out of the 1000 acres on Paint Creek; that the defendants might be compelled to convey the same; and that the court would grant general relief, &c.

*272] *The answer of the defendant, Taylor, admitted the bonds, and that the 500 acres were to be laid off in one tract. It alleged, that the consideration of the first bond was two horses, sold to him by the complainant, at the price of 40*l.* Virginia currency for both; and that the consideration of the other bond was another horse, valued at 48*l.* It referred to the entry for the 1000 acres upon the waters of Licking, dated June 15th, 1780, which was in these words: "Colonel Richard Taylor enters one thousand acres on treasury-warrants, adjoining an entry of Major Thompson's, on a buffalo road leading from Hingston's fork to the sweet licks, beginning at his south-east corner, thence, north, along said Thompson's line, 600 poles, thence, east, for quantity." The answer then averred, that the mentioning of Hingston's fork of Licking in the bond, was not a description of locality, but of tract; and that the mentioning Hingston was no greater recommendation of the land than if another fork of Licking had been named; because both parties were unacquainted with it, and Taylor had understood that his said entry was on Hingston. That the provision in the bond for a choice out of 5000 acres was an alternative; and it was not intended, that the complainant should have his choice out of the 6000 acre warrant; and it was intended and understood by both parties, that Taylor should hold 1000 acres thereof, unincumbered, and not liable to the complainant's choice. It averred further, that these 1000 acres were located on the shares

on Paint Creek ; that Taylor held part, and Kenton and Helm another part, as locators ; that he sold his part to Massie, but he did not recollect the quantity. Of the remaining 5000 acres, he exchanged 2000 with Colonel Abraham Buford, for two entries of 1000 acres each, because there was a greater probability of getting good land upon small entries than upon large. That these 2000 acres were located on the south side of Green river. That the other lot of 2000 acres, part of the 5000, was located on the north fork of Paint Creek ; but understanding the land was not good, he had 1500 acres withdrawn, and finally located on some of the waters of Paint Creek, as he was informed ; but he was so much unacquainted with that country, that he could not point it out particularly. The remaining 1000 acres were located and patented south of Green river. That he had offered the complainant a choice of any of those lands, except the 1000 acres held *by [*273 Massie, Kenton and Helm, which he had refused. That the 500 acres on the north fork of Paint Creek were inferior to the other lands, as he had been informed and believed ; and the complainant having positively refused them, Taylor had sold them. But the 1500 acres on the waters of Paint Creek, which were originally part of the 2000 acre lot, and the three tracts of 1000 acres each, south of Green River, were yet held by him ready for the choice of the complainant. That Taylor informed the complainant, before the commencement of this suit, fully, of the exchange with Buford, and had been always ready and willing to let him have his 500 acres as aforesaid. That Taylor informed the complainant of his said military warrant ; and that it was for 6000 acres ; and that he reserved 1000 acres thereof, which it was then possible he might want to live on, and that the complainant's right of choice was only to extend to the remaining 5000 acres. That since Taylor discovered that the first-mentioned 1000 acres laid on Slate Creek, a branch of Licking, and not on Hingston, a branch of Licking, he informed the complainant thereof, and also that he had no lands on Hingston.

The answer of Massie denied, that previous to his paying the consideration of the land to Taylor, and the issuing of the patent, he had any notice that the complainant had any claim to that land, and averred, that he was a *bonâ fide* purchaser, for a valuable consideration, without notice.

The jury (who, by the practice of Kentucky, are called to ascertain facts in chancery suits) found the following facts :

1. That the defendant executed the bonds.

2. That at that time, he had no lands on Hingston's fork of Licking.

3. That on the 29th of August 1795, he assigned to John Brown, the plot and certificate of survey, &c. (the 2000 acres before mentioned), which survey was made by virtue of a military warrant, No. 1734.

*4. That on the 31st of July 1797, he assigned to Massie, &c., [*274 the 1000 acres before mentioned, being a survey of part of the same warrant.

5. That the complainant demanded of Taylor 500 acres, in virtue of the said bonds, before the commencement of this suit ; but it did not appear that any lands had been conveyed in compliance with that demand ; neither did it appear that any particular piece of land was pointed out by the complainant, when the said demand was made, except that he had made his election to have 500 acres out of the survey assigned to Massie, and gave notice thereof to Taylor, who refused to convey it.

6. That 500 acres might be laid off in that survey, worth five dollars an acre, in the form called for in the bonds.

7. That the 5000 acres mentioned in the bonds were part of the warrant No. 1734, for 6000 acres, granted to Taylor for his own services.

8. That Taylor had the entry of 1000 acres, of June 15th, 1780.

9. That when the bonds were executed, Taylor had a military warrant for 6000 acres, 1000 whereof were entered on Paint Creek, in partnership with the locators, and since assigned to Massie ; 2000 were exchanged with Abraham Buford, for other 2000 acres of military warrants, in separate entries of 1000 each, because Taylor deemed it more probable that he should get good land on small entries than on large ones.

10. That 1000 acres of the said 5000 were entered on the south side of Green River.

11. That the remainder of the 5000 acres is located on Paint Creek, or its waters.

12. That Taylor was willing that the complainant should make his choice out of any of the three tracts of 1000 acres each, south of Green River, or out of the 1000 acres on the waters of Licking, or out of the 500 acres, or the 1500 acres, on the waters of Paint Creek.

*275] *13. That the average price of lands on Hingston, was three and a half dollars per acre, and on Slate, two dollars per acre.

14. The 1000 acres adjoining Thompson, were worth two dollars per acre.

15. The land transferred from Taylor to Buford, was worth one dollar and fifty cents per acre.

16. The land transferred by Buford to Taylor, was worth two dollars per acre.

The decree of the district court, upon the bill, answers, and facts found, was, in substance : That the complainant should, on or before the 1st of September then next, make choice of his 500 acres out of the following tracts of land, to wit, 1000 acres adjoining Major Thompson's entry, on a buffalo road leading from Hingston's Fork to the Sweet Licks ; the 2000 acres transferred by Buford to Taylor ; the 1000 acres entered in the name of Taylor on Lost Creek, a branch of the Ohio ; the 500 or the 1500 on Paint Creek ; and give notice to Taylor of such choice, within one month after it should be made.

Commissioners were appointed to lay off and survey the said 500 acres for the complainant ; and it was further decreed, that Taylor should, before the 1st of November then next, convey the said 500 acres to the complainant ; but if the complainant should not make his choice, and give notice as aforesaid, then Taylor should, on or before the 25th of the then next November, convey to the complainant 500 acres out of one of the said tracts, in a reasonable form, according to the condition of the bonds ; and that Taylor should pay the costs of the suit. Upon this decree, the complainant sued out his writ of error.

Breckenridge, Attorney-General, for plaintiff in error.—The records *276] show that Taylor had no land on Hingston, *and that, at the time of the decree, the plaintiff had not the liberty to choose out of the 5000 acres.

When a specific execution of a contract is decreed, it must be decreed to

be executed entirely, or not at all. Contracts receive the same construction in a court of equity as in a court of law. Neither can make an agreement for the parties. A court of law, in the construction of the present bond, on an action of debt, upon a breach of the condition in not conveying land on Hingston, could not consider the bond as discharged by the conveyance of land on Slate Creek. The defendant knew, or ought to have known, his property, so as not to deceive the plaintiff.

The difference in value between the lands on those two water-courses, is found by the jury to be a dollar and a half per acre. Suppose, the land on Slate Creek had been worth ten times as much as that on Hingston, the defendant could not, by this bond, have been compelled to convey land on Slate Creek, when he had contracted to convey land on Hingston. As the defendant, therefore, had no lands on Hingston, a specific performance of the contract was impracticable, and therefore, the plaintiff was, at least, entitled to damages to the value of those lands.

The decree is erroneous in another point. It directs the plaintiff to make choice out of 5000 acres of the defendant's land, when it is confessed. by the answer that the defendant had but 4500 acres; the 500 on the waters of Paint Creek having been sold by him. It is true, that the 12th fact found is, that the defendant is willing to let the plaintiff have his choice out of all his military lands, including these 500 acres, but a jury can find nothing contrary to that which is confessed or not denied in the pleadings.

*The court below has decreed that the defendant may specifically execute his contract, although it appears, 1. That he has no land on Hingston. 2. That he has sold 500 acres of the 5000, and, consequently, 3. That the 6000 acres out of which the plaintiff had a right to choose, is reduced to 4500. [*277

By the contract, the plaintiff had a right to choose out of 6000 acres, and as the defendant had no land on Hingston, is it not fair and equitable, that the plaintiff should have liberty to choose out of the defendant's 6000 acres? And as the defendant has reduced the plaintiff's choice to 4500 acres of land, inferior to the other 1500 acres, the plaintiff seems to be entitled to damages for the difference in quality. The plaintiff is certainly entitled either to a choice out of the whole of the defendant's military lands, or damages equal to the whole value of the lands on Hingston.

Hughes, for the defendant in error. Two questions arise in this case: 1. Had the plaintiff a right to choose lands not mentioned in the bond? 2. Has any conduct of the defendant enlarged the plaintiff's right of choice, under the contract?

The bill charges no fraud. Massie's 1000 acres were not within the plaintiff's choice. Taylor meant to reserve these 1000 acres unincumbered. The plaintiff was to choose only out of 5000 acres; and, although Taylor had a right to locate 6000 acres, yet that was no reason for the plaintiff's claim to choose out of the whole 6000. The answer of Taylor positively denies that the plaintiff's choice was intended, or understood by either party, to extend to the whole 6000 acres of military land; and this answer being responsive *to an allegation in the bill, and not contradicted by evidence, is conclusive upon that point. [*278

2. Has any conduct of the defendant enlarged the plaintiff's right of

choice? He relies on the mistake in the description of the land, but does not allege fraud. If it was a mistake, both parties were equally ignorant, as both lived in Botetourt county, in Virginia. It was not known to either, that the lands on one of the creeks was more valuable than those on the other, or that they would become so, in the course of the twenty years which have now elapsed since the date of the contract.

The words of the bond are, "out of one thousand acre tract located by the said Richard Taylor, on Hingston's fork of Licking." The real location was "on a buffalo road leading from Hingston's fork to the sweet licks." The description was intended to be of the tract located by the defendant several years before, and was not intended to fix its locality. Both the parties meant the same thing; they meant the 1000 acre tract located by the defendant in 1780, wherever it might lie. The fact turned out to be, that the tract did not lie exactly as it was supposed to lie, but still, it was the same tract which was contemplated by both parties. The description "on Hingston's fork of Licking," could not, at that time, influence the plaintiff; he has not even averred in his bill, that it did. The defendant has always been ready and willing to give the plaintiff his choice in the land actually intended by both parties, at the time of the contract.

The jury have found the present comparative value of the lands, not what it was twenty-two years ago. Its present value may depend on a variety of circumstances, which could not have been foreseen and contemplated, at the time of the contract.

*279] *The defendant is ready specifically to execute the contract as it was understood by the parties at the time; but as the plaintiff now construes it, it cannot be executed specifically, and therefore, there is no ground for an equitable jurisdiction. The party must be left to his remedy at law.

There is no contradiction between the admission in the defendant's answer, that he had sold the 500 acres which the plaintiff had refused, and the 12th fact found by the jury, that the defendant was willing that the complainant should make his choice out of those 500; for although the defendant may have sold them, yet, it does not appear that he has conveyed them away, and he may be willing to forfeit his contract for the sale of them, if the plaintiff should choose them; or if conveyed, he may be willing to take the chance of repurchasing them.

The *Attorney-General*, in reply.—Under no rational or legal construction of the bonds, can they be supposed to refer to lands located on Slate Creek, when they mention lands located on Hingston. This would be to make, and not to construe, the contract. The acquirement of land on Hingston was the plaintiff's object. It was unimportant to him, by whom, or when, the lands were located.

If the defendant had contracted to transfer, on a certain day, six per cent. stock, he could not discharge that contract by the transfer of three per cent. stock, although he should make up in quantity the difference of value arising from the different quality of the stock. But here the defendant offers only the same quantity of inferior land.

It is no excuse for the defendant, to say that no fraud was intended by him in describing the land as lying on Hingston, when it laid on Slate; and that it

was a mere mistake of a name. Whether it happened by mistake or fraud, is totally immaterial to the plaintiff. The defendant sold, and the plaintiff bought, the land on the defendant's own description. He was bound to describe it truly. But the jury have found his description to be false in a very important particular. The injury to the plaintiff is the *same, whatever may have been the motives of the defendant, and he is equally [*280 bound to repair the injury. The plaintiff, therefore, if not entitled to the land on Paint Creek, which he has elected, or to the value thereof, is entitled to the value of the lands on Hingston.

Marshall, Ch. J., delivered the opinion of the court.—The bill states the original contracts, and claims a specific performance, by permitting the plaintiff to elect the 500 acres to which he is entitled, out of the tract of 1000 acres, which had been located on Paint Creek; and also contains a prayer for general relief.

On the specific object of the bill, the right to make an election out of the lands on Paint Creek, there can be no difficulty. One thousand acres, part of the original warrant, having been clearly withdrawn, at the time of the contract, from the quantity out of which the 500 acres, sold by the defendant, were to be chosen, there can be no pretext for the claim set up in the bill. As little foundation is there for the claim to damages, instead of the land itself, on account of the 500 acres stated in the answer to have been sold; which sale, the counsel for the complainant considers as a wrong, which has put out of his client's reach a tract he had a right to elect, and has, consequently, disabled the defendant from complying with his contract. To this claim two answers may be given, either of which would completely defeat it.

1st. The fact found by the jury shows, that the defendant is still ready to convey this land. The attorney-general would exclude this finding from the case, because it contradicts the admission of the answer; and it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded. The principle of law is unquestionably laid down correctly; but the court can perceive no incompatibility between the admission of the answer, and the fact, as found by the jury. They may both be true; and, of consequence, *the court must consider both as true. After [*281 the answer was filed, the land may have been repurchased by Mr. Taylor, and such a repurchase would have been proper evidence, to justify the fact found by the jury, and would put him in a situation to perform his contract, so far as respected this particular tract. But were it even otherwise—

The 2d answer is, that the concession made by the defendant must be taken altogether. He states the complainant to have refused this particular tract of 500 acres, before it was sold. The complainant had, consequently, elected not to take it, and, of course, the defendant was at liberty to dispose of it.

The other point in the case is attended with more difficulty. It is, that the representation made by Taylor, at the time of the sale, was untrue in a material point. He represented the tract of 1000 acres which had been located, and out of which the plaintiff would have a right to take the lands he purchased, to lie on Hingston's fork of Licking, when, in truth, it lay on

Slate, another branch of the same river, where the lands prove to be less valuable than on Hingston. That this misrepresentation is material, cannot be denied; but it is contended by the defendant, that it originated in mistake, not in fraud; and as the country was, at that time, unknown to both the contracting parties, and the material object was to give the purchaser a right to take the land he had purchased out of the tract already located for the seller, an accidental error in the description of the place where the tract in contemplation of the parties lay; an error which could have had, at the time, no influence on the contract, ought not now to affect the person who has innocently committed it.

From the situation of the parties and of the country, and from the form of the entry, it is reasonable to presume, that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain *liable for that variance. *282]
In this case, the defendant has sold land on Hingston, and offers land on Slate. He has sold that which he cannot convey, and as he cannot execute his contract, he must answer in damages. It is, therefore, the opinion of the court, that the plaintiff is entitled to an issue to ascertain the damages he has sustained by the inability of the defendant to perform his contract, and to the damages which shall be found.

Although, in the general principles laid down, the court was unanimous, I did not, in consequence of the particular circumstances of this case, concur in the opinion which has been delivered. I will briefly state those circumstances.

In his bill, the plaintiff does not allege that he was, in any degree, induced to make the contract, by supposing the land already located to lie on Hingston's fork. This representation, then, was an accidental circumstance, which has not, in the slightest degree, influenced his conduct. Nor does he now, in his bill, urge this variance in the description of the property as a reason for claiming damages, instead of the specific thing contracted to be sold. Nor does it appear, that this claim was set up in the district court. On the contrary, he alleges, that the land on Paint Creek is also in his power, and insists on making his election out of that tract. Under such a bill, in a case where the contract is a very advantageous one to the purchaser, I am not convinced, that a court of equity ought to award him damages, on account of an error in the description of the property, which was innocent in itself, which at the time appeared to be unimportant, and which most obviously did not conduce to, nor in any manner affect, the contract. The person claiming damages in such a case should, I think, be left to his remedy at law. I should, therefore, have been disposed to affirm the decree of the district court. I am, however, perfectly content with that which I have been directed to deliver.(a)

(a) The Judges present were, MARSHALL, Ch. J., PATERSON, WASHINGTON and JOHNSON, Justices.

*Wilson *v.* Speed.

Competency of witness.—Final judgment.

An assignee of a pre-emption warrant is held to be a competent witness, if the facts intended to be proved by his testimony do not tend to support the title of the party producing him.

A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits.

Error to the District Court of Kentucky, on a judgment which dismissed the *caveat* of Wilson against Speed. The *caveat* was in these words:

"Let no grant issue to James Speed, a citizen of the state of Kentucky, for 139 acres of land, said to be surveyed upon an entry of 200 acres, by virtue of a treasury-warrant, number 13,800, the 24th of November 1782, and the survey dated the 10th day of November 1797, because John Wilson, a citizen of the state of Virginia, claims the same; part, by virtue of a survey made on his settlement-right, the 20th day of January 1786, and part, by virtue of a survey made on the entry of his pre-emption warrant, on the 20th day of January 1786, for Andrew Cowan, and assigned by him to William Dryden, for his use; which claims are of a superior nature to the said Speed's. April 22d, 1799.

(Signed) John Wilson."

The facts appearing upon the record, so far as they are pertinent to the questions before this court, were as follows: In the year 1776, Wilson made an improvement, by raising a crop on the land, and built part of a cabin. In consequence of this improvement, he obtained, on the 16th of February 1780, a certificate for a settlement-right to 400 acres, and a right of pre-emption to 1000 acres. On the same day, Andrew Cowan obtained a certificate for the pre-emption of 1000 acres, on account of marking and improving the same, in the year 1776, adjoining the lands of John Wilson, on the north side, to include his improvement.

*On the 23d October 1780, Andrew Cowan entered a pre-emption warrant for 1000 acres, on the head-waters of Boon's Mill creek, to include his cabin, and the head-waters of several small branches running into Kentucky and Dick's rivers. "Also, as assignee of John Wilson's one thousand acres, adjoining the above, including said Wilson's cabin." On the 29th of April 1783, John Wilson entered "400 acres of land, by virtue of a certificate for settlement, lying on a dividing ridge between the waters of Kentucky and Dick's rivers, to include part of both waters, and his improvement." These 400 acres were surveyed for Wilson on the 20th of January 1786; and were never assigned by him. [*284

On the same day, the 1000 acres, upon the pre-emption warrant, were conveyed for Andrew Cowan as assignee of Wilson. On the back of this original certificate of survey was written an assignment, purporting to be from Andrew Cowan to William Dryden, and attested by "Young Ewing." And also an assignment (made by order of Garrard county court, during the pendency of the present *caveat*), by certain commissioners, in behalf of the heirs of Dryden, to William Buford.

On the 24th of November 1782, James Speed, the defendant, entered 200 acres upon a treasury warrant, the survey upon which was the cause of the present *caveat*. This survey was for 139 acres, part of the 200, dated the

10th of November 1797, and interfered with Wilson's survey of 400 acres, upon his settlement-right, and with that for 1000 acres, pre-emption, which were surveyed in the name of Andrew Cowan, as assignee of Wilson.

Upon the inquiry into the facts, before the jury, the plaintiff, Wilson, took two bills of exception. The first stated, that he offered to produce
*285] the said Andrew Cowan (who had released to the plaintiff, and *all claiming under him, all his, the said Cowan's, right to the land, &c.) to prove, that although the pre-emption warrant for the 1000 acres was taken out in his name, it was not taken out by him, nor with his privity; and that, although the entry was in his name, it was not made by him, nor with his privity. And also, to prove that he never did, and does not now, set up any claim or title to the said pre-emption, or any part thereof. Also to prove, that the assignment on the original survey of the said pre-emption, now brought into court by the register of the land-office, purporting to be an assignment made by the said Cowan to William Dryden, was not executed by him; the execution of the same not being proved by "Young Ewing," the attesting witness to the same. But the court was of opinion, that the said Cowan was not a competent witness, and excluded him from giving testimony.

The 2d bill of exceptions stated, that, after the testimony of Cowan was excluded, the plaintiff offered to produce Charles Campbell, to prove that the said assignment, and the signature thereunto, as well as the name of the attesting witness, were in the handwriting of William Dryden; to the admission of which testimony the defendant objected, alleging, that "Young Ewing," the subscribing witness, ought to have been produced; and the court being of that opinion, the testimony of Charles Campbell was also excluded; and the *caveat* was dismissed, with costs.

Hughes, for the plaintiff in error, contended, that the judgment of the court below was erroneous, for two reasons; 1st. Because the witnesses who were rejected, were competent; and 2d. Because the *caveat* ought not to have been dismissed, as to that part of the defendant's survey which interfered with Wilson's survey of 400 acres, upon his settlement-right.

*286] *1. As to the rejection of the witnesses. If Cowan had any interest it was removed by the release. And if it be alleged, that he ought not to be permitted, upon the ground of policy, to discredit his own paper, the answer is, that that principle has been applied only to negotiable paper; but here, the witness is called merely to disprove what is alleged to be his handwriting. It is to show that he never put his hand to the paper, and not to invalidate a paper to which he had given a credit, by subscribing his name. The counsel for the defendant below relied upon the case of *Walton* v. *Shelly*, 1 T. R. 296, but, besides the inapplicability of the case, it has been overruled by that of *Jordaine* v. *Lashbrooke*, 7 Ibid. 601.

But Campbell's testimony ought not to have been rejected. The court rejected it, on the ground that "Young Ewing," the subscribing witness, ought to have been produced. It is true, that if we had wanted to establish the assignment from Cowan as genuine, it would have been incumbent upon us to have produced Young Ewing, or accounted for his absence. But if the assignment was fictitious, how was Young Ewing to prove that Cowan did not execute it? He could only say, that his own name was not written by himself, and that he did not subscribe his name as a witness to that instrument;

but it does not necessarily follow, that Cowan did not execute the assignment. The testimony of Young Ewing was not the best evidence of the fact that the plaintiff wished to prove. Whereas, Campbell could have proved expressly, that the whole assignment and signatures were written by Dryden, and not by Cowan and Ewing.

2. But the judgment is erroneous, because it dismissed the *caveat*, and did not decide which of the parties "hath the better right." It does not appear to have been decided upon its merits; particularly, so far as the plaintiff claimed a settlement-right.

Breckenridge, Attorney-General, for the defendant.—The testimony of Cowan was properly rejected on three grounds.

*1. Because it went to prove a title different from that set up by the plaintiff. The act of assembly requires that the *caveat* should express "the nature of the right on which the plaintiff therein claims the land." The *caveat* states, that he claims "by virtue of a survey, made on the entry of his pre-emption warrant," "for Andrew Cowan, and assigned by him to William Dryden, for his" (the plaintiff's) "use." The proof offered was, that the survey and warrant never was assigned by Cowan. The plaintiff, therefore, wished to bring proof to contradict his own allegations. The jury are, by the land law, to find "such facts as are material to the cause, and not agreed by the parties." But the facts offered to be proved, were foreign to the cause. [*287

2. Because the testimony went to contradict and falsify a record. According to the uniform decisions of the courts in Kentucky, warrants, entries and surveys are matters of record, as much as the patent. The records produced by the plaintiff show, that the warrant, entry and survey are in the name of Cowan, and that Cowan assigned to Dryden, and that Dryden's heirs, by a decree of Garrard county court, assigned to Buford. The facts would have been contradicted by the testimony offered.

But if the plaintiff could be permitted to invalidate or falsify the record, it could not be done on the trial of a *caveat*, which is intended as the means of trying legal rights to incipient titles; titles which are on their passage to maturity. (*Wilson* v. *Mason*, 1 Cr. 66.) It is a proceeding in derogation of the common law, and ought be strictly pursued. If Cowan has no title, or is only a trustee, this inquiry cannot be made in the trial *of a *caveat*, but must be made in equity. Dryden's heirs cannot be bound by such an *ex parte* inquiry; and they are interested as assignees of Cowan. In order to overturn the claim of Speed, Wilson must have had a prior existing legal right. [*288

3. Because the witness might be ultimately benefited by the event of the suit. The release is of no avail; it came from the wrong quarter. Cowan ought to have been released by Dryden's heirs and Buford. Cowan is interested in one of two ways, or in both; 1st. In the ultimate goodness of the title by his assignment; or 2d. For having assigned that to which he had no claim. If Wilson prevails, Cowan is benefited, because the title which he transferred is sanctioned and settled by the decision. If the determination of a cause may, perhaps, prevent a suit against the witness, he is inadmissible. Esp. N. P. 705.

As to the correctness of excluding Campbell's testimony, there can be no

doubt. To have received it, would have violated that known rule, that the subscribing witness to an instrument must be produced. This rule, it is true, has some exceptions, but none that will include this case. Esp. N. P. 780.

But if all the testimony offered had been admitted, it would have been irrelevant; and would have been bad upon demurrer. At the time of entering the *caveat*, the plaintiff had no right in law, because it was registered in the name of Dryden. At the time of the decree, it was in Buford, under the decision of the court of Garrard county.

With respect to the 2d point made by the plaintiff's counsel, viz, that the *caveat* was not dismissed upon the merits, so far as relates to the plain-
*289] tiff's settlement-right, he is probably mistaken in point of fact. *The judgment of the court, although not altogether full and formal on this point, justifies the inference that the court did examine into the merits of that claim. Of this, however, the court here will judge for themselves, upon an inspection of the judgment itself, as stated on the record. It says, "the court being now sufficiently advised of and concerning the premises, is of opinion, that the *caveat* herein be dismissed;" and this is the only judgment which could have been given against the plaintiff. If the judgment had been for the defendant, it would have said, that he had the better right.

Hughes, in reply.—It has always been the practice of the courts in Kentucky, to decide the right to be in the plaintiff or defendant, when the decision is on the merits.

The testimony offered, did not go to prove a different title from that set up by the plaintiff; it went to prove his allegation to be substantially true.

The process by *caveat* is a summary remedy, and the law, by directing the court to decide according to the very right of the case, gives a chancery jurisdiction. In case of a *caveat*, there can be no legal title. It is a process given expressly to prevent a legal title. The entry, &c., are not matter of record. It is true, there appears to be an assignment on a paper in the register's office, but that does not make the assignment a record.

Cowan was not interested. He was not liable to Dryden, if the assignment was a forgery. Campbell's testimony was the best evidence to prove the fact for which it was offered. That of the subscribing witness might be the best evidence that the assignment was genuine, but not that it was a forgery.

*290] *The judgment was not upon the merits, and there is nothing in the record from which a contrary inference can be drawn.

February 14th, 1806. Marshall, Ch. J., delivered the opinion of the court.—In this case, the errors assigned are, 1. That testimony has been improperly rejected by the judge of the district court. 2. That the *caveat*, as to that part of the land which was claimed in virtue of the survey on Wilson's settlement-right, was improperly dismissed.

The *caveat*, so far as respects the claim of Wilson, in virtue of the survey on his pre-emption warrant, thus stated his title: "John Wilson claims, by virtue of the survey, made on the entry of his pre-emption warrant, for Andrew Cowan, and assigned by him to William Dryden, for his use." The pre-emption warrant issued on Wilson's certificate to Andrew Cowan, as assignee thereof; the survey was made in Cowan's name, and is

assigned to William Dryden, but the assignment does not purport to be for the use of John Wilson.

At the trial, the plaintiff offered to prove that the assignment to Cowan was made in trust for himself, and that the assignment to Dryden was never made by Cowan. The witness, by whom these facts were to be substantiated, was Cowan himself. He was objected to by the counsel for the defendant, as incompetent, and the objection was sustained by the court. To this opinion of the district judge, an exception was taken, and the question proposed is, the competency of Cowan to prove the fact, that he never was entitled to the land in controversy, and did not make the assignment of the survey. *We put the release out of the case, because it cannot affect [*291
the interest of Cowan, if he had any, that interest being a liability to the person appearing to be his assignee. Upon a consideration of this fact, and its connection with a *caveat* brought by Wilson, the witness appears to the court to stand free from any possible objection on the part of the defendant. It would not appear, that he could derive a benefit from proving, in this cause, that he never was entitled to the land in dispute, and never assigned the survey.

But from the facts proposed by the plaintiff, which were before the court, it appears, that Dryden had sold to Buford, for whose benefit this *caveat* was really brought; and it is alleged by the counsel for the defendant, that if the testimony of the witness would establish the right of those who might ultimately resort to him, under his supposed assignment, and such a suit would be prevented by a decision of this *caveat* in favor of Wilson, he is, therefore, an incompetent witness; but the court does not perceive that this consequence would flow from the testimony; and if it is imagined, that Cowan might suspect it, this would constitute an objection rather to his credit than his competency. Cowan, therefore, was competent to prove the facts to establish which his testimony was offered.

But if he had been received, and had established those facts, what would have been their amount? They are, "That Cowan never did purchase the said pre-emption, did not make the entry on the pre-emption warrant, or survey it, or procure it to be surveyed, and does not now, nor ever did, claim title to the same. That the plaintiff, claiming to own the land, did sell it to William Dryden, who sold the same to William Buford, for whose benefit the *caveat* was brought." These are the facts which the plaintiff proposed to prove, and which are stated on the record. Had they *been proved, [*292
it appears to the court, that the *caveat* ought to have been dismissed. These facts do not support the title set up in the *caveat*.

It is conceived by this court, that the statements made in the *caveat* could only be supported by an assignment, which, on the face of it, purported to be for the use of Wilson. That an assignment made to Dryden, whereby the legal ownership of the survey was conveyed to him, although, in fact, intended for the benefit of Wilson, would not enable Wilson to maintain a *caveat* in his own name. It would authorize him to use the name of Cowan, but not to prosecute the suit in his own name. If, however, a contrary practice has been firmly established in Kentucky, the court would be very unwilling to shake that practice. But in this case, the assignment to Dryden was not, in fact, for the use of Wilson, but of Dryden himself. The testimony, therefore, if received, could only have defeated the plaintiff's

action. It cannot be said, therefore, that the judge has erred in dismissing the *caveat*, as to the part claimed under the pre-emption warrant.

But with respect to so much of the *caveat* as was supported by the survey on the settlement-right, no exception of form, or to the testimony, has been taken, and it ought not, therefore, to have been dismissed, but on the merits. On this point, therefore, there is error in the judgment of the district court, for which it must be reversed.

This cause came on to be heard, on the transcript of the record of the proceedings of the court for the district of Kentucky, and was argued by counsel, on consideration whereof, it seems to the court, that there is error in the judgment of the district court in this, that the *caveat* entered by the plaintiff was entirely dismissed, whereas, it ought to have been decided on its merits, so far as respected that part of the land which was claimed by the plaintiff, under his survey of four hundred acres. It is, therefore, considered *293] by the court, that the said judgment be reversed and annulled; *and that the defendant pay to the plaintiff, his costs. And the cause is remanded for further proceedings.

Buddicum *v.* Kirk.

Deposition.—Payment.—Accord and satisfaction.

Notice of the time and place of taking a deposition, given to the attorney-at-law of the opposite party, is not such notice as is required by the act of assembly of Virginia.[1]

But the attorney-at-law may agree to receive, or to waive notice, and will not afterwards be permitted to allege the want of it.

If notice be given, that a deposition will be taken on the 8th of August, and that if not taken in one day, the commissioners will adjourn from day to day, until it shall be finished; and the commissioners meet on the 8th, and adjourn from day to day until the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeable to notice.

Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence.

An assignment of debts, and balances of accounts, cannot be pleaded as an accord and satisfaction, to an action of debt on a bond.

Error to the Circuit Court of the district of Columbia, in an action of debt against the defendant, as heir-at-law of the obligor, on a bond dated the 20th of September 1774, conditioned to pay 994*l.* 3*s.* 5*d.*, Virginia currency, in equal instalments, at six and twelve months from the date of the bond.

The defendant, being an infant, pleaded by Archibald McLain, his guardian. 1. Payment; to which there was a general replication and issue.

2. That after the execution of the bond, viz, on the ——— day of ——— 1784, at, &c., it was accorded and agreed, between the plaintiff and the said James Kirk (the obligor), in his lifetime, that the said James Kirk should assign and make over to the plaintiff, all the balances of money due to the said James Kirk and one Josiah Moffett, arising from a store kept by them in partnership, in the town of Leesburgh, in discharge and satisfaction

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[1] Wheaton *v.* Love, 1 Cr. C. C. 429.

of the said bond; and that the said James Kirk did, afterwards, on the day and year last mentioned, at the town aforesaid, pursuant to the said accord and agreement, assign and make over to the plaintiff, all the aforesaid balances, and the plaintiff did then and there receive the said assignment and transfer of the said balances, in satisfaction for the said bond; and this he is ready to verify, &c. This plea was adjudged bad, on general demurrer.

*3. That after the execution of the said writing obligatory, the plaintiff, by his certain deed of release, with his seal sealed, which [*294 said deed is lost and destroyed by time and accident, did release and discharge the said James, in his lifetime, and his heirs, of and from the payment of the said writing obligatory, that is to say, on the ——— day of ——— , in the year 1784, at the county aforesaid; and this he is ready to verify. To which plea, there was a general replication and issue.

Upon the trial, the jury found both the issues of fact for the defendant, and the plaintiff took two bills of exception.

1. The first stated, that the defendant offered in evidence the deposition of Patrick Cavan, tending to prove that wheat, to the amount of 166*l.* 8*s.* 10*d.*, had been delivered by the obligor to the plaintiff, on account of the bond, and sundry debts due to Kirk & Moffett had been assigned to the plaintiff, in full discharge of the bond; and that the plaintiff had indulged some of the debtors, until the debts were barred by the statute of limitations. That notice was given to the plaintiff's attorney, that the deposition would be taken on the 8th of August 1801, and if not taken in one day, that the commissioners would adjourn from day to day, until it should be finished, and that he agreed that it might be taken on that day, whether he attended or not; but did not assent or object to its being taken on any other day. That the commissioners, to whom the *dedimus* was directed, met on the 8th of August 1801, and adjourned to Monday the 10th, and from the 10th to the 11th, from the 11th to the 12th, and from the 12th to the 19th, when the deposition was taken. That the plaintiff's attorney did not attend on the 8th, or any of the other days, and had no notice of the several adjournments. That the defendant also offered to prove by Archibald McLain, that the plaintiff's attorney, after the deposition was taken, read it, but did not then object *to its being read in evidence; and that the said Patrick Cavan died before the trial. To the reading of this deposition, the [*295 plaintiff objected; but the court suffered it to be read.

2. The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that the defendant was not entitled, on the plea of payment, to discount the bonds and notes assigned to the plaintiff, as mentioned in the deposition of Cavan, unless it should appear to the jury that the same had been collected by the plaintiff; which instruction the court refused to give, but directed the jury, that the deposition was competent evidence to be offered in proof of a discount, on the plea of payment.

E. J. Lee, for the plaintiff in error, contended, 1. That the deposition was irregularly taken, inasmuch as a notice to take a deposition on the 8th, is not notice to take it on the 19th; and although notice was given, that if the deposition was not taken on the 8th, the commissioners would adjourn from day to day, yet in this case, they adjourned over from the 12th to the 19th, without giving new notice. Besides, the notice in this case is to the

attorney-at-law, and not to an attorney in fact. If it be said, that an attorney-at-law may bind his client, by an agreement relative to any matter in the proceedings, or trial of a cause, yet, the assent of the attorney only went to the taking the deposition on the 8th of August, and not on any subsequent day.

2. It was not competent for the defendant to prove that assent, by the testimony of Archibald McLain, who was his guardian of record, and answerable for costs.

3. The matter contained in the deposition was not competent evidence, upon either of the issues. It certainly was not evidence of a release under seal; and the assignment would not be a payment, unless it produced the money to the plaintiff. If anything but money is relied upon as satisfaction of a bond, it must be pleaded by way of accord and satisfaction, and not
*296] *as payment. One bond cannot be pleaded in discharge of another, *à fortiori*, cannot an assignment of a bond. *Rhodes* v. *Barnes*, 1 Burr. 9.

Simms, for the defendant.—1. If the plaintiff had not notice of the time of taking the deposition, it was his own fault, or that of his attorney. The attorney, having received and acknowledged notice for the 8th of August, was bound to attend; and if he had attended, he would, of course, have had notice of the adjournment. This want of notice, therefore, is to be attributed to his own negligence. But if the notice was insufficient, the court, under the circumstances of the case, did not err in admitting the deposition. When the plaintiff's attorney read the deposition, he did not object. By his silence, he lulled the defendant into security, at a time when, if the objection had been made, he might have corrected the mistake, by giving new notice, and taking the deposition *de novo*. But instead of that, he concealed his objection, until the deponent was dead, and when he knew that the defendant would totally lose the benefit of his testimony. In such a case, the court will say, that the silence of the attorney, when he read the deposition, was a waiver of the notice.

2. As to the second objection, that Archibald McLain was not a competent witness, because he was the guardian of the defendant. It does not appear upon the record, that the witness was the same Archibald McLain, who was the guardian. And besides, it appears, that before the trial, the defendant himself was of age, and had leave to appear by attorney.

3. As to the objection, that the matter of the deposition was not competent evidence on the issues. The court did not say it was complete proof of payment, but that it was matter proper to be left to the jury, upon the plea of payment, and from which a payment might be inferred.

*297] *March 1st, 1806. MARSHALL, Ch. J., delivered the opinion of the court to the following effect:—This case comes up on two bills of exception, 1st. As to the notice of taking the deposition; and 2d. As to its applicability.

1. As to the notice. There are two modes of taking depositions, under the act of congress. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. This deposition is not taken under that part of the act. By a subsequent part of the section, depositions may be taken by *dedimus potestatem*, according to common usage. The laws of Virginia, therefore, are to be referred to on the subject of notice.

Those laws do not authorize notice to an attorney-at-law. The word attorney, in the act of assembly, means attorney in fact. An attorney-at-law is not compellable to receive notice; but he may consent to receive, or he may waive it, and shall not afterwards be permitted to object the want of it. But this deposition was not taken agreeable to the notice received. The commissioners did not adjourn from day to day; but passed over the intermediate time between the 12th and the 19th of August.

This circumstance, however, is not, by the court, deemed fatal, under the particular circumstances of this case, though, without those circumstances, it might, perhaps, be so considered. The agreement that the deposition might be taken, whether the attorney were present or absent; his subsequent examination of the deposition, without objecting to the want of notice, and the death of the witness, were sufficient grounds for the defendant to believe that the objection would be waived.

2. The objection to the competency of McLain is totally unfounded, as it does not appear upon the record *that he was the guardian; and especially, as the defendant became of full age before the trial. [*298

3. The objection to the applicability of the deposition is also void of foundation. For although it was not conclusive evidence, it was still admissible.

The court is, therefore, of opinion, that there is no error in the judgment below.

Judgment affirmed.

Douglass & Mandeville *v.* McAllister.

Charge of the court.—Damages.

The court, upon a jury trial, is bound to give an opinion, if required, upon any point relevant to the issue.

Semble. In estimating damages for the breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose.

McAllister *v.* Douglas, 1 Cr. C. C. 241, affirmed.

Error to the Circuit Court of the district of Columbia, in an action of *assumpsit*, for not delivering flour according to contract.

The transcript of the record contained a bill of exceptions, which stated, that the plaintiff offered in evidence the following writing, addressed by the plaintiff below, to the defendants, the present plaintiffs in error, viz:

"Will you receive my flour on the following terms, viz., whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the wagoner, and deduct it from the carriage. You will credit me with the highest market price, at the time of delivery, and note it on the receipt; and any balance of flour that may remain in your hands, unpaid as it is delivered, you will pay me, when I send for it, or deliver as much flour as is coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed or charged at six pence per barrel.

"Agreed. Given under our hands, Alexandria, April 27th 1803.

(Signed) Douglass & Mandeville.
John McAllister."

*The defendants had received from the plaintiff 408 barrels of flour, under that contract, and the plaintiff made his election, and de- [*299

manded the flour of the defendants, on the 14th of October 1803. No final answer was made by the defendants to the demand, until the 19th of November; but the intermediate time was given to them to consider of the demand and make propositions of compromise. No compromise being made, and the flour not being delivered, this action was commenced, on the 21st of the same month. It did not appear, that any answer was given to the plaintiff's demand.

At the trial, the plaintiff offered evidence to the jury of the price of flour on the 19th and 21st days of November, the price being the same on both days, and contended to the jury only for that price. Whereupon, the counsel for the defendants prayed the court to instruct the jury, that in estimating the compensation for the non-delivery of the said flour, they should be governed by the price of that article on the day the plaintiff signified his option, and made his demand under the contract, to have the flour specifically delivered to him; and further prayed the court, in case the aforesaid instruction was not given, to direct the jury by what rule, in point of time, they are to take the price of flour in the estimation of the damages, sustained by the plaintiff, by reason of the breach of the contract. But the court being divided in opinion upon those points (two judges only being present), did not give the instructions as prayed, wherefore, the defendants excepted, &c.

The jury found a verdict for the plaintiff, for $2159.48, upon which judgment was rendered accordingly, and the defendants brought their writ of error. The question before this court was, whether the court below ought to have given the instructions prayed for by the plaintiffs in error.

This question was submitted, without argument, by *Swann*, for the plaintiffs in error, and *E. J. Lee*, for the defendant.

*300] *February 17th, 1806. MARSHALL, Ch. J.—The error complained of is, that the circuit court did not give an opinion on a point proposed. The court was certainly bound to give an opinion, if required, upon any point relevant to the issue.

It appears, from the facts stated, that the cause of action did not accrue until the 19th of November, when the negotiation for a compromise was broken off. A tender of the flour at any time after the 14th, and before the 19th, would have been a compliance with the contract. As the plaintiff claimed no more than the price of the flour on the 19th, and as the refusal of the court to instruct the jury did not alter the verdict, which was for the price on that day, and was for the same amount as if the opinion had been given, there is no error of which the defendants could complain.

Judgment affirmed, with costs.

Simms and Wise *v.* Slacum.

Insolvent discharge.—Fraud.

A discharge from the prison rules, under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law; and upon such discharge, no action can be sustained upon the prison-bounds bond.[1]

Slacum *v.* Simms, 1 Cr. C. C. 242, reversed.

Error to the Circuit Court of the district of Columbia, in an action of debt, brought by Slacum, as assignee of Charles Turner, sergeant of the court of Hustings of Alexandria, upon a prison-bounds bond, in which Simms was the principal, and Wise, the surety.

The condition of the bond was as follows: "Whereas, Jesse Simms, in jail and custody, by virtue of a writ of *capias ad satisfaciendum*, sued out of the clerk's office of the court of Hustings, holden in Alexandria, dated the 12th day of August 1800, at the suit of George Slacum, assignee of Charles Turner, sergeant of the court of Hustings aforesaid, for the sum of $1285.45, *including all legal costs at the time of the caption aforesaid, having prayed the benefit of the prison rules, as laid out and bounded by [*301 order of the court of Hustings aforesaid, and having tendered the above-bound Peter Wise, junior, as surety for the same, agreeable to an act of the general assembly in that case made and provided. Now, if the said Jesse Simms do well and truly keep himself within the prison rules, as laid out and bounded by the court of Hustings aforesaid, and from thence not depart, until he shall be discharged by due course of law, or pay the aforesaid sum of $1285.45 to the aforesaid George Slacum, assignee of Charles Turner, sergeant aforesaid, then the above obligation to be void, or else to remain in full force," &c.

The pleadings were finally brought to this issue, whether Simms did depart from the prison rules, without being discharged by due course of law?

At the trial, three bills of exception were taken by the defendants; but the only question decided by this court arose upon the third; which stated, that after the execution of the bond, Simms was discharged by a warrant from two justices of the peace, under the authority of the insolvent act of Virginia; and that, being so discharged, and not before, he departed out of the rules. The plaintiff offered evidence to prove sundry acts of fraud committed by Simms, in order to procure the discharge; whereupon, the counsel for the defendants prayed the opinion of the court, and their instruction to the jury, that if they should be of opinion, from the evidence, that frauds were committed individually by Simms, in obtaining his discharge, but without the participation of the magistrates who granted it, and without the participation of Wise, the other defendant, such frauds, so committed by Simms, could not so far vitiate or avoid the said proceedings under the insolvent act, and the discharge so obtained by Simms, as to charge Wise, in this action, for a breach of the condition of the bond, by reason of Simm's having left the prison rules, by virtue of such discharge. Which instruction the court refused to give; but were of opinion, and directed the jury,

[1] S. P. Ammidon *v.* Smith, 1 Wheat. 447.

that if they should be of opinion, from the evidence, that any fraud was
*302] committed by Simms alone, in obtaining, or for the purpose of *obtaining, the said warrant of discharge, though without the concurrence of either of the magistrates, or of Wise, in such fraud, it did so avoid the discharge so obtained by Simms as to charge Wise in this action, for a breach of the said condition, by reason of Simms's having left the prison rules by virtue of such a void discharge. To which refusal and instruction, the defendants excepted.

The act of assembly of Virginia, 1792, c. 67, concerning the county courts, § 15, P. P. 86,(*a*) authorizes the county and corporation courts to lay out, and mark the "bounds and rules" of their respective prisons; and declares, that "every prisoner, not committed for treason or felony, giving good security to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his or her health, and keeping continually within the said bounds, shall be adjudged in law, a true prisoner."

The act of 1792, c. 79, concerning the escape of prisoners, § 2, P. P. 119, provides, that if a prisoner, having given security for, and obtained the liberty of, the prison rules, shall escape and go out of the same, the sheriff shall immediately apply to a justice of the peace for an escape-warrant, to retake the prisoner, and give notice thereof to the creditor, and assign over to the creditor the bond taken for the liberty of the rules, who shall be obliged to receive the same; and the creditor may proceed to take his debtor upon the escape-warrant; and if he be retaken and committed to jail, the sureties in the prison-rules bond shall be discharged; but if the debtor be not retaken on the warrant, and committed, the sureties are liable to the creditor. And the sheriff is not liable, unless the sureties were insufficient, when taken. By the 1st section of the act, the escape-warrant must be upon the oath of the sheriff, or some other credible person.

The act of 1793, c. 151, for the relief of insolvent debtors, P. P. 303, authorizes two justices of the peace to discharge insolvent debtors, and pro-
*303] vides, that notice *shall be given to the party at whose suit the prisoner is in execution. It declares also, that the warrant of discharge shall be sufficient to indemnify the sheriff against any action of escape. And that the prisoner shall not be again imprisoned upon any judgment obtained previous to his taking the oath, unless by virtue of a *ca. sa.* issued by order of the court in which the judgment shall have been rendered. The estate of the insolvent is vested in the sheriff. But the creditor may, on *scire facias*, have a new *fi. fa.* to seize any property which the debtor may afterwards acquire.

C. Lee, for the plaintiffs in error. A prisoner in the bounds is as much in jail as if within the walls of the prison. The oath of the insolvent debtor was provided as the guard against fraud; but the bond is only a substitute for walls to the prison-bounds. As to the surety, a discharge by a competent authority is conclusive. The warrant of discharge is an indemnity to the sheriff, whether obtained by fraud or not. The act of assembly does not

(*a*) P. P. is used in this book as a reference to Pleasant & Pace's edition of the laws of Virginia, published in 1803, 8vo.

expressly provide, that it shall indemnify the surety as well as the sheriff, but he is within the same reason. The body of the debtor cannot be retaken, unless by order of the court, on proof of fraud. In the case of fraud in the debtor alone, the remedy of the creditor is not by an escape-warrant, but by a new *ca. sa.* against his person, or a *fi. fa.* against his goods.

The sheriff is bound to discharge the prisoner upon receipt of the warrant; if he disobeys it, he is liable to an action of false imprisonment; and after obeying it, he cannot go before a justice of the peace, and swear it was an escape, so as to obtain an escape-warrant. If he cannot get an escape-warrant, he cannot assign the prison-rules bond; for he is, by the act, only authorized to assign it, when an escape has actually happened. The creditor is not bound to take an assignment; nor can he demand it. When, therefore, the debtor is discharged by a competent authority, the obligation of the bond ceases. It is *functus officio;* the surety is no longer liable for an escape, and is *as much discharged as if, after an escape, the debtor is retaken on an escape-warrant, and committed to jail. [*304

The act of assembly did not intend that the bond should give the creditor a new security for his debt, or to place him in a better situation than he would be, if his debtor were to remain within the stone walls of the jail. The bond was intended for the ease and benefit of the debtor. If the bond is a security against the fraud of the debtor, there are no bounds to the responsibility of the surety.

The words "in due course of law," mean by authority of law; that is, by a competent legal authority. The notice required by the act to be given to the creditor, is to enable him to attend and show fraud, if he can. But if the surety is answerable for fraud, it would be more for the interest of the creditor not to show the fraud at that time, but to wait until it has had the effect of obtaining a discharge. If a judgment at law is obtained by fraud, it is still a valid judgment, until reversed.

Swann, for the defendant in error. In England, it is settled, that a discharge under an insolvent act, must be free from fraud or collusion, and in every respect regular. It is true, that the warrant of discharge is *primâ facie* evidence of a due discharge, and throws the burden of proof of fraud upon the other party. Esp. N. P. 167, 245. But fraud, when proved, will "avoid every kind of act." *Bright* v. *Eynou*, 1 Burr. 395.

In order to guard a creditor against the risk of his debtor's escape, when allowed the liberty of the prison rules, the law requires that the debtor should bind himself in a penalty, and if he escapes, he is as much liable at law for the penalty as his surety is, and the surety is as much bound as the debtor. The one is bound exactly as the other is bound. If the penalty is forfeited as to one, it is forfeited as to the other. Whatever would make Simms liable upon the bond, would make Wise equally *liable. If, then, Simms had voluntarily escaped, he would have been liable to [*305 the penalty of his bond. But a discharge obtained by fraud and imposition is, as to him, at least, void; otherwise, you permit a man to take advantage of his own fraud; for if the discharge is valid, it puts an end to his obligation upon his bond. A discharge obtained by fraud is, in substance, as much an escape, as if the prisoner had merely gone off in disguise, or imposed upon his jailers by a borrowed dress. But it is a maxim of law, that no man

shall gain an advantage by his own fraud. If this fraudulent discharge dissolves the obligation of the bond, Simms gains an advantage by his own fraud ; therefore, the fraudulent discharge cannot dissolve the obligation of the bond. If the obligation of the bond be not dissolved as to Simms, it is not as to Wise, for both are equally bound.

But the words of the condition of the bond are, that Simms shall not depart therefrom "until he shall be discharged *by due course of law*." A discharge obtained by fraud and imposition is not a discharge in due course of law ; on the contrary, it is a perversion of the course of law ; the law is turned aside from its due course. Shall Simms be permitted to say, that his discharge, grounded on falsehood, fraud and imposition, is a discharge in due course of law ? If Simms cannot say it, Wise cannot say it. Wise can avail himself of no defence at law, which would not equally avail Simms.

There is a vast difference between the case of the sheriff and that of the surety. The sheriff is bound to obey the warrant : all he has to inquire is, whether the justices had jurisdiction : he is only the officer of the law, and bound to execute all lawful precepts. Not so, the surety : he is a volunteer: he undertakes for the good faith of the debtor : he substitutes himself in his place, to the extent of the penalty.

It is not necessary that the sheriff should swear an escape, before he can assign the bond. It is true, he cannot oblige the creditor to take the bond, unless an escape has been sworn to ; but there is nothing in the law which forbids the sheriff to assign the bond, or the creditor to receive it, without such an oath.

*306] *February 19th, 1806. Marshall, Ch. J., delivered the opinion of the majority of the court.—This case depends on the construction of an act of the legislature of Virginia, which allows the prison rules to a debtor whose body is in execution, on his giving bond, with sufficient security, not to go out of the rules or bounds of the prison ; that is, while a prisoner. The condition usually inserted is, not to depart therefrom until he shall be discharged by due course of law, or shall pay the debt. The act further provides, that the prisoner, on delivering a schedule of his property on oath, to a tribunal constituted for the purpose, and pursuing certain steps prescribed in the law, shall be discharged, and all his property shall be vested in the sheriff, for the benefit of the creditors at whose suit he is in execution.

In the case at bar, the forms of the law were observed, and a certificate of discharge obtained, after which the debtor departed from the rules. Conceiving this discharge to have been obtained by fraud, the creditor brought a suit upon the bond, and the court instructed the jury, that if a fraud had been practised by the debtor, although neither the justices who granted the certificate, nor the surety, partook thereof, yet it avoided the discharge, and left the surety liable in this action. To this opinion, the defendant's counsel excepted, and upon that exception, the cause is before this court.

The certificate of discharge may be granted either by the court, sitting in its ordinary character for the transaction of judicial business, or by two magistrates, who are constituted by law an extraordinary court for this particular purpose. Whether granted in the one mode or the other, it is of

equal validity. In either case, the judgment of discharge is the judgment of a court, and, as such, is of complete obligation.

The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and therefore, all acts performed under them are valid, so far as respects third persons. A *sheriff who levies an execution, under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale [*307 under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud, as if it had been obtained fairly.

When the person who has committed the fraud attempts to avail himself of the act, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose; but it may well be doubted, whether a penalty would be incurred, even by the person committing the fraud, for an act which the judgment would sanction. Thus, if a debtor, taken on mesne process, escapes, he may be retaken by the authority of the sheriff, and if not retaken, the sheriff may be liable for an escape; but if he fraudulently obtains a judgment in his favor, in consequence of which he goes at large, it has never been imagined, that the sheriff could retake him, on suspicion that the judgment was fraudulent, or be liable for an escape, on the proof of such fraud.

Thus, too, where, as in Virginia, an injunction has been adjudged to discharge the body from confinement, if a debtor in execution, by false allegations, obtains an injunction, whereby his body is discharged from prison, or from the rules, it has never been conjectured, that the injunction thus awarded was void, and the acts performed under it were to be considered as if the injunction had not existed. In that case, it would not be alleged that there was an escape, and that the security to the bond for keeping the rules was liable for the debt, because the discharge was fraudulently obtained; but the discharge would have all its legal effects, in like manner as if no imposition had been practised on the judge by whom it was granted. The judgment rendered in his favor may not shield the fraudulent debtor from an original claim, but it is believed, that no case can be adduced, where an act, which is the legal consequence of a judgment, has in itself created a new responsibility, even with respect to the party *himself, much less with [*308 respect to third persons, who do not participate in the fraud.

It would seem, then, upon general principles, that a debtor who has departed from the prison-rules under the authority of a judgment of discharge, granted in due form by a competent tribunal, has not committed an escape, even to charge himself, much less a third person. Such a discharge might not be permitted to protect him from the original debt, even if the case had not been particularly provided for by statute; but the act of departing from the rules, after being thus discharged, could not charge him with a new responsibility, to which he was not before liable, much less will it impose on his security, a liability for the debt. Departing from the rules, after being discharged in due course of law, is not a breach of the condition of his bond.

This opinion receives great additional strength from those arguments,

drawn from the objects and provisions of the act, which have been forcibly urged from the bar. The objects of the act unquestionably are, not to increase the security of the creditor, but to relieve the debtor from close imprisonment in the confined jails of the country, and to consult his health, by giving him the benefit of fresh air. But as this indulgence would furnish the means of escaping from the custody of the officer, and thereby deprive the creditor of his person, it was thought necessary to guard against the danger which the indulgence itself created, not to guard against dangers totally unconnected with this indulgence. Security, therefore, ought, in reason, to be required against a departure from the rules, without a lawful authority so to do, because the means of such departure were furnished by being allowed the use of the rules; but security against a fraud in obtaining such authority need not be required, because the means of practising that fraud are not facilitated by granting the rules. They may be used by a debtor in close jail, as successfully as by a debtor admitted to the rules.

It is also a material circumstance in the construction of the act, that
*309] ample provision is made for the very case. *A new *capias* may be awarded, to take the person of the debtor. This remedy is not allowed in the case of an escape; and it is strong evidence that the legislature did not contemplate a departure from the rules, under a certificate issued by proper authority, as an escape, that the remedy given the creditor is competent to a redress of the injury, replaces him in the situation in which he was before it was committed, and is not founded on the idea that there has been an escape.

The arguments founded on the provisions respecting the property of the debtor, also bear strongly on the case. They confirm the opinion, that a departure from the rules, under a certificate of discharge, granted by a proper tribunal, ought not to be considered as an escape. So, too, does that provision of the act, which requires notice to the creditor, and not to the security.

Without reviewing the various additional arguments which have been suggested at the bar, the court is of opinion, that upon general principles, strengthened by a particular consideration of the act itself, a departure from the rules, under such an authority as is stated in the proceedings, is not an escape which can charge the security in the bond for keeping the prison-rules, although that authority was obtained by a fraudulent representation on the part of the debtor, neither the magistrates nor the security having participated in that fraud. There is error, therefore, in the instruction given to the jury, as stated in the third bill of exceptions, for which the judgment is to be reversed, and the cause remanded for further trial.

Judgment reversed.

Paterson, J. (*dissenting.*)—As to the third exception, which embraces the main point in the cause, my opinion differs from the opinion of the majority of the court, and accords with the direction given by the court below. The condition of the bond is, "that Simms do well and truly keep himself within the prison-rules, and thence not to depart until he shall be discharged by due course of law, or pay the sum of $1285.45 to George
*310] Slacum, *assignee," &c. The act that will not exonerate the principal, will not exonerate the surety from the obligation which they

have entered into ; for the surety stands on the same floor as the principal, and assumes the like character of responsibility, in regard to the terms specified in the condition of the bond. The benefit of the act of insolvency, if obtained by fraud or perjury on the part of Simms, will be unavailing, and his going beyond the limits of the prison, in consequence or under color of a discharge, thus procured, will be an invalid and unwarrantable departure. Fraud infects the decision ; and the legal principle is, that the fraudulent person shall not be suffered to protect himself by his own fraudulent act. If he should, then a judgment, which is laid in fraud, will, as in the present case, operate to the extinction of a legal, pre-existing obligation or contract. But a discharge, fraudulently obtained, is of no virtue ; of no operation ; and is, in truth and in law, no discharge ; it has neither legal effect, nor even legal existence as to the party himself, and the surety who stands in his shoes. If the judgment be of no avail as to the principal, it will be of no avail as to the surety ; it cannot be ineffectual as to the one, and operative as to the other. The discharge must be legal, to be valid, and to exonerate the surety from the special condition of the bond. The judgment itself is a fraud on the law ; and I can discern no difference between the debtor's going beyond the prison-bounds voluntarily, or under color of a judgment so obtained ; except that the latter is a case of deeper die, and less excusable in a legal and moral view than the former.[1]

Although Simms is liable to be imprisoned by virtue of a new process, yet he may have gone out of the jurisdiction of the court ; or, if not, Slacum will be deprived of the benefit of the bond which Simms and Wise executed.

The sheriff stands on different ground ; for he is exonerated from all liability, by an express provision in the statute. Besides, if the justices have jurisdiction of the subject, and should not exceed their jurisdiction, it is not incumbent on the sheriff, to examine into the regularity, fairness and validity of their proceedings and judgment ; he looks at the instrument of discharge, which, emanating *from a competent authority, it is his duty to obey. But though the discharge may excuse the sheriff, as an officer of the court, it will not excuse the party, nor his surety. As to them, it is inoperative and of no legal efficacy. [*311

[1] See the remarks of Judge IREDELL, in Maxfield *v.* Levy, 4 Dall. 335.

Harris *v.* Johnston.

Conditional payment.—Action for price of goods.—Promissory note.

An action cannot be maintained on an original contract for goods sold and delivered, by a person who has received a note as conditional payment, and has passed away that note.[1]

A bill of parcels, delivered by J., stating the goods as bought of D. and J., is not conclusive evidence against J., that the goods were the joint property of D. and J.; but the real circumstances may be explained by parol.

If part of the goods were the sole property of D., and the residue the sole property of J., and if J. had authority from D. to sell D.'s part, J. may maintain an action for the whole, in his own name.

An indorsee of a promissory note, payable to order, cannot, in Virginia, maintain an action at law, upon the note, against a remote indorser, but he may in equity.[2]

Johnston *v.* Harris, 1 Cr. C. C. 257, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, for goods sold and delivered, and money had and received.

The defendant pleaded the general issue, and upon the trial, took two bills of exception. The first stated that this action was commenced on the 10th of July 1801, and that on the trial, the plaintiff offered evidence of the sale and delivery of goods, to the amount of $2149.33. That the defendant offered in evidence a bill of parcels of the same goods, rendered by and in the handwriting of the plaintiff, Johnston, amounting to 644*l.* 16*s.*, Virginia currency, containing a particular account of rum and sugar, beginning with these words: "Mr. Theophilus Harris, bought of Dunlap & Johnston;" at the foot of which bill was the following receipt, signed by the plaintiff: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers, or order, indorsed by John Towers and Theophilus Harris, payable the 2d April 1798, when paid, received in full;" which bill was rendered to the defendant by the plaintiff, at the time of the sale and delivery.

The defendant further offered evidence to prove that the note in that receipt mentioned, was delivered to the defendant with the blank indorsement of Towers, and by the defendant indorsed in blank to the plaintiff, at the time of the sale and delivery of the goods, *and by the plaintiff *312] afterwards indorsed to one John Dunlap, who, on the 19th of April 1798, brought suit thereon against the present defendant, Harris, in the court of Hustings, in the town of Alexandria, upon his indorsement, striking out the name of the plaintiff, Johnston, and filling up the defendant Harris's indorsement with a direct assignment from Harris to Dunlap. That upon that suit judgment was rendered, by the court of Hustings, for Dunlap against Harris, from which judgment he appealed to the Dumfries district court, where the judgment of the court of Hustings was reversed,(*a*) and Dunlap appealed

(*a*) It was understood and admitted by the counsel on both sides, that the judgment was reversed, because the court was of opinion that, in Virginia, the holder of an indorsed promissory note, payable to order, could not strike out an intermediate blank indorsement, and fill up the blank indorsement of a remote indorser, with an order to pay the money to himself; and that the holder could not maintain an action against any of the parties to the note, but his own immediate indorser, or the maker of the note.

[1] Black *v.* Zacharie, 3 How. 483; Small *v.* Jones, 8 Watts 265.

[2] Riddle *v.* Mandeville, 5 Cr. 322; United States Bank *v.* Weisiger, 2 Pet. 331.

from the judgment of the district court to the court of appeals, where the judgment of the district court was affirmed.

The defendant, on the trial of the present suit, also offered evidence to prove that the said John Dunlap, on the 19th of April 1798, also commenced suit against Towers, upon his indorsement of the same note, which suit was still pending in the court below. That the said John Dunlap was the same Dunlap whose name is mentioned at the head of the bill of parcels aforesaid, and who is still living. Whereupon, the defendant prayed the court to instruct the jury, that upon proof of these circumstances, the plaintiff could not recover in this action for goods sold and delivered; and that from the bill and receipt, given as aforesaid, the transaction must be considered as a joint contract. Which instruction the court refused to give, as prayed, but directed the jury, that the bill of parcels, before mentioned, is evidence (but not conclusive) of a joint contract of sale for the rum and sugar; and that the plaintiff might explain the transaction by parol, or other evidence, to prove that he *was the sole owner of the sugar, and that the said Dunlap was the sole owner of the rum, and that the contract for [*313 the sale of the sugar was made with the plaintiff in his own right, and that the contract for the sale of the rum was made with him as agent for Dunlap. But if the plaintiff should produce no such explanatory evidence, he could not maintain the present action.

And the court further instructed the jury, that if they should be satisfied that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap; and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant, for the whole amount of the goods so sold and delivered; and that the other facts stated were not sufficient to bar the plaintiff.

The 2d bill of exceptions in the present cause stated, that the plaintiff produced a witness, who proved, that the sale of the goods was made in the store of Dunlap, where the goods were deposited; that he never knew Dunlap to claim any title to the sugar, nor the plaintiff to the rum, and that previous to the sale, Dunlap claimed the rum as his separate property, and the plaintiff claimed the sugar as his separate property; and that Dunlap requested the plaintiff to sell the rum with the plaintiff's sugar. Whereupon, the defendant prayed the court to instruct the jury, that the evidence so offered was not competent to contradict or explain the purport of the bill of parcels and receipt, or to show that the plaintiff sold part of the goods as his separate property, and the residue as agent of Dunlap; and that it did not amount to proof of such several property and agency, as would enable the plaintiff to recover in this action, for the whole of the goods sold. Which instruction the court refused to give; but instructed the jury, that the declarations of Dunlap, or of the plaintiff, or the request of either of them, could not be given in evidence, unless the defendant was present when such declaration or request was made.

*A verdict being rendered for the plaintiff, the defendant moved [*314 the court for a new trial, which was refused, and the court ordered the clerk to deliver up to the defendant the note of Clingman & Magaw, in-

dorsed by Towers, which was referred to in the receipt, and which was filed in the suit of Dunlap against the present defendant.(*a*)

Upon this case, two questions arose. 1st. Whether the bill of parcels was conclusive evidence of a joint contract of sale, and of the joint property of Dunlap and Johnston? 2d. Whether, under the other circumstances of the case, the plaintiff could recover in this action?

C. Lee and *Jones*, for the plaintiff in error.—1. The bill of parcels is written evidence, purporting a joint contract, and cannot be contradicted by parol. The action ought to have been joint. The bill of exceptions does not state any evidence from which the jury could infer that part of the goods was the sole property of one, and the residue the sole property of the other. The circumstances offered to prove that fact were too slight to justify the inference, and the court ought to have instructed the jury to that effect.

2. The contract which arose on the sale of the goods has been changed to a special contract, to pay on a certain condition, viz., if the plaintiff shall use due diligence to get the money on the note, and shall not succeed. If the *315] plaintiff negotiates the note, he receives *its value; he is paid for the goods sold; he has received satisfaction, and can never resort to the defendant, until the note is returned to the plaintiff, and he has taken it up, and offered to return it to the defendant. Whatever would prevent the plaintiff from recovering against the defendant on the note, would equally prevent him from recovering on the contract for goods sold and delivered. The present suit was commenced, while suits were depending on this very note, by Dunlap against the present defendant, and by Dunlap against Towers. The defendant cannot, at the same time, be answerable upon the note, and upon the original contract of sale.

The order which the court made, that the plaintiff should deliver up to the defendant the note which had been filed in the case of Dunlap v. Harris, did not aid the judgment. The court had no authority to make such an order; the note was the property of Dunlap, and not of the plaintiff. But the note was of no use to the defendant. It was barred by the act of limitations, and that by the conduct of the plaintiff.

In the case of *Kearslake* v. *Morgan*, 5 T. R. 513, it is admitted by the counsel on both sides, that if a negotiable note, given for a prior simple-contract debt, be indorsed over by the plaintiff, and is outstanding, the plaintiff cannot recover upon the original contract. In the present case, it must be presumed, that the plaintiff received value for the note, when he passed it to Dunlap, and it does not appear that he has ever been obliged to refund.

Swann, *E. J. Lee* and *Simms*, contrà.—It does not appear, that the note was not returned. But this court, in the case of *Clark* v. *Young* (1 Cr. 181), had decided, that it is not necessary, in such a case, to return it. So, in the case of *Puckford* v. *Maxwell*, 6 T. R. 53, the court said, that "in cases

(*a*) The record did not state the whole order of the court, upon the motion for a new trial. The court, upon further argument and consideration, being doubtful whether the plaintiff could support this action, until he had got back the note from Dunlap, informed the plaintiff's counsel, that they would grant a new trial, unless the plaintiff would get that note, and return it to the defendant, and also obtain a release from Dunlap to Harris of all right of action for the rum sold.

of this kind, if the bill, which is given in payment, do not turn out to be productive, it it not that which it purports to be, and which the party receiving it expects it to be, and therefore, he may consider it as a nullity, and act as if no such bill had been given at all." The same point is *also decided in 1 Esp. Rep. 5, and *Owenson* v. *Morse*, 7 T. R. 64. [*316

The question of negligence does not arise in this case. The reason of the admission in the case of *Kearslake* v. *Morgan*, that if the note was outstanding, the plaintiff could not recover upon the original cause of action, is, that the defendant would be liable to be sued upon it. The words are, "if he may be sued upon it by a third person." But here, the record itself shows that Harris could not be sued upon it by a third person, being only liable to the present plaintiff, who was his immediate indorsee, that point having been decided in the court of appeals in Virginia, upon this very note. As, therefore, Harris is liable upon the note to the present plaintiff only, and as he will not be liable to him on the note, in case he recovers in the present action, it is the same thing as if the note had been taken up by the plaintiff, and ready to be delivered to the defendant.

Jones, in reply, admitted, that modern decisions have laid down the law broadly, that if the note or bill is not honored, it is of no avail; but it is otherwise, if the note or bill be negotiated; it is then a payment until returned. In the case of *Clark* v. *Young*, the plaintiff had not negotiated the bill, and the parties answerable to Clark were insolvent. The liability of the defendant to a suit by a third person, on the note, is not the only ground of the opinion in *Kearslake* v. *Morgan*. Another ground is, that the defendant may have the benefit of the note against the parties answerable to him. But, if the present defendant is not liable to be sued on the note, in the name of a third person, yet Dunlap may sue him upon it, in the name of Johnston.(*a*)

*February 19th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—This case comes up on two exceptions taken to opinions [*317 given in the circuit court. The plaintiff in the court below had sold to the defendant in that court, certain goods, wares and merchandise, of which he had given him a bill, headed with the words, "Mr. Theophilus Harris, bought of Dunlap & Johnston," &c. At the foot of this bill of parcels was the following receipt: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers, or order, indorsed by John Towers and Theophilus Harris, payable 2d April 1798, when paid, received in full." This note was indorsed in blank by the defendant in error, and a suit was instituted upon it by Dunlap against Harris, in which suit he ultimately failed, it being the law of Virginia, that on a note, an action by the indorsee can only be maintained against the drawer, or his immediate indorser.

(*a*) MARSHALL, Ch. J.—Not, if Johnson recovers in the present suit.

Jones.—But if Dunlap has a right to the note, he may sue in equity, and payment by Harris to Johnson would not be a bar.

MARSHALL, Ch. J.—True. We shall consider that point. I have always been of opinion, that in such cases, a suit in chancery can be supported; though I do not recollect any case in which the point has been decided.

The defendant below objected, 1st. That the bill of parcels was conclusive evidence of joint property in the goods sold and delivered, and therefore, that the action was not maintainable in the name of Johnston alone. 2d. That no action was maintainable on the original contract, the plaintiff below having indorsed the note mentioned in the receipt, and not having reacquired any property in it, so as to be able to restore it to Harris. No
*318] *laches* are imputed, or are imputable, to the holder of the note. *Both these points were decided against the defendant below, and a judgment was rendered against him, from which he has appealed to this court.

On the first point, the court is of opinion, that there is no error. The written memorandum was not the contract, and was only given to show to what object the receipt at its foot applied. It is not, therefore, a bar to a disclosure of the real fact ; it is not conclusive evidence of joint ownership in the property sold, and of a joint sale, but will admit of explanation. The court, therefore, did not err in allowing explanatory evidence to go to the jury, nor in allowing the jury to judge of the weight of that evidence.

On the 2d exception, the material point to be decided is, whether an action can be maintained, on an original contract for goods sold and delivered, by a person who has received a note as a conditional payment, and has passed away that note. Upon principle, it would appear that such an action could not be maintained. The indorsement of the note passes the property in it to another, and is evidence that it was sold for a valuable consideration. If, after such indorsement, the seller of the goods could maintain an action on the original contract, he would receive double satisfaction.

The case cited from 6 Term Reports appears to be precisely in point. The distinction taken by the counsel for the appellee, that in this case Harris can never be sued on the note, is not so substantial as it is ingenious. Harris has a right to the note, in order to have his recourse against his indorsee, and Johnston has not a right to obtain satisfaction for the goods from Harris, while he is in possession of the satisfaction received from Dunlap. In the case quoted from Term Reports, the liability of the defendant to an action from the actual holder of the note, is not the sole ground on which a disability to sue on the original contract was placed. That dis-
*319] ability was also occasioned *by the obvious injustice of allowing to the same person a double satisfaction, and of withholding from the debtor, who had paid for the note, before he could indorse it, and who would be compelled, by the judgment, to pay for the goods, on account of which he had parted with it, the right of resorting to his indorser. But, if it was indispensable to show that Dunlap has a remedy against Harris, it is supposed, that the holder of a note may incontestably sue a remote indorser in chancery, and compel payment of it. The case of *Clark* v. *Young*, decided in this court, does not apply, because, in that case, the plaintiff below had not parted with his property in the note.

The court does not think that the order (made after the judgment was rendered) for the rendition of the note to the defendant below, can correct the error committed in misdirecting the jury.

The judgment is to be reversed, for error in directing the jury that the action was maintainable on the original contract, after the note received as conditional payment had been indorsed.

Dixon's Executors *v.* Ramsay's Executors.

Foreign executors.—Conflict of laws.

An executor cannot maintain a suit, in the District of Columbia, upon letters testamentary, granted in a foreign country.[1]

All rights to the testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.

Dixon *v.* Ramsay, 1 Cr. C. C. 472, affirmed.

Error to the Circuit Court of the district of Columbia, upon a judgment in favor of the defendants, upon a general demurrer to their plea, which (after *oyer* of the plaintiffs' letters testamentary) stated, that the defendants' testator, at the time of making the promises, &c., and from thence, always, until his death, resided in the town of Alexandria, in the county of Alexandria, in the district of Columbia, and that the defendants have always resided in the same town, and that the plaintiffs have not obtained probate of the said letters *testamentary, at any place within the district of Columbia, or the United States of America. [*320

E. J. Lee, for the plaintiffs in error.—The question is, whether the plaintiffs must take out letters testamentary in the district of Columbia, before they can maintain an action, as executors.

There is nothing in the laws of Virginia, which requires that letters testamentary should be there taken out upon a foreign will, provided they have been taken out in the country where the testator lived and died. The 14th section of the act of Virginia (P. P. 162), relates only to the title to lands under a will. If, then, there is nothing required by the laws of Virginia, the right, and the powers of the executors, depend upon the rules of the civil law, and the law of that country of which the testator was a subject.

By the law of England, an executor may commence suit before the probate. 1 Com. Dig.; 2 Bac. Abr. 413. The very naming of an executor is a disposition to him of all the testator's personal estate, for he comes *in loco testatoris*, and is entitled to the surplus, after payment of debts and legacies. 2 Bac. Abr. 423. He derives all his power, not, like an administrator, from the government of the country, but from the will of his testator. The debts due to the estate follow the person of the creditor, not that of the debtor, and the disposition of them is to be governed by the laws of that country of which the testator was a subject. *Bruce* v. *Bruce*, 2 Bos. & Pul. 229–30; *Bempde* v. *Johnstone*, 3 Ves. jr. 200; Appendix to Cooper's Bankrupt Law, 29, Babille's Opinion; Vatt. lib. 2, c. 3, § 8, p. 109, 110, 111; 3 Dall. 370, 377 (note); *Hunter* v. *Potts*, 4 T. R. 175, 184.

The case of *Fenwick* v. *Sears*, 1 Cr. 259, was that of an administrator, who derives his whole authority from the laws of the place; it, therefore, cannot decide the present case, which is that of an executor, who derives his whole authority from the will of his *testator. That case, too, was decided under the peculiar laws of Maryland, which differ from those [*321

[1] Kerr *v.* Moon, 9 Wheat. 565; Armstrong *v.* Lear, 12 Id. 169; Noonan *v.* Bradley, 9 Wall. 394; Curtis *v.* Smith, 6 Bl. C. C. 537.

of Virginia upon this subject. By the law of Maryland, 1798, c. 101, § 4, no alien can be an executor or administrator.

But it is said, that the rights of creditors require that the executor should give security for the faithful administration of the estate. But this would be of no avail, if the executor, after giving security, should choose to return to England. For, according to the decision of the court of appeals of Virginia, in the case of *Baylor's Executors*, a creditor cannot maintain an action against the sureties of an executor, until he has proved his debt by an action and judgment against the executor, and proved a *devastavit* also, by a suit. But he can never get a judgment against an executor, who is not found in the state; and consequently, can never have judgment against the surety. But if an executor be absent, the creditor may, in chancery, attach the assets. A voluntary payment to an executor, without letters testamentary, in Virginia, is good. Why, then, should not the executor be permitted to sue? If no purpose of justice is to be answered, by refusing the right to sue; and if it is not refused by the positive laws of Virginia, a strong argument may be drawn from the inconvenience of obliging an executor to procure letters testamentary in every state in the Union, and, perhaps, for very trifling debts.

Swann, contrà.—The case of *Fenwick* v. *Sears* has settled the question, as to a foreign administrator. In what does that differ from the case of a foreign executor? It is said, that the latter derives his authority from the will, which is a universal title. But the authority under the will is inchoate, until completed by the probate, and is limited to a very few acts. It is certain, that an executor, before probate, cannot obtain a judgment. The ordinary, in England, and the court, in Virginia, may refuse an executor, who is under a disability; for example, an alien enemy; an infant under seven-
*322] teen; an idiot, &c. Until, therefore, he is *received, his capacity to act is not decided by the only competent tribunal.

In England, the ordinary cannot require security from an executor. 2 Bac. Abr. 376, 377. It can only be done by the court of chancery, considering him as a trustee, when there is good ground to apprehend his wasting the estate. In Virginia, the interest of creditors, legatees and distributees is attended to. Yet their interest might be destroyed, if the executor was permitted to receive money, or give an acquittance, before he had given security. It is, therefore, questionable, whether an executor, in Virginia, can do any valid act, until he has qualified himself according to law. It is also doubtful, whether the assets can be attached (3 Wils. 297), for that would invert the order of administration. If they cannot, a foreign executor might, by his attorney, withdraw all the assets, and leave the creditors without remedy. A judgment-creditor here would have a preference. But if he sues in England, upon a judgment of this country, his claim is reduced to a simple contract.

Probate, in a peculiar jurisdiction, will not support a suit out of that jurisdiction. It would be strange, therefore, if a probate, even in the prerogative court, which is the present case, should extend across the Atlantic into a foreign country. *Hilliard* v. *Cox*, 1 Ld. Raym. 562; *Adams* v. *Savage*, 2 Ibid. 855–6. The laws of Virginia have provided for the probate of all wills, foreign as well as domestic (P. P. 162, § 14, 15).

C. Lee, in reply.—By the civil law, the executor succeeds to all the movables and personal estate, and credits of his testator. His title is derived from the will, and his powers are as great as those of his testator were. 2 Bl. Com. 510.

The will is to be proved, where the testator died, and the property is to be distributed according to the laws of that country. The whole [*323 estate, wherever situated, is to be distributed according to one law. If a foreign executor should give bond in Virginia, by which law is he to be governed? Can there be two executors of the same will, governed by different laws, as to their administration? Can strangers interfere and get administration? It is true, the municipal laws may bind property in the country; but if no such laws, then the property is governed by the laws of the country where the testator had his domicil. Security ought not to be required here, if not required in England; and if taken in England, it ought not to be required here. (See Target's opinion upon the *Duchess of Kingston's* will, in Collectanea Juridica.)

February 19th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country.

It is contended, that this case differs from that of an administrator, which was formerly decided in this court, because an administrator derives his power over the estate of his intestate from the grant of the administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be. This distinction does certainly exist; but the consequences deduced from it, do not seem to follow. If an executor derived from the will of his testator a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable, that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintains the *suit [*324 by virtue of his letters testamentary, he can only sue in courts to which the power of those letters extends. It is not, and cannot be denied, that he sues by virtue of his letters testamentary; and consequently, in this particular, he comes within the principle which was decided by the court in the case of an administrator.

All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country. The court can perceive the inconvenience which may often result from this principle, but it is an inconvenience for which no remedy is within the reach of this tribunal.

Judgment affirmed.

Scott *v.* Negro London.

Slavery.

If the owner of a slave, removing into Virginia, take the oath required by the act of assembly, within sixty days after such removal, it will prevent the slave from gaining his freedom, although he was brought into Virginia by a person claiming and exercising the right of ownership over him, eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than twelve months; and although the true owner never brought him in.

London *v.* Scott, 1 Cr. C. C. 264, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria.

Negro London brought an action of assault and battery against Scott, to try his right to freedom. His claim was grounded upon the act of assembly of Virginia, of the 17th December 1792 (P. P. 186), the 2d section of which is in these words: "Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free." The 3d section imposes a penalty upon every person importing slaves contrary to the act.

*325] *The 4th section is in these words: "Provided, that nothing in this act contained, shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he or she shall take the following oath, before some justice of the peace of this commonwealth: 'I, A. B., do swear, that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves, nor have I brought with me any slaves, with an intention of selling them, nor have any of the slaves which I have brought with me, been imported from Africa, or any of the West-India islands, since the first day of November, one thousand seven hundred and seventy-eight. So help me God.' Nor to any person claiming slaves by descent, marriage or devise; nor to any citizens of this commonwealth being now the actual owners of slaves, within any of the United States, and removing such hither; nor to travellers or others making a transient stay, and bringing slaves for necessary attendance, and carrying them out again."

The defendant below took a bill of exceptions, which stated, in substance, the following facts: The defendant's father, claiming to own the plaintiff as his slave, brought him from Maryland into Alexandria, in July 1802, without the knowledge or consent of the defendant, and hired him out, in Alexandria, until his death, which happened about Christmas in the same year. The plaintiff had continued to reside in Alexandria until the present time, except about three weeks in April 1803. The defendant's father never took the oath required by the 4th section of the act. The defendant, in March 1803, got possession of the plaintiff, and in April following, being then a resident of Maryland, but intending to remove to Alexandria, hired him out, in Alexandria, claiming him as his slave, under a bill of sale from Thomas Contee, dated the 3d of September 1800. The defendant came from Maryland in June 1803, and on the 5th of July next following, took the oath prescribed by the 4th section of the act. Where-

*326] upon, the court instructed the jury, that if they should be of opinion, from the evidence, that the defendant's father brought the *plaintiff

from the state of Maryland, into the county of Alexandria, in the year 1802, and exercised acts of ownership over the plaintiff, and hired him out as his slave, and that the plaintiff has been kept in the county of Alexandria, one whole year, or so long at different times as amount to a whole year, from the importation to the bringing of the action, and that no other oath was made than that which the defendant had offered in evidence as aforesaid, then the plaintiff was entitled to his freedom, although the jury should be satisfied that he was the property of the defendant, at the time he was so brought into the town of Alexandria.

E. J. Lee, for the plaintiff in error.—At the time the plaintiff in error took the oath, the negro had not been kept a year in the county of Alexandria; the forfeiture had not accrued; the oath was taken within sixty days after the removal of his owner. The importation by the father, without the knowledge or consent of his son, the owner, did not oblige the latter to take the oath, within sixty days after such importation. The act is penal, and is, therefore, to be construed strictly. No prosecution against the son, for the penalty under the third section of the act, could have been maintained, upon such an importation by the father. The oath by the son would have been a good defence. The act does not say it shall be taken within sixty days after the importation of the slave, but within sixty days after the removal of the owner. The opinion of the court below was, that the oath ought to have been taken, within sixty days after the removal of the negro.(*a*)

(*a*) The opinion of the court below seems to have been misunderstood by the counsel. The grounds upon which that court decided, are believed to be, not that the son was bound to take the oath, within sixty days after the removal of the slave by the father, but that the father ought to have taken the oath, within sixty days after his removal with the slave. The act does not require the oath to be taken by the person who has the absolute property of the slave, but by him who brings a slave into the state. The words of the oath are, "nor have I brought with me any slaves, with an intention of selling them." The son might safely take the oath, and sell the slave immediately, for he did not bring the slave with him. The son would not have been liable to the penalty of $200, under the 3d section, because he did not import the slave: but the father would, because he did import him.

The right to freedom which the slave acquires is not a mere penalty on the owner, but an independent right, not to be controlled by its consequences. The object of the act was to discourage, and gradually to abolish slavery; or, at least, to prevent its increase. Two means were adopted by the legislature. One was the prevention of further importations; the other was the emancipation of such as should be imported contrary to the act. This emancipation was not a penalty, intended solely to prevent importation, but a specific remedy for the evil, after it had happened. The penalty of $200, under the 3d section, was the preventive means, and the emancipation, under the 2d section, was the remedial means, of accomplishing the object of the legislature. The evil was not the importation of freemen, but of slaves. To make slaves free was, therefore, as direct an accomplishment of their object as to prevent their importation. The act could not intend that the right to freedom, given by the 2d section, should depend upon a title litigated between two persons, each claiming to be the owner. The words are, "slaves which shall hereafter be brought into this commonwealth," not by their owners, but by any person claiming and exercising authority over them. If a stranger should take a slave from Maryland, claiming title, and bring him into Virginia, and keep him there a year, the slave must, under the 2d section of the act, be free.

C. Lee, contrà.—The general rule is, that a slave imported shall be free. Is the present case within the exception? The father, being in possession of the slave, claiming title and exercising authority as owner, brought him from Maryland into Alexandria. If he did so, without authority from the son, and if the son was the true owner, and if the slave was lost by the negligence, or in consequence of the act of the father, he is liable to the son. The father, therefore, was a person to whom the effects of the 2d section would extend, and to save himself from those effects, it was his duty to have the oath prescribed by the 4th section.

*328] *But it is clearly to be inferred, from the 4th section, taken together with the words of the oath, that the oath will protect the owner's title only to such slaves as he shall bring with him, when he comes to reside in Virginia. The words are, that nothing in the act shall extend to him who may incline to remove, if, within sixty days after "such removal," he shall make oath that he has not "brought with him any slaves," with an intention of selling them. It is not meant to say, that the slave must come in at the same instant with the owner, but it must be all part of one transaction. The son never brought the slave into Alexandria. He was not brought, with the intent of residing here with the son.

Suppose, the son had never come to reside in Alexandria, and the slave had been kept by the father, in Alexandria, more than a year, what could prevent the slave from obtaining his freedom? Could it be objected, that the father was not the true owner, and that the slave was kept there, without the knowledge and consent of the son? Again, suppose, the son had not come, until after the slave had been kept in Alexandria a year by the father, and the son should then, within sixty days after his removal, take the oath, would that destroy the slave's right to freedom? If it would not, it must be, because the son could not connect the importation of the slave with his own removal. Why could he not connect an importation made thirteen months before his removal, as well as an importation made eleven months before his removal? Is it because a right to freedom had vested in the slave before the removal of the son? That cannot be; because the proviso says, that nothing in the act contained, shall extend to those who may incline to remove, if, within sixty days after such removal, they will take the oath. The word nothing refers as well to the year's residence, as to the first importation of the slave. It might be said, therefore, that the son did incline to remove; and within sixty days after such removal, did take the

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And the remedy of the true owner must be against the wrongdoer, in the same manner as against a man who should, without authority, take his slave from Maryland, and in attempting to cross the Potomac, the slave should be drowned. So, in this case, if the father, without authority from the son, bought the slave from Maryland into Alexandria, and the slave thereby gains his freedom, by the negligence of the father, the father is liable to the son. The right of the slave to his freedom does not depend upon the crime of the person who may in law be adjudged to be the true owner. It is sufficient, for the slave to show that the person in whose posession and under whose contrel he was, and who claimed and exercised over him the authority of an owner, has violated the law, and done the act which, by law, confers upon him his freedom. The consequental damage to the owner cannot affect the true slave. He was not the cause of the injury. The true owner must look to the author of the injury, against whom the laws have provided him a remedy.

oath, and therefore, he is not to be affected by the year's residence. The length to which this argument may be carried, shows its sophistry. It leads to the entire destruction of the second section of the act; for if the true owner may come, and make oath, after one year, he *may, after fifty. [*329
The proviso, therefore, must be limited to an importation of the slave with his owner. Upon this construction, it will read thus: "Provided that nothing in this act shall extend to those who shall remove with their slaves, and who shall, within sixty days after such removal, take the oath." But the son did not remove with his slave, and therefore, is not within the benefit of the proviso.

Jones, in reply.—A slave does not, under this act, gain his freedom, unless he was brought in by his true owner. The acquisition of freedom by the slave is a part of the penalty upon the owner, for violating the law. The freedom can only be acquired in a case where the owner is liable to the penalty of $200, under the 3d section. When the owner and the slave do not come in at the same time, the sixty days begin to run from the time of the removal of the master. If the owner comes, before the slave has resided one year in Virginia, it is sufficient.

February 19th, 1806. Marshall, Ch. J., delivered the opinion of the court.—This case arises under a clause in an act of the Virginia assembly, giving freedom to slaves who shall be brought thereafter into that state, and kept therein one whole year together, or so long at different times as shall amount to one year; and under a proviso of the same act, that it shall not extend to any person who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he shall take an oath which is prescribed in the act.

The negro London was brought from Maryland into Alexandria, where he was hired out, in the year 1802; some months after which, his master, the plaintiff in error, also removed into Alexandria, and within the [*330
*year from the time the negro was brought in, and also within the sixty days from the time the plaintiff in error removed to Alexandria, the oath prescribed by the law was taken.

No right to freedom having vested in London, at the time this oath was taken, the question is, has it brought the plaintiff within the proviso of the act? That the plaintiff is within the letter of the proviso, is unquestionable. He is a person who inclined to remove from one of the United States, into Virginia, who actually did remove, and who took the requisite oath, within the limited time.

But it is contended, in behalf of the defendant in error, that the acts of bringing the negro into the state, and of removing into it, must be concomitant, in order to bring the case within the proviso: or, in other words, that the owner must be a person "inclining to remove into the state," at the time the slave was brought in. This inaccuracy of construction seems to be founded on the idea, that the penalty of forfeiting the property accrues on bringing the slave into the state, whereas, it attaches on his continuance in the state for twelve months. Until such continuance has taken place, the offence has not been committed. If, then, all the acts which bring a person within the proviso, are performed, before the right to freedom is vested, and before the provisions of the act have been infracted,

it seems to the court, that the rights of the party remain unaffected by the act. If London had been ordered to Maryland for a day, and then brought with his master into Alexandria, the construction of his counsel would be satisfied; and it seems strange, where the letter of a law has not been violated, that such an unimportant circumstance should affect its spirit.

Unless this mode be admitted of coming within the proviso, a person inclining to remove into Virginia, whose slaves had preceded him, though not for one year, could not bring himself within, or avoid the forfeiture, *331] although permitting them to come into that state was no *offence; a construction of the act which the court cannot think consistent with its spirit or letter.

This court is, therefore, of opinion, that the circuit court erred, in directing the jury that, under the circumstances stated, the plaintiff below was entitled to his freedom, and doth reverse the judgment rendered by the circuit court, and remand the cause for further proceedings.

Judgment reversed.

Wise *v.* Withers.

Militia duty.—Sentence of court-martial.

A justice of the peace in the District of Columbia is an officer of the government of the United States, and, as such, exempt from militia duty.

A court-martial has not exclusive jurisdiction of that question, and its sentence is not conclusive.

Trespass lies against a collector of militia fines, who distrains from a fine imposed by a court-martial, upon a person not liable to be enrolled in the militia—the court-martial having no jurisdiction in such cases.[1]

Wise *v.* Withers, 1 Cr. C. C. 262, reversed.

Error to the Circuit Court of the district of Columbia, in an action of trespass *vi et armis*, for entering the plaintiff's house, and taking away his goods. The defendant justified as collector of militia fines. The plaintiff replied, that at the time when, &c., he was one of the United States' justices of the peace for the county of Alexandria. This replication, upon a general demurrer, was, by a majority of the court below, adjudged bad; whereupon, the plaintiff sued out a writ of error, and the questions made on the argument were—

1. Whether a justice of the peace, for the county of Alexandria, was liable to do militia duty? and—

2. Whether an action of trespass will lie against the officer who makes distress, for a fine assessed upon a justice of the peace by a court-martial?

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[1] But see Shoemaker *v.* Nesbit, 2 Rawle 201, where it is ruled, that if a court-martial, acting in good faith, convicts a person, not subject to militia duty, of the offence of non-attendance at training, neither the members of the court, nor the officer who executes their sentence, are liable as trespassers *ab initio*. Chief Justice Gibson there says, that the court must necessarily have power to decide upon the question of liability to military duty, which is the subject-matter; and therefore, an erroneous decision will not render them responsible in trespass. And see Savacool *v.* Boughton, 5 Wend. 179–80 where the soundness of the decision in Wise *v.* Withers is strongly questioned. And in Dynes *v.* Hoover, 20 How. 65, it is held, that where a court-martial has jurisdiction over the subject-matter, and its proceedings are in a regular course of law, the officer who executes its sentence will be protected. See also Vanderheyden *v.* Young, 11 Johns. 150.

C. Lee, for the plaintiff in error.—This case depends upon the act of congress of March 3d, 1803, entitled "an act more effectually to provide for the organization of the militia of the district of Columbia" (2 U. S. Stat. 215). *The 6th section says, "that the commanding officers of companies shall enroll every able-bodied white male, between the ages [*332 of eighteen and forty-five years (except such as are exempt from military duty by the laws of the United States), resident within his district."

The act of congress of the 8th of May 1792, § 2 (1 U. S. Stat. 272) exempts from militia duty the vice-president of the United States; the officers, judicial and executive, of the government of the United States; the members of both houses of congress, and their respective officers; all custom-house officers, with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen, employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners actually employed in the sea-service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective states." This act applies not only to such officers as then existed, but to all such as might thereafter be created.

If the plaintiff is an officer, judicial or executive, of the government of the United States, he is exempted.

In *Marbury's Case*, 1 Cr. 168, this court decided, that a justice of the peace, for the district of Columbia, was an officer, and that he became such as soon as the commission was signed, sealed and ready to be delivered. If the commission, therefore, is a criterion to decide who is an officer, we are at a loss to conceive what objection can be taken. The justices of the peace for the district of Columbia are appointed by the President of the United States, by and with the advice and consent of the senate, and are commissioned by the president. Their powers and duties are prescribed by the act of congress, "concerning the district of Columbia," § 11 (2 U. S. Stat. 107). Whether those powers are judicial or executive, or both, is immaterial.

*_Jones_, contrà.—1. A justice of the peace, in the district of Columbia, is not a judicial officer of the government of the United States. [*333 By the act of congress, those appointed for the county of Alexandria are to exercise the same powers and duties as justices of the peace in Virginia. The expression in the act of 1792, "officers judicial of the government of the United States," means only the judges of the supreme and inferior courts of the United States. Justices of the peace in the states are not considered as judicial officers. By the constitution of Massachusetts, the judicial officers are to hold their offices during good behavior, and yet the commissions of justices of the peace are limited to seven years. So the constitution of the United States says, that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior; but by the act of congress, the justices of the peace in the district of Columbia are to hold their offices only for five years. These justices, therefore, are either not judges, or the constitution has, in this respect, been violated. It is plain, however, that congress did not consider them as judges. A sheriff sometimes acts as a judicial officer in holding elections; and some of the officers in the execu-

tive departments exercise judicial functions in many cases, but they are not, therefore, judges. An act of congress may give judicial powers to certain officers, but they are not, therefore, judges.

2. He is not an executive officer "of the government of the United States." This description was intended, by the act of 1792, to comprehend only the officers of the superior departments, or those which strictly constitute the government of the United States, in its limited sense. This is to be inferred, because the act goes on to enumerate, by name, all the inferior officers which it meant to exempt. Why enumerate, if the general description comprehended the whole?

3. The circuit court of the district of Columbia has not jurisdiction of this question. The question who is *to be enrolled in the militia, and the assessment of the fines, are matters submitted exclusively to the courts-martial, which are courts of peculiar and extraordinary jurisdiction, specially appointed for that purpose, by the act of congress (2 U. S. Stat. 217, § 8). The words are, the "presiding officer shall lay before the said court (the battalion court of inquiry) all the delinquencies, as directed by law, whereupon, they shall proceed to hear and determine." There is no provision for revising the decisions of those courts-martial. They are final and conclusive, like those of an ecclesiastical court, or a court of admiralty.

*334]

If they have jurisdiction, and especially, if they have exclusive and final jurisdiction in the case, the officer who executes their orders is justified. He cannot be considered as a trespasser.

C. Lee, in reply.—There can be no doubt but the plaintiff is an officer. There can be as little that he is an officer judicial or executive, or both; and if he is not an officer of the government of the United States, he is not the officer of any other government. There is no distinction between an officer of the United States and an officer of the government of the United States. An officer appointed by the President of the United States, to an office created by a law of the United States, and exercising his authority in the name of the United States, must be as much an officer of the government of the United States, as any other officer in the United States. The reason of enumerating other officers by name was, because it might, perhaps, be doubted whether they would come under the general description of officers judicial and executive.

As to the jurisdiction of the circuit court. A limited power given to certain tribunals, not extending to all persons, cannot control the general jurisdiction given to that court. Whenever a peculiar limited jurisdiction is given to certain persons, and they exceed it, not only their *officers, but they themselves are liable to an action. They are all subject to the general law of the land. If this were not the case, and a court-martial should compel a man of more than forty-five years of age, for example, to perform militia duty, and continue to fine him from time to time, there would be no redress.

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The court-martial, in the present case, had no jurisdiction over the person of the plaintiff. He was exempt, and therefore, they could delegate no authority to their officer.

February 19th, 1806. MARSHALL, Ch. J., delivered the opinion of the

court.—In this case, two points have been made by the plaintiff in error. 1st. That a justice of the peace in the district of Columbia is, by the laws of the United States, exempt from militia duty. 2d. That an action of trespass lies against the officer who makes distress, in order to satisfy a fine assessed upon a justice of the peace, by a court-martial.

1. Is a justice of the peace exempt from militia duty? The militia law of the district refers to the general law of the United States, and adopts the enumeration there made of persons who have this privilege. That enumeration commences with "the vice-president of the United States, and the officers, judicial and executive, of the government of the United States."

It is contended by the plaintiff, and denied by the defendant, that a justice of the peace, within the district, is either a judicial or an executive officer of the government, in the sense in which those terms are used in the law. *It has been decided in this court, that a justice of the peace is [*336
an officer; nor can it be conceived that the affirmative of this proposition, was it now undecided, could be controverted. Under the sanction of a law, he is appointed by the president, by and with the advice and consent of the senate, and receives his commission from the president. We know not by what terms an officer can be defined, which would not embrace this description of persons. If he is an officer, he must be an officer under the government of the United States. Deriving all his authority from the legislature and president of the United States, he certainly is not the officer of any other government.

But it is contended, that he is not an officer, in the sense of the militia law; that the meaning of the words "judicial and executive officers of the government," must be restricted to the officers immediately employed in the high judicial and executive departments; and in support of this construction, the particular enumeration which follows those words is relied on; an enumeration which, it is said, would have been useless, had the legislature used the words in the extended sense contended for by the plaintiff. A distinction has also been attempted between an officer of the United States and an officer of the government of the United States, confining the latter more especially to those officers who are considered as belonging to the high departments; but, in this distinction, there does not appear to the court to be a solid difference. They are terms which may be used indifferently to express the same idea.

If a justice of the peace is an officer of the government of the United States, he must be either a judicial or an executive officer. In fact, his powers, as defined by law, seem partly judicial, and partly executive. He is, then, within the letter of the exemption, and of course, must be considered as comprehended within its proper construction, unless there be something in the act which requires a contrary interpretation. The enumeration which follows this general description of officers, is urged as furnishing the guide which shall lead us to the more limited construction. But to this [*337
*argument it has very properly been answered, by the counsel for the plaintiff, that the long enumeration of characters exempted from militia duty which follows, presents only one description of persons; custom-house officers, and those who hold a commission from the president, or are appointed by him: and of these by far the greater number do not hold such commis-

sion. The argument, therefore, not being supported by the fact, is inapplicable the case.

The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the district of Columbia, is exempt from the performance of militia duty.

It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.

The judgment is reversed, and the cause remanded for further proceedings.

United States *v.* Grundy and Thornburgh.

Forfeiture.

Under the act of congress of December 31st, 1792, which declares, that if a false oath be taken in order to procure a register for a vessel, the vessel or its value shall be forfeited, the United States have an election to proceed against the vessel as forfeited, or against the person who took the false oath, for its value. But until that election is made, the property of the vessel does not vest in the United States; and the United States cannot maintain an action for money had and received, against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel, and received the purchase-money before seizure of the vessel.[1]

Error to the Circuit Court of the United States for the district of Maryland, in an action for money had and received for the use of the United States, by the defendants, as assignees of Aquila Brown, jr., a bankrupt; it being money received by the defendants for the sale of the ship Anthony Mangin, which ship the United States alleged was forfeited to them, by
*338] reason that Brown, in *order to obtain a register for her, as a ship of the United States, had falsely sworn that she was his sole property, when he knew that she was in part owned by an alien.

On the general issue, a verdict was rendered for the defendants, and the plaintiffs took three bills of exception.

1. The first stated that they gave in evidence to the jury, that on the 25th of November 1801, and for several months before and after, Aquila Brown, jr., a citizen of the United States, and Harman Henry Hackman, a subject of the elector of Hanover, were copartners in merchandise, and carried on trade at Baltimore, under the firm of Brown & Hackman, and that Brown, at the same time, carried on trade at Baltimore, on his separate account, under the firm of A. Brown, jr. That before that day, and during the year preceding, the ship Anthony Mangin was built, rigged and equipped, within the United States, for the house of Brown & Hackman, under a contract made for them, and under their authority, and was paid for with

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[1] Caldwell *v.* United States, 8 How. 366. It is otherwise, when no such option is given to the United States, but an absolute forfeiture is declared; in such cases, the forfeiture relates to the commission of the offence, and will override a subsequent sale to a *bonâ fide* purchaser. The Neptune, 3 Wheat. 607; Caldwell *v.* United States, 8 How. 381–2; Henderson's Distilled Spirits, 14 Wall. 44, 56; The Monte Christo, 6 Ben. 148.

their funds, and that, on that day, Brown applied to the collector for a register for that ship, in his own name, and as his sole property, and for that purpose, took and subscribed the usual oath, which contains an asseveration that he then was the true and only owner of that ship, and that no subject or citizen of any foreign prince or state was then, directly or indirectly, interested therein, or in the profits or issues thereof; whereupon, a register was granted to him in the usual form. That afterwards, and after the 28th day of the same November, A. Brown, jr., as well as Brown & Hackman, were declared bankrupts, and their effects severally assigned, the defendants being the assignees of A. Brown, jr. The plaintiffs, in order to prove that the ship, at the time of taking the oath, was the property of the house of Brown & Hackman, and belonged in part to Hackman, an alien, offered Hackman himself as a witness, who objected to be sworn, alleging that he ought not to be compelled to give evidence against his interest. Upon the *voir dire*, he explained his interest thus: that if the plaintiffs should recover in this action, the funds of the estate of Brown would be diminished by the whole amount recovered. That Brown & Hackman had drawn and indorsed bills of exchange to a large *amount, which had come to the hands of the [*339
United States by indorsement, and he believed himself to be liable therefor, in case of failure of the funds of Brown. Whereupon, the court was of opinion, that he was not a competent witness for the plaintiffs.

2. The second bill of exceptions stated (in addition to the facts contained in the first) that the plaintiffs, in order to prove that, at the time of the oath, the ship was the property of Brown & Hackman, offered to swear a witness to prove, that in a book, purporting to be one of the books of account of Brown & Hackman, in the possession of one of the assignees of Hackman, who refused to produce it at the trial, although it was then in his possession, he saw an entry in the handwriting of Hackman, purporting to be made on the 28th of November 1801, charging the freight of the ship, on her then intended voyage, to the debit of Brown, and to the credit of Brown & Hackman. But the court rejected the evidence as inadmissible for that purpose.

3. The third bill of exceptions (in addition to the facts contained in the former bills) stated, that the plaintiffs offered to prove, that at the time of Brown's taking the oath and obtaining the register in his own name, the ship was owned in part by Hackman, an alien, and that Brown knew the fact to be so. That afterwards, and before the bringing of this action, Brown became bankrupt, and his effects were assigned to the defendants. That at the time of his bankruptcy, and of the assignment, the ship was in his possession, and that by virtue of the assignment, the defendants took her into their possession, as part of the estate of Brown, and sold her to a certain Thomas W. Norman, for $18,250, which sum they received, and at the time of trial, had in their possession. The defendants then gave in evidence that, after the sale of the ship to Norman, the United States seized her as forfeited; and libelled her in the district court. That Norman filed his claim, and upon proof and hearing, the judge dismissed the libel. That no action had ever been instituted by the United States against Brown. Whereupon, the attorney for the United States prayed the court to direct the jury, that if they believed the matters *so offered in evidence on the part of the [*340
United States, the United States were entitled to recover, in this action, the said sum of $18,250, which direction the court refused to give; but

instructed the jury, that if they believed, that any of the matters of fact in the oath of Brown alleged, were within his knowledge, and were not true, the said evidence given by the plaintiffs was not sufficient in law to maintain the present action.

Breckenridge, Attorney-General of the United States.—The great question in this cause is, whether the property of the ship Anthony Mangin vested in the United States, upon the commission of the act of forfeiture by Brown, without a sentence of condemnation.

This action is founded on the act of December 31st, 1792, "for registering and recording of ships and vessels." (1 U. S. Stat. 286.) We contend, that under the 4th section of this act, no sentence of condemnation was necessary to vest the property in the United States. This section, after stating the nature of the oath required in order to obtain a register of the ship, says, "And in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered (with costs of suit) of the person by whom such oath shall have been made."

A forfeiture by statute is analogous to a forfeiture at common law. At the common law, by an outlawry, the property of the outlaw immediately vests in the crown without office found. Co. Litt. 128 *b*.

The English court, upon the statute of 12 *Car. II., c.* 18, which creates forfeitures very similar to those of our statute, have decided, that by the act of forfeiture, the property is so completely divested from the owner and vested in the crown, that detinue can be maintained for it. *Roberts* v. *Withered*, 5 Mod. 193; s. c. Comb. 361; 12 Mod. 92; 1 Salk. 223. And Rookby, J., said, "the property is divested out of the owner, by importa-
*341] tion, *but not vested in him that sues, until bringing the action, or seizure." That case has been recognised and made the ground of decision in a late case. *Wilkins* v. *Despard*, 5 T. R. 112. These cases decide, that the right to recover either the specific goods, or their value, does necessarily give to the court the right to determine the question of forfeiture.

If the right of the United States was only inchoate, at the commencement of the suit, the judgment in this case would have completed it, as effectually as a sentence of condemnation. The United States might have proceeded either *in rem*, or for the value of the ship. They might either seize and libel the ship, or sue the person.

In the case of seizure of a ship under the act of August 4th, 1790 (1 U. S. Stat.), there must be a prosecution in conformity with the regulations of the 67th section of that act; and an important question arises, whether we are thereby prevented from proceeding *in personam* for the value of the thing forfeited. We contend, that we may proceed either way; for of what use are the word "or the value thereof," if the recovery must be by seizure and condemnation? The words being in the alternative, leave us that option. In *Roberts* v. *Withered*, it is said, "that though some persons proceed by way of information, upon the forfeitures, yet actions of detinue will

nevertheless lie." 5 Mod. 194. Suppose, the act had declared that the party shall forfeit $1000, would not an action lie for this money?

But admitting that the act of 1790 requires a sentence of condemnation, to vest the right in the United States, we contend, that the 29th section of the act of December 31st, 1792, under which the present action is brought, does not. (1 U. S. Stat. 298.) Although it refers to the act of 1790, it is only for the purpose of designating the courts in which the recovery is to be had; and to the manner of disposing of the forfeiture. It has no reference to the kind of suit, or to the manner of proceeding, to effect the recovery *of the subject. The words of the 29th section are, "that all penalties and forfeitures which may be incurred, for offences against this act, [*342 shall and may be sued for, prosecuted and recovered, in such courts, and be disposed of, in such manner, as any penalties and forfeitures which may be incurred for offences against the act (of 1790) may legally be sued for, prosecuted, recovered and disposed of."

The statute of 12 Car. II. has stronger expressions to show that a sentence of condemnation was necessary to vest the property. Its words are, "under the penalty of forfeiture of ship and goods, one moiety to his majesty, and the other moiety to him or them that shall inform, seize or sue for the same." Our statute is not only silent as to the mode of recovery, whether by information, seizure or suit, but contains the words "or the value thereof" (which the British statute does not), and therefore, recognises any mode of recovery, by which that value can be obtained.

It is not unworthy of remark, that vessels are, by the act of 1790, rendered liable to forfeiture, in three cases, §§ 14, 27, 60, in neither of which is it declared, that "the value thereof" may be recovered. The 67th section, if intended to ascertain the forfeiture of ships by seizure and condemnation only, may operate consistently on that act, but it cannot, where an alternative is given to sue for the value. As we cannot proceed *in rem*, without a seizure, if a transfer or sale secures the property in the transferee or vendee, the law will, in this respect, be defeated.

Admitting that the vendee is safe, the offender is liable to be proceeded against *in personam*, for the value of the property forfeited: If so, his assignees, in case of his bankruptcy, are also; for his creditors have but an equitable lien on his estate in the hands of his assignees; and the United States have a legal right, which, after suit brought, has relation back to the time of the forfeiture.

*With respect to the exceptions to the witnesses, the court, in rejecting the testimony of Hackman, have carried the doctrine further [*343 than it is warranted by any precedent. It was, in fact, deciding that a witness may refuse to give testimony against a defendant, because that defendant is his debtor, and his testimony, by establishing the plaintiff's claim, would diminish the funds out of which the witness's claim might be satisfied. This interest is certainly too remote and contingent to exclude the witness. It may, perhaps, affect his credibility, but not his competency.

The other witness, who was called to prove the entry in the books of Brown & Hackman, was also improperly rejected. After the rejection of Hackman himself, and after proving the book to be in the possession of the opposite party, who refused to produce it, the next best evidence was the

testimony of a person who had seen the entry in the book, in the handwriting of Hackman.

The judgment of the district court upon the libel is no bar to the present action. That judgment was not given on the point of the forfeiture, but upon the ground that the United States could not follow the thing itself into the hands of a *bonâ fide* purchaser, for a valuable consideration without notice. It does not bar the remedy *in personam.*

P. B. Key and *Martin*, contrà.—1. As to the rejection of Hackman, as a witness. He was offered by the United States, to prove that he was an alien, and was interested in the ship, at the time the oath was taken by Brown. The defendant objected, and upon the *voir dire*, he declared himself interested, and objected to answering against his interest.

Key was about to read an authority, when the Chief Justice told him that no authorities would be required on that point. JOHNSON, J., said, he
*344] should *like to see the authority, for his own satisfaction. MARSHALL, Ch. J.—When we said, there was no necessity for authorities, we meant authorities to prove that a man, in a civil case, is not bound to testify against his interest. But this does not preclude the objection, that the facts stated by the witness, as the ground of his interest, did not prove him to be interested. *Key* then cited Peake's Law of Ev. 132.

2. As to the rejection of the witness who was called to prove the entry in the books of Brown & Hackman. There was no proof that it was one of the books of that firm; nor was any notice given to the defendants to produce it. It was not proved to be in the possession of the defendants, but in that of the assignees of Brown & Hackman, who were different persons. The plaintiffs might have had a *subpœna duces tecum.* The ground of the opinion of the court was, that the testimony offered was not the best evidence, as the book itself might have been had.

3. The important question in the cause is, whether, by the act of forfeiture, the property vested in the United States, before condemnation. We admit, that the owner of property may maintain trover against a vendee, claiming under a third person, and disaffirm the sale; or he may affirm the sale, and bring an action for the price. The present action is grounded on the right of property being in the United States, at the time of the sale. The seizure of the vessel was not made by the United States, until after the assignees of Brown had sold and delivered her to a third person.

If the present action is not founded on the right of property, the action should have been debt for the penalty, or a special action on the case, grounded upon the statute, and averring every matter necessary to entitle
*345] the United States to recover. *The right of the United States to the property, depends upon the act of 1792. The 4th section, which declares the forfeiture and penalty, is silent as to the remedy. When the act creating a penalty is silent as to its mode of recovery, the action must be debt, or case on the statute. The only remedy, then, which the United States had, was either by a seizure of the ship, or an action of debt, or special action on the case, for the penalty. But the present is an action for money had and received. It is not grounded on a crime or a *tort.*

The United States have lost their remedy *in rem*, by suffering it to be

sold, without notice. Upon this point, the sentence of the district court, which has been acquiesced under, is conclusive; for it goes upon the ground that the United States had not the right to the thing, at the time of the sale; for if they had, the vendee gained no legal title, and therefore, could not be protected by the want of notice. But he was protected by want of notice; he must, therefore, have gained a legal title, which could be protected. He could gain his legal title only from the assignees, but they could not convey a legal title which was not in them. At the time of sale, therefore, the legal title must have been in the assignees; and as there could not be two legal titles to the same thing, at the same time, in different persons, the title could not be in the United States. This is the consequence which inevitably results from the sentence.

Having lost their remedy against the thing, their only alternative is an action for the penalty against the person who took the false oath. The act provides no substitute for the process *in rem*, but the action against that person; it gives no right of action against the person who may be in possession of the thing. No action for the penalty will lie against Brown's assignees. It is in the nature of a criminal prosecution.

*The act gives the United States an election of one of two remedies, but not of both. They may proceed *in rem*, or *in personam*. [*346
Until their election is made, the thing itself is not forfeited, for they may never choose to proceed against the thing, but may prefer the remedy against the person. They have made their election, by proceeding *in rem*; having failed there, they could not take the other side of the alternative, and sue for its value. The sentence has been submitted to, and is conclusive, until reversed.

Suppose, the libel had been dismissed, because it was not sufficiently proved that Brown had sworn falsely, or that he knew he was swearing falsely, could the United States turn round, and try the same question again, upon an action against Brown for the penalty? Or, after suing Brown for the penalty, and failing to recover judgment against him, could they seize the ship, and try the question over again. A judgment, until reversed, is conclusive as to the subject-matter of it. *Moses* v. *Macferlan*, 2 Burr. 1009.

At common law, a forfeiture does not alter the property, until there is some act done by the party claiming the forfeiture, either *en pais*, or of record. A forfeiture of lands relates back to the time laid in the indictment; but the forfeiture of goods relates to the time of conviction. In both cases, the time must appear of record. Co. Litt. 390 *b*, 391 *a*. In case of *deodand*, nothing is forfeited, until it be found by inquest. So, in the case of *felo de se*, no part of the personal estate is forfeited to the king, before the self-murder is found by inquisition. So, in the cases of flight, and of goods waived. 1 Hawk. P. C. 101, 104.

The case of *Roberts* v. *Withered*, 5 Mod. 193, was decided on the ground that an action of detinue was a process *in rem*, and equivalent to a seizure.

**Harper*, in reply.—1. As to the exclusion of Hackman's testimony. [*347
It may, perhaps, be safely admitted, that if the testimony has an immediate, direct and certain effect upon his interest, a man may be excused from

testifying. But in the present case, it depended upon several contingencies. 1st. Whether Brown's estate would be sufficient to pay the claim of the United States; 2d. Whether Hackman's certificate would bar the United States, a point not yet decided, and upon which legal opinions differ; 3d. Whether the United States would choose to resort to Hackman, until the effects of Brown were exhausted; and 4th. Whether there would be any surplus of Hackman's estate. The authority from Peake 132, is not to the point; for he says, that the testimony must go to establish a debt against himself, before the witness can be excused from giving it. And the case which he cites from Strange 406, shows that it is only a matter of indulgence, and not of right, even in such a case: for although the witness was bail in the action, yet if he was a subscribing witness, the Chief Justice said, he would oblige him to swear.

2. As to the testimony respecting the book. It was proved, that the book was in the hands of the assignee of Hackman, who refused to produce it. We could not issue a *subpœna duces tecum*, because the book was a private document; and it not being in the possession of the defendants we could not compel them to bring it in, under the act of congress. Between a bankrupt and his assignees, there is a perfect privity as to all matters of contract and interest. The book, therefore, must be supposed to be in the hands of Hackman; and as the court refused to compel him to testify, or to produce the book, evidence of its contents was the next best evidence in our power. As to this case, it was as if the book had been lost or destroyed. If a subscribing witness to a bond be out of the reach of the process of the court, you cannot compel him to testify, but you may give evidence of his handwriting.

*348] 3. As to the main question. *The defendants are not sued as assignees. The action is against them in their own right, as having received money to which the United States are entitled. We say, that they have taken property of the United States, and sold it, and we are entitled to the money. The forfeiture of the value is to be recovered of the person who took the oath; but this does not prevent the United States from pursuing such other remedies as they might have had by reason of the forfeiture. If, then, the forfeiture gave the United States the right to the thing, they are entitled to the present remedy.

The question is, at what time did the property vest in the United States by reason of the forfeiture? The case in 5 T. R. refers to, and recognises, the law as decided in *Roberts* v. *Withered*, in 5 Mod. The decision there was, that by the illegal act of the party, the property was divested out of him. The doctrine of abeyance does not exist in any case: it has been laughed out of existence. The property must be somewhere. If it does not vest in a private owner, it goes to the sovereign, or to the government. If divested out of the owner, it goes, *eo instanti*, to the person to whose use it is forfeited. When the forfeiture accrues to a private person, he must do some act to entitle himself. But not so in the case of the king; it vests in him immediately. He is not bound to do any act. In the case of *Roberts qui tam* v. *Withered*, 5 Mod. 193, the right of the informer did not accrue until the action brought; but the whole had gone to the king by the forfeiture. The offence divests the property, but it is not vested in an informer,

until action brought. In the mean time, it is in the king. The informer's right only vests by action.

There is a difference between a forfeiture by statute, and a forfeiture by common law. The common law says, the king shall have it, if he will; but the statute says, it shall absolutely vest in the king. By the statute, the king, speaking by the legislature, has determined his will; he has made his election to have the thing. But the statutory remedy does not take away the common-law remedy: it is cumulative. The United States are not obliged to resort to the statutory remedy.

*But it is said, that the United States had an election, and that no right to the thing vested, until they made their election. We may admit it; but we say, we have elected the present remedy. Admit, that we elected to seize the vessel. It had escaped; it was gone out of our power. It was still an election, and we are now proceeding in an action for its value. The election will relate back. We have the whole three years to make the election. If we pass the three years, the property goes back to the former owner. The value is not to be considered as a penalty, but as a debt. We might have brought *detinue* or *trover* for the ship, instead of an action for the value, or a seizure. [*349

We admit, the sentence cannot be inquired into; but it does not affect the present question. The decision was not on the point of the forfeiture.

February 22d, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—This action is brought to recover money, received by the defendants, for a ship sold by them as the assignees of Aquila Brown, a bankrupt: which ship is considered, in this cause, as having been liable to forfeiture, under the "act for registering and recording ships or vessels." It is founded on the idea, that, at the time of sale, the ship was the property of the United States, in virtue of the act of forfeiture which had been committed, and of the proceedings of the United States in consequence of that act.

It appears, that in 1801, Aquila Brown, jr., then carrying on trade in his own name, in Baltimore, obtained a register for the Anthony Mangin, as his sole property; having first taken the oath which the law requires, to enable him to obtain such register. He afterwards became a bankrupt, and the Anthony Mangin passed, with his other effects, to his assignees, who sold her for the money now claimed by the United States. After *this sale, facts were discovered, inducing the opinion that a certain Harman Henry Hackman, a foreigner, was part-owner of the vessel, a circumstance within the knowledge of Aquila Brown; and upon this ground, she was seized and libelled in the court of admiralty. By the sentence of that court, the libel was adjudged not to be supported, and was dismissed. It is agreed, and is so stated in the reasoning of the judge, which accompanied his opinion, that this sentence was not intended to decide the question of forfeiture; but was founded on the alienation of the vessel, before the forfeiture was claimed. Acquiescing in this decision, the United States brought the present action. At the trial, the judge instructed the jury, that this action was not maintainable, although they should be of opinion, that the fact alleged in the oath, which was taken to obtain the register, was untrue, within the knowledge of the person taking the oath. To this instruction, an [*350

exception was taken; and upon that, among other points, the cause comes into this court.

The words of the act under which the right of the United States accrues are: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made."

The question made at the bar is, whether, by virtue of this act, the absolute property in the ship or vessel vests in the United States, either in fact or in contemplation of law, on the taking of the false oath; or remains in the owners, until the United States shall perform some act, manifesting their election to take the ship and not the value. So far as respects this question, the effect of the sentence in the court of admiralty is put out of the case, for the court has not decided what the effect of that sentence will be.

It has been proved, that in all forfeitures accruing at common law, nothing vests in the government, until *some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence; but the distinction taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.

*351]

The cases cited from 5 Mod. and 5 Term Reports, are certainly strong cases. Whether they can be reconciled to the general principles of English law, need not be considered, because the present inquiry respects the construction of an act of congress, containing words which vary essentially from those used in the acts of the British parliament, on which those decisions were made. The question, therefore, does the ship vest absolutely in the United States, so as to make it their property, whether such be the choice of the government or not, or may they elect to reject the ship and proceed for its value? must be decided by the particular words of the act.

The words, taken according to their natural import, certainly indicate, that an alternative is presented to the United States. "There shall be a forfeiture of the ship, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath shall have been made." Had a special action on the case been brought against the person, by whom the oath was made, stating circumstances on which a forfeiture would arise, and averring an election on the part of the United States to claim the value, it would be a very bold use of the power of construction which is placed in a court of justice, to say, that such an action could not be maintained, because the vessel itself was vested in the government, and the value was only given, in the event of the vessel being withdrawn from its grasp.

*In addition to the obvious and natural import of the words used by the legislature, the opinion that an alternative is given to the

*352]

government, derives some strength from the consideration, that the forfeitures are claimed from distinct persons. If the ship be forfeited, she is claimed from all the owners. In an action for the Anthony Mangin, Harman Henry Hackman could not have defended himself, by averring his interest in the vessel, and that only the share of Brown was forfeited; but in an action against Hackman, for the value, the declaration, or information, must have averred that he was the person who took the false oath, and proof that it was taken by his partner, would not have supported that averment. They are, then, distinct forfeitures, claimed from different persons. The ship, from the owners; the value, from the particular owner who has taken the false oath. The United States are entitled to both, or to only one of them. A right to both has not, and certainly cannot, be asserted. If there be a right only to one, the government may elect to take either, but until the election be made, the title to the one is perfectly equal to the title to the other.

It seems to be of the very nature of a right to elect one of two things, that actual ownership is not acquired in either, until it be elected; and if the penalty of an offence be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering, materially, the situation in which that person is placed, to say, that either is vested in him, before he makes that choice. If both are vested in him, it is not an election which to take, but which to reject; it is not a forfeiture of one of two things, but a forfeiture of two things, of which one only can be retained. That the legislature may pass such an act is certain; but that the one under consideration is such an act, is not admitted by the court.

If the property in the vessel was actually vested in the United States, by the commission of the offence, then the judgment of a court, condemning the vessel, *or declaring it to belong to the government, would, in [*353
fact, do nothing more than ascertain that the offence had been committed; it would not vest the thing more completely in the government, in point of right, than it was vested by the commission of the offence. If, notwithstanding the complete ownership of the vessel, which the argument supposes in the government, immediately upon the act of forfeiture, and in virtue of that act, a suit for the value might have been maintained, it would seem to follow, that a judgment, declaring the vessel to be the property of the United States, would not bar an action for the value, provided the benefit of that judgment had not been received by the United States. The real principle on which an action for the value can be maintained, would seem to be, that the ship itself did not belong to the United States in consequence of the false oath, but in consequence of the election to take the ship. If this election be not made, and the government shall elect the value, then the property of the vessel remains in the original owners, and is no obstacle to a suit for the value. But if this opinion be mistaken; if the property in the ship be immediately vested in the government, notwithstanding which the value may be claimed, the court cannot distinctly perceive why the same action might not be maintained, notwithstanding the declaration of a court that the property was in the United States, provided the benefit of their judgment was not obtained. In this view of the case, if the court of admiralty had decreed in favor of the United States, and the Anthony Mangin

had been destroyed, before the benefit of that judgment had been received the person who had taken the false oath might still have been sued for the value. This would never be contended; and yet, if the absolute ownership of the vessel by the United States does not preclude a right to sue for the value, before a judgment be rendered, there is some difficulty in discerning when it will preclude that right. In fact, the idea that one of two things is actually vested in government, by an act to which forfeiture is attached, seems incompatible with the idea of a right to elect which of two things shall vest.

It seems, then, to be the necessary construction of the act of congress *354] that the United States acquired no *property in the Anthony Mangin, until they elected to pursue that part of the alternative given by the statute. Of consequence, the money for which that vessel was sold, was not, at the time, received for the use of the United States; but for the use of the creditors of the bankrupt.

To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case, that an election, subsequent to the sale, shall carry back the title of the United States to the commission of the act of forfeiture, so as, by this fiction of law, to make them the real owners of the vessel at the time of sale, and consequently, of the money for which she was sold?

Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing, which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title to the Anthony Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

The court will not inquire whether an action on the case, against Grundy & Thornburgh, for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown. But some objections to it may be stated, which deserve consideration. It certainly gives no notice of the nature of the claim, a cir- *355] cumstance *with which, in a case like this, the ordinary rules of justice ought not to dispense. It asserts a claim, founded on a crime yet remaining to be proved, not against the person who has committed that crime, or against him who possesses the thing which is liable for it, but against those who, though the assignees of the effects, are not the assignees of the *torts* committed by the bankrupt. It may change the nature of the defence. The court suggests these difficulties, as probably constituting objections to the action, without deciding on them. The points previously

determined show that it is not maintainable in this case, under that alternative of the statute which subjects the vessel to forfeiture.

It remains to be inquired, whether it can be maintained under the provision which gives a right to sue for the value. Upon this part of the case, no doubt was ever entertained. Not only must the declaration specially set forth the facts on which the right of the United States accrued, and the law which gives their title, but the action must be brought against the person who has committed the offence. Discarding those words which relate to other objects, and reading those only on which the claim to the value is founded, the statute enacts, that "in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the value of the vessel, in respect to which the same shall have been made, to be recovered, with costs of suit, of the person by whom such oath shall have been made." It certainly requires no commentary on these words, to prove that an action for the value can only be supported against the person who has taken the oath.

It being the opinion of the court that this action is not maintainable, under any proof offered by the plaintiffs, it was deemed unnecessary to inquire whether the other exceptions in the record be well or ill founded.

*Without declaring any opinion respecting them, the judgment of the circuit court is affirmed. [*356

Judgment affirmed.(*a*)

(*a*) The opinion of Judge WINCHESTER, in the case of United States *v.* The Anthony Mangin, Norman, claimant, referred to in the argument, was as follows:[1]

The libel is grounded on the statute for enrolling and registering ships and vessels. The proceedings being *in rem*, all the world become parties to the sentence, so far as the right of property is involved; and of course, all persons any wise interested in the property in question are admissible to claim and defend their interests.

The libel states the cause of action, with all the averments necessary to support the affirmative allegation, that a forfeiture has accrued. The only claimant intervening in this cause, is T. W. Norman, who alleges himself to be a purchaser *bonâ fide*, for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase; and under such purchase, *i. e.*, *bonâ fide*, and for valuable consideration, claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits.

On these proceedings, several questions of law have been raised and argued by the counsel; and as the great point in the cause does not appear to have ever received, either in this country or Great Britain, any direct judicial determination, I have, with great diligence, examined into the questions, which, from the breaking the cause, I saw must necessarily be involved in the determination. The opinion which I am now to give, though the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court, upon a new, great and important legal question, and which will probably receive, as it ought, the ultimate judgment of the supreme court.

It is necessary to keep in different views, the questions of fact in issue, the questions of law arising from those facts, and the parties between whom they arise. It is to be distinctly remembered, that A. Brown, whose wilful perjury is alleged to sustain the forfeiture sued for, is no party to this suit; neither are his assignees, in any shape, parties to this suit, to be directly affected by the judgment. Every consideration,

[1] 2 Pet. Adm. 452.

therefore, which would support a prosecution against the actual offender, to recover the penalty of his wilful crime, or which might be alleged against those who stand in his situation, as privies in law *quoad* the forfeiture, must be laid out of the case. The only parties to this case are, the United States and the informant, as libellants, and T. W. Norman, as claimant of the ship.

I think it peculiarly necessary to confine my opinion to the state of facts, and the questions of law applying to the parties in court, because it is not necessary for me to decide, whether the assignees of A. Brown are clothed with any of the essential characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had; and the question *de bonâ fide emptoris*, does arise directly upon Captain Norman's claim, and will determine this case. To that I shall, therefore, immediately proceed.

No seizure was made, nor libel filed against the ship, until after Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration; nor until after he had obtained a new register, in his own name, upon that purchase. It is argued by the libellant's counsel, that Brown was not competent to pass any property to his assignees, nor they, to any purchaser under them, as the forfeiture relates back to vest the property from the time of the false oath, and that the claim of the libellants is paramount to that of the claimant The defendant's counsel argue, in support of his claim, that the relation back to the time of the offence is never admitted, to overreach rights intermediately acquired by third persons.

In commenting upon the case from 1 T. R. 252, when the argument was first opened, Mr. Martin pressed very strongly the *dictum* of Lord KENYON, that if the relation back to the time of an offence was admitted, as to the property, it would, in every case, equally relate to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases for applying the argument *ab inconvenienti*, and as such I was forcibly struck with it, when mentioned. The manner in which Lord KENYON is reported to have made this observation, plainly shows it to be the declaration of a sudden impression, and which, though correct as applied to some special cases, is not so in the latitude reported, either at common law, the civil law, or in equity, supported by policy.

1. At common law, even as to the guilty party, no attainder whatsoever has relation, as to the mesne profits of land, but only from the time of the attainder. 3 Bac. 272; Co. Litt. 290 *b*, 118 *a*.

2. By the civil law, and the rules of equity adopted from that code, a subsequent possessor is not only not in a worse situation than those from whom he derives his possession, but even in cases where the original possessor might be bound to restore profit, a *bonâ fide* possessor is exempt from any such obligation; as in the case of a *bonâ fide* purchaser. *Bonâ fide emptor non dubie percipiendo fructus etiam ex re aliena, interim suos facait, non tantum cos qui diligentia et opera ejus proveniunt, sed omnes; quia quod ad fructus attinet loco domini est.* Zouch, Q. J. C. 213.

3. It would not be equitable or just, in the abstract, to permit a legal owner to lie by, to avail himself of the ignorance of an innocent holder. And the same considerations of policy, which, in England, permit the offender and his family to enjoy the profits of lands forfeited for treason, which is a strong and acknowledged case of relation to the offence, lest the land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offence, or only to the time of conviction.

As this reason against relation does not appear to have the force it carried at first view, we must have recourse, 1st. To the principles of decision in analogous cases; in their application, always having regard (as was justly argued by Mr. Harper, on the motion to produce Brown's examination before the commissioners) "that a relation back shall never be admitted to injure the rights of third persons, nor to protect or favor wrong." And, 2d. To the statute under which the forfeiture is claimed in this case.

The adjudged cases on this subject, are six classes of offences, which incur a forfeit-

ure of real estate (2 Bl. Com. 267); and seventeen which produce a forfeiture of personal property (Ibid. 421). In this numerous classification, the principle which governs each description of cases does not materially differ. I have, therefore, selected only, 1st. The cases of outlawry, and attainder of crimes; and (as illustrative of these cases) 2d. Waived goods; 3d. Relation of executions at common law, and since the statute of Charles; and 4th (as involving the general doctrine of this case, and to explain the case of *Roberts* v. *Withered*, cited by Mr. Harper, from 5 Mod. 193; Salk. 223), a case of villeinage which governed that decision.

1. Attainder, or conviction of crimes and outlawry. Of this description, there are two classes, which are adjudged to have relation to the time of the offence committed, and overreach all intermediate alienations, treason and *felo de se*. The case of treason, in which the forfeiture as to land relates to the time of the offence committed, depends upon feudal principles. As the land could not be aliened by the tenant, voluntarily, it would be preposterous to admit that to be done, through the medium of a crime, which could not be done by a lawful act; and the power to sell, introduced by subsequent statutes, is construed as applying only to lawful alienations. The reason assigned in some books, that it shall relate to the offence, "because the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which, the same books admit, is only affected from the time of the conviction; and the time charged is traversable, even in the case of land, by third persons claiming an interest therein. 5 Bac. Abr. 228; Hale H. P. C. 261, 262; 3 Bac. Abr. 271; Plowd. 488; 8 Co. 170; Hale H. P. C. 264, 270; 3 Inst. 230. It is a proposition universally true, that the forfeiture, upon an attainder of treason, relates but to the conviction, as to chattels, unless the case of the offender killed in resisting, or flight, form an exemption, which may well be doubted. Indeed, says Lord Coke, it hath always been holden, that any one indicted of treason or felony, may *bonâ fide* sell any of his chattels, real or personal. 3 Bac. Abr. 271; Perk. 29; 8 Co. 171; *Jones* v. *Ashurst*, Skin. 357; 4 Com. Dig. Forfeiture, B. 4; 2 Inst. 48.

In the case of a *felo de se*, it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided. 3 Bac. Abr. 272. This is the only case I have ever discovered, in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a drag-net indeed. It may, perhaps, most correctly be considered as a case *sui generis*, and neither for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases. Those who are curious on this subject, will be amused with the argument of Chief Justice Dyer, on the drowning of Sir J. Hales, and will, probably, be as much convinced by the reasoning of the Chief Justice, as by the logic of the grave-digger in Hamlet, to prove that the drowning of Ophelia was *se defendendo*. Plowd. 262.

Outlawry subjects the party to forfeitures, which are well known to depend upon the nature of the suit on which they are prosecuted. Without inquiring when an office is necessary, or may be dispensed with by the crown, I shall mention one case, where, even after an outlawry (of which purchasers might always have notice, as it is a matter of record), a fair purchaser was protected, even against the crown. It is from Hardres 101, *Attorney-General* v. *Freeman*. A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands, among others, were found by inquisition; and this case was pleaded in bar, to bind the king before the inquisition. The court held, that a lease, or other estate made by the party, after outlawry, and before an inquisition taken, will prevent the king's title, if it be made *bonâ fide*, and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made after the inquisition, will take away or discharge the king's title. 5 Bac. Abr. 564; Salk. 395; Carth. 442.

These cases are strong to show the general protection afforded by law to fair purchasers, even where the forfeiture is *in rem*, and the offender is not actually divested of his possession, the necessity of which is directly affirmed in the second description of cases to which I have referred, viz:

2. Waived goods. "As to waived goods, these belong to the king, and are in him without any office, for the property is in nobody. They may belong in like manner to the lord of the manor, by grant, but not by prescription." 5 Bac. Abr. 517; 5 Co. 109. The general principle of these cases is conformable to that quoted by Mr. Harper from 12 Mod. 92, to show that an offence like that charged against Brown, divested the property out of him, and left it, as it were, in abeyance, until suit, which vested the property, by relation, from the act of forfeiture. A position of greater comprehension, or which, as a general one, should embrace the libellant's case, could scarcely be imagined. Waived goods are in the king, without office; that is, even without seizure, the purpose of which, as to legal title to the king, is answered by the office; the property is, as it were, in abeyance; yet this case, so completely applicable in its general principles, contains the strongest possible illustration of the doctrine, that a title by forfeiture, in the case of a personal chattel, begins from suit, seizure or conviction, and has no relation back; for "the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; for the lord's property begins from the seizure." 5 Bac. Abr. 517; Kitchen 82. This case is conclusive against Mr. Hollingsworth's argument, that this question is a question of property only, since it proves that property only begins from the seizure, which cannot be lawfully made to affect an intermediately vested right of a third person.

3. The relation of executions at common law, and since the statute; considering this case as one between the government and the claimant, from analogy to cases of the king's precedency in execution. By the statute of 33 Hen. VIII., c. 9, it is enacted, that if any suit be commenced or taken, or any process awarded for the recovery of any of the king's debts, then the same suit or process shall be preferred before any person or persons. And as to the king's execution of goods, the same relates to the time of awarding thereof, which is the *teste* of the writ; as it was in the case of a common person at common law. 2 Bac. Abr. 734.

Now, to apply this doctrine to the case before the court, and even admitting to this libel the same extent of relation as is admitted at common law upon the king's execution against personal chattels, and as to real and personal by the above recited statute, will it overreach the sale to Captain Norman? It is generally agreed, that an execution executed, though posterior to the time to which the king's extent relates, bars the king's priority; and in the case of Lechmere *v.* Thorowgood, 3 Mod. 236, Comb. 123, it was holden, that if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed, for the property of the goods is changed by the subject's execution. Here, then, we advance one step farther in restricting the doctrine of relation, as it applies to individual interests. It is presumed, that the principles of relation upon executions, since the statute, are too familiar to require any reference to adjudged cases.

The case of *Roberts* v. *Withered*, as reported by Salkeld, and copied by Bacon, is in these words: "By the act of navigation, 12 Car. II., c. 18, certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize or sue for the same." It was adjudged, that, in this case, the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villein distrained; for the bringing of the action vests a property in the plaintiff. When this case was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court than any which occurred in their researches. On a careful examination of that case, I now think, it will be found not to bear on the point now to be decided. In the first place, it may be observed, that the case, as reported, does not afford any ground to presume, that any other person than he who unlawfully imported the goods was interested in that suit; but on the contrary, it is presumable, that it was a suit against the original importer. In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation. And further, it is

to be remarked, that the question in that case, seems to have been only upon the form of action. It was detinue, which is founded on property; and all that that case decides is, that in a case of specific forfeiture, the bringing of a suit vests a property in the plaintiff, sufficient to sustain that form of action; for the case to which it is likened, and on which the decision rests, is express, to show it does not relate to the interests of others; for, says the book, "in this case the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villein," which case, as I will show, goes not only to the form of action, but to the full length of this case. I will read that case. (*Vide* Littleton, § 177, with Lord COKE's comment thereon). So, in this case, the ship was liable to forfeiture, and might have been specifically recovered from Brown, by the government, or any prosecutor under its laws, before a *bonâ fide* alienation by him; but if they have waited until such alienation by him, and a third person has honestly bought and paid for the property, they may be answered in the language of Littleton, "that it shall be adjudged their folly, that they did not enter, when the offender was in possession;" for, according to Lord COKE, before such seizure, they had neither *jus in re*, nor *jus ad rem*, but only a right to sue, which I understood to be Lord COKE's possibility above referred to.

From all these cases and principles, I infer, that the relation of the forfeiture to the time of the offence, in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in case of forfeiture of chattels, the relation is only to the time of conviction; that the forfeiture to which a party is subjected, by statute, of a personal chattel, must be construed with relation to the continuance of his ownership in that chattel, at the time of conviction, and cannot be prosecuted *in rem*, to affect a *bonâ fide* purchaser for a valuable consideration; and this construction, I think not only warranted by the statute on which this suit is founded, and which speaks of a recovery of the value of the ship, but also by sound legal principles. The value can only be recovered against the actual offender, and never from a *bonâ fide* holder; for against the offender, it is the value at the time of the offence; even against a *malâ fide* holder, it is only of the thing, be the value of that thing greater or less. If any holder *bonâ fide* was liable, because of his possession, he would not be the less so, after he had parted with his possession; but he might be made answerable for the value of the thing, in the same manner as if the possession continue with him; but even where he was not strictly a *bonâ fide* holder, the remedy is lost, if his possession is gone. And it is but just, when two remedies are given to punish an offence, one of which shows the plain intent of the legislature, that it shall follow the offender, personally, or in his personal interests, so to construe the other remedies as not to permit them to be extended to involve others who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown, by his false swearing, subjected the ship to forfeiture *de facto*, and that no alienation by him could vest a better title in the vendee than the vendor possessed; and that as he held the ship subject to forfeiture, so any holder under him, or through him, must take subject to that forfeiture, is certainly a strong one. The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true, as a general principle; and the exceptions to its operation are those on which I rely to warrant my construction of the statute in providing for a recovery of the value of the ship, as well as to show that, in some instances, he who has no title at all may yet transfer a valid one to personal chattels. Robbery can give no title to goods, and upon conviction, there is a judgment of restitution, according to the statute, which fixes the remedy against any person in possession at the time of the conviction; and this is by the express provision of positive law. Yet, the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft, before conviction. And if the owner of goods loses them, by a fraud, and not a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person, *e. g.*, a pawnbroker, who has fairly acquired a new right of property in them. If, therefore, he who hath

no title at all, may in some cases, nevertheless, give a legal right, *à fortiori*, he who holds by a title defeasible only within a limited time (for by the statute of limitation, the prosecution, in cases like the present, must be within three years) may transfer a good title to a fair purchaser for a valuable consideration. The language of Blackstone is very emphatic: "the right of proprietors of personal chattels is preserved from being divested, only so far as is consistent with that other necessary policy, that purchasers, *bonâ fide*, in a fair, open and regular manner, should not be afterwards put to difficulties, by reason of the previous knavery of the seller."

The statute provides, that in case of a wilful false oath, in any of the matters required, previous to the obtaining of the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which the same shall have been made, or the value thereof to be recovered," &c. It seems to me, to be the plain and just construction of this statute, that the wilful false swearing does not *ex directo* produce a forfeiture of the ship. The forfeiture is alternative, either of the ship, or the value of the ship, at the election of the government or persons suing; but not of both the ship and the value. If the government had recovered the value from Brown, there would have been an end of proceeding against the ship. And if the offence charged against Brown only produces a specific forfeiture by a subsequent election, the argument is cogent, that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity; and conclusive, that Brown's title was not forfeited *de facto*, but forfeitable only, and therefore, within the principles of the cases of villeinage and waived goods, before relied on by me, and expressly by Blackstone. 2 Com. 421.

Further, the forfeiture is of the ship, or the value. I have construed this clause somewhat differently from all the counsel, and though this circumstance produces doubts of its correctness, yet, as it has weighed with me, and minds of less comprehension may sometimes embrace truths which may escape superior understandings, I think it my duty to mention it. It is this. That the ship is not liable to forfeiture in the hands of any holder, other than the persons false swearing, in any case but where such holder would be liable to a suit for the value. The words, that there shall be a forfeiture of the ship, &c., or of the value thereof, to be recovered, with the costs of suit, of the person by whom such oath or affirmation shall have been made, plainly show the intent of the legislature, that the penalty and punishment should attach to the offender only. "To be recovered of the person," both grammatically and legally, relate to the object to be recovered, to wit, the ship, or the value thereof; and to the person from whom, and from whom only, the one or the other is to be recovered. The guilt of false swearing forfeits only such interests as the offender possessed; for, by the express provision of the 16th section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture; and the words of the statute, which connect the recovery with the forfeiture, in this case, exclude the idea of any recovery from an innocent holder. *Expressio unius est exclusio alterius.*

If the ship is forfeited by the sole act of the false swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers, in public market. Every particular sale would be a particular conversion, and every one through whose hands she may have passed might be sued for the value of the price; but the statute says, that the value shall only be recovered of the offender himself. A party having fairly obtained and fairly lost or departed with his possesion, would not, in such case, be liable for the thing, or its value. 3 Com. Dig. 359; 2 T. R. 750. If not liable, when his possession has honestly ceased, neither can he be made so, when it honestly continues, since his own act cannot vary his responsibility.

Does reason or policy require a different construction? The government prohibits an act, under a penalty against the party offending. They say, we, for this, forfeit the thing in respect to which you have sworn falsely, if it continues in existence, and is yours; but if lost, or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated, if sold, pay the value; if you have fraudulently impaired the thing, pay the value. The one or the other shall be re-

*Marine Insurance Company of Alexandria *v.* John and James H. Tucker.

Marine insurance.—Deviation.—Loss by capture.

If a vessel be insured "at and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston, for Baltimore and Alexandria, and sail with intent to go first to Baltimore, and from thence to Alexandria, and before she arrives at the dividing point, is captured; it is a case of intended deviation only, and not of non-inception of the voyage insured.[1]

It depends upon the particular circumstances of the case, whether, if the vessel be captured and re-captured, the loss shall be determined total or partial.

Error to the Circuit Court of the district of Columbia.

This was an action of covenant, by John and James H. Tucker, on a policy of insurance, dated September 1st, 1801, upon the sloop Eliza, at and from Kingston, in Jamaica, to Alexandria, in Virginia. *The defendants pleaded, 1st. That the vessel never sailed on the voyage insured, and was not prosecuting the voyage insured, at the time of the capture; and 2d. A general performance of the covenants contained in [*358 to *365

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covered of you, of *you*, the guilty party. But this prohibition contains no threat of punishment against an innocent holder. No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender; and the law can never require of a purchaser to examine into the secrets of the heart. It is more the interest and policy of government, to increase its wealth and strength, by the employment of its ships in trade and commerce, than to augment its revenues by forfeitures. It, therefore, wisely protects the interests of fair shipholders from forfeiture for the crimes of others, while it carefully provides for the punishment of fraudulent contraventions of its laws. Protection is not, by this construction, afforded to guilt or fraud; it is only a shield for innocence. The remedy remains, as it ought, against him who committed the offence. Government cannot be deprived of its forfeiture, by any fraudulent alienation. Such a sale would be void. *Jones* v. *Ashurst*, Skin. 357; *Twyne's Case*, 3 Co. 81; 2 Bl. Com. 421.

The possession is, legally, and to effectuate the statutory provision, still in the vendor. Indeed, all the reasoning on this subject is contained in two axioms of the civil law, to which this court may be allowed to refer. *In rem actione tenetur qui dolo desiit possidere.* Zouch, Elem. 197. *Et aliquando, qui feri non debet, factum valet; firmum et probum quod sit bonâ fide, improbatur autem quod sit malâ fide vel dolo.* Ibid. 41. If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interests of commerce, and the security of all shipholders.

I do, therefore, order and decree, that the libel in this case filed shall stand dismissed, and that the ship, &c., be restored to the claimant. But as the case involved questions of great difficulty, upon which eminent counsel have differed in opinion, and judges may differ, and it was proper, in every view of the case, to put those questions in a course of legal adjudication, I shall certify probable cause of seizure, and decree restitution, without costs.

[1] Winter *v.* Delaware Mutual Safety Ins. Co., 30 Penn. St. 334; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241; New York Firemen's Ins. Co., *v.* Lawrence, 14 Id. 46. The principle of this case is, that if there be no change of the *terminus* of the voyage insured, and the vessel actually sail for her intended port of destination, an intention to deviate by calling at an intermediate port for the delivery of cargo, will not avoid the insurance, if the ship be captured before arriving at the point of divergence, so that there is no actual deviation. The same doctrine was held in Winter *v.* Delaware Mutual Safety Ins. Co., *ut supra.*

the policy; upon which pleas, the issues were joined, and verdict and judgment for a total loss.

At the trial, the defendants took three bills of exception. The 1st presents the following case: The execution of the policy was admitted. The vessel was of the value insured, and belonged to the plaintiffs (the defendants in error), who were British subjects, resident at Alexandria. The vessel was navigated under a British register, and had sailed from Alexandria for Kingston, in June 1801, with a cargo, consigned to Bryan & Co., in Jamaica, who were instructed, by a letter from the plaintiffs, to sell the vessel and remit the proceeds. The vessel was commanded, ostensibly, by Boaz Bell, but really, by Eli R. Patton, who also went as supercargo, with orders to sell the vessel at any rate; but if not sold, to return to Alexandria with the proceeds of the outward cargo. Bryan & Co. used their best endeavors to
*366] sell the vessel, but without effect, and *could get no offer for her, either before or after she sailed from Kingston. Having taken in ten tierces of coffee, the property of the plaintiffs, to be delivered at Alexandria, she cleared out at the custom-house, in Kingston, on the 10th of August 1801, for the port of Alexandria, with intention to sail, on that day, with convoy, then lying at Port Royal, but which convoy did not sail until the 17th.

While waiting for convoy, freight was offered to Baltimore, and the master, having obtained a permit and made a post-entry, discharged his ballast, and took on board twenty hogsheads and ten tierces of sugar, for that port, and signed bills of lading accordingly; but this caused no delay as to the time of his sailing, as he waited for convoy—it being known that several Spanish cruisers were hovering on the coast of Jamaica. On the 17th, she sailed for Baltimore, with intention to go first to Baltimore, and from thence to Alexandria. On the 22d, whilst sailing, in the usual course from Kingston to Baltimore and Alexandria, she was captured, by a Spanish vessel, as prize, and all her men were taken out by the Spaniards, excepting Bell and one other. In less than three days, she was re-captured by a British sloop of war, and carried back to Kingston, on the 26th of August, where she was libelled for salvage.

*367] *The rate of salvage, in cases of re-capture, is fixed by British statutes, and does not exceed one-eighth of the value, at the port of adjudication. Bryan & Co., as agents of Patton, put in a claim in behalf of the underwriters, alleging that the vessel had been abandoned to them. The vice-admiralty court decreed restoration, on payment of one-eighth for salvage, and full costs; and directed the vessel to be sold, to ascertain the true value, unless it could be otherwise agreed upon. The claimant used no endeavors to agree with the captors, as to the true value of the vessel and cargo, otherwise than by a sale; and on the 1st of October, she was sold for $915, and the ten tierces of coffee were purchased by Patton, for the plaintiffs, at the price of $1000. The costs, charges and commissions amounted to $909, and the salvage to $239. The agents of the plaintiffs were content, and satisfied with the mode of ascertaining the value by sale, and did not apply for an appointment of appraisers to ascertain the value.

On the 24th of September 1801, when the abandonment of the vessel was made, by Bell and Patton, she was safe in the harbor of Kingston, but liable for salvage; and the value of the ten tierces of coffee was sufficient to pay the salvage, and all costs and charges.

The register was lost by the capture and re-capture, and had never been found. The plaintiffs could not, according to the laws of Great Britain, obtain a new British register, while they continued to reside out of the British dominions.

Baltimore is not in the direct course from Kingston to Alexandria, after a vessel has entered the Chesapeake Bay.

The plaintiffs received information of the capture and re-capture, at the same time, in a letter from Bryan & Co., dated 25th of September 1801, which also mentioned the sale; but it did not appear, at what time the *plaintiffs received that letter. On the 26th of November, they [*368 offered to abandon the vessel to the underwriters, who refused the offer. Upon this state of facts, the defendants moved the court to instruct the jury, not to find a verdict for a total, but, at most, for a partial loss, which instruction the court refused to give, and the defendants took their bill of exceptions.

The second bill of exceptions did not vary the material facts above stated, but alleged, that the vessel sailed from Kingston, with an intention of going to Alexandria, but also with an intention of touching first at Baltimore, and there delivering part of her cargo, and from thence to Alexandria. That while prosecuting her voyage, with that intent, and while in the direct course, both to Baltimore and Alexandria, and before she arrived at the dividing point between Baltimore and Alexandria, she was captured, &c. Whereupon, the plaintiffs prayed the court to instruct the jury, that there was no deviation at the time of the capture, and that the voyage insured was actually commenced; which instruction the court gave as prayed, and the defendants took their second bill of exceptions.

The third exception was to the refusal of the court to instruct the jury, that the loss of the register, by means of the capture and re-capture, was not sufficient, in law, to defeat the voyage; but that the loss of that document might be supplied by special documents of public officers, setting forth the circumstances of the loss, so that the vessel might have prosecuted that voyage, without seizure and confiscation, under the laws of Great Britain, for want of a British register.

E. J. Lee, for the plaintiffs in error.—1. The voyage insured was never commenced; and the vessel was not in the prosecution of that voyage, at the time of her capture. 2. The plaintiffs cannot recover for a total loss. If there was, in fact, a total loss, it was caused by the misconduct or neglect of the plaintiffs, or their agents, in not doing the best in their power for all concerned. *3. The plaintiffs had not a right to abandon, at the time [*369 when they offered to abandon. 4. The loss of the register was not equivalent to the loss of the vessel. 5. The not communicating to the underwriters the intention of going to, or touching at, Baltimore, was such a concealment as vacated the policy.

1st. Was there an inception of the voyage insured? The contract of insurance is founded on good faith, and must express the intention of the contracting parties. The object of a policy is to reduce to certainty, and to preserve unaltered, what each party engages to perform. The voyage insured must be truly and accurately described, as to the time and place at which the risk is to commence, the place of departure, and the place or places of

destination. Every circumstance relating to the voyage must be stated with the greatest regard to truth. When, therefore, it is intended, that the vessel shall touch at an intermediate port or ports, it must be stated in the policy. Marshall on Insurance, 227. This minuteness of description must have for its object the protection of underwriters from those frauds to which they are exposed by their unfavorable situation for obtaining correct information. But this object will be defeated, if the insured are not bound to commence and prosecute the voyage described in the policy.

The voyage insured was from Kingston to Alexandria. The vessel was bound to sail directly to Alexandria, as her only port of destination, with all convenient dispatch, in the regular and usual course from the one place to the other. If she sailed, with a determination to go first to Baltimore, and there deliver a cargo of thirty hogsheads of sugar, and afterwards, to
*370] come from Baltimore to Alexandria, she did not commence, *and was not lost in the prosecution of, the voyage described in the policy. If the voyage commenced was not, in every respect, the same with that insured, the underwriters are not liable. The voyage commenced was not a voyage from Kingston to Alexandria, but a voyage from Kingston to Baltimore, and from Baltimore to Alexandria.

It is an uncontroverted principle of marine law, that if the voyage is changed, or not performed in the manner described in the policy, the policy does not attach. This principle is established by the case of *Wooldridge* v. *Boydell*, Doug. 16.

This is not a case of deviation, but of non-inception. In cases of deviation, the *termini* are the same. But it is immaterial, whether the termination of the voyage commenced is the same with that insured, when the vessel, in fact and in truth, sails directly for a port not mentioned in the policy, nor contemplated by the parties at the time the insurance was made. If the vessel, in this case, had commenced a voyage for Baltimore, but with an intention to touch at Alexandria, in her way to Baltimore, it would not have been the voyage insured. So, if the master was under an engagement, when he sailed from Jamaica, to go to Baltimore at all events, before he came to Alexandria. The termination of the voyage commenced was Baltimore and Alexandria. The vessel was obliged to come to both places. The *termini* of the voyage were not those described in the policy.

The necessity of commencing and performing the precise voyage described in the policy, is further proved by the opinion given in the case of *Beatson* v. *Haworth*, 6 T. R. 531, where it is decided, that if a vessel is insured to several ports, she must pursue the order in which the places are named in the policy. In the case of *Way* v. *Modigliani*, 2 T. R. 30, the question was, whether the policy ever attached; and if it did, whether it
*371] was not discharged by the vessel's *not sailing upon the precise voyage insured. The case was this: a ship was insured "at and from the 20th of October 1786, from any ports in Newfoundland to Falmouth, or her ports of discharge in the channel." On the 1st of October, the ship left Newfoundland, and went to the Banks, fished there until the 7th, and then sailed from the Banks to England; and on the 30th of November, while in the direct track from Newfoundland to England she was lost. She left Newfoundland for the Banks, long before the policy attached, and although, on the 20th of October, she was in the direct course from Newfoundland to

England, and so continued, until she was lost, yet, because she sailed from Newfoundland, with an intention of going to the Banks, and from thence to England, and actually carried that intention partially into effect, it was determined, that the policy did not attach, and that the voyage insured was not commenced. The partial execution of the intent cannot vary the principle, and was not relied upon in that case. BULLER, J., said, "The first is the substantial ground, namely, that the policy never attached at all. Where a policy is made in such terms as the present, to insure a vessel from one port to another, she must have sailed on the voyage insured, and not on any other. The voyage insured is from a port in Newfoundland to England, whereas, the vessel sailed to the Banks, which was a different voyage. This point has been already decided by the case of *Wooldridge* v. *Boydell*, where it was held, that if a ship, insured for one voyage, sail upon another, although in the same track, part of the way, and she be taken, before the dividing point between the two voyages, the policy is discharged. That was a stronger case than the present, for there the very intention of sailing upon a voyage different from that insured, vacated the policy."

The actual sailing to a port is only one mode of proving the sailing with an intention of going to that port. If the intention is proved, it is not material by what means. Marshall 406 (note). If the voyage is changed, the policy is vacated. *A voyage may be changed, by taking on board a consignment to a different port; and the consignment will be evidence of the change. Or it may be changed, by varying the plan of the adventure, before the commencement of the risk; but a deviation takes place in the execution of the original plan. Therefore, an intention to alter the voyage will destroy the contract. Millar 431. To vary in the smallest particular from the original plan of the voyage, constitutes an alteration. Ibid. 392. [*372

In the present case, the plan of the voyage was fixed by the policy, and on the 10th of August, the vessel had actually cleared out, with an intent to pursue it; after which, she discharged her ballast, and took in thirty hogsheads of sugar, to be delivered in Baltimore. This not only altered the original plan of the voyage, but increased the risk of capture, by increasing the value of the prize. The case of *Stot* v. *Vaughan*, cited in Marshall 232, 4 Williams' Abr. 296, determined by Lord KENYON, is in favor of the underwriters upon this point.

The case of *Kewley* v. *Ryan*, 2 H. Bl. 343, is the only one which has the appearance of opposition. But that case will be found to be unlike the present in the following particulars: 1. In *Kewley* v. *Ryan*, the vessel sailed from Grenada for Liverpool, which was the voyage insured, but with an intention to touch at Cork, which was in the usual course from Grenada to Liverpool. But in the present case, the vessel sailed for Baltimore, with an intention to come round to Alexandria from Baltimore, which is not in the course from Kingston to Alexandria. 2. In *Kewley* v. *Ryan* the vessel intended only to touch at Cork; but in the case at bar, the vessel sailed on a trading voyage for Baltimore. *Stitt* v. *Wardell*, 2 Esp. Rep. 610. *3. The Eliza altered the plan of the original adventure, by taking in sugar for Baltimore; but in *Kewley* v. *Ryan* it does not appear that the original plan was changed. 4. The risk was increased by taking the cargo for Baltimore, but the intention of touching at Cork did not increase the risk. [*373

Independent of these differences between the two cases, it is very ques-

tionable whether the determination in *Kewley* v. *Ryan* is correct, upon principle. It establishes a doctrine which enables the insured to defraud underwriters, by making the evidence of intention to vary the voyage depend upon the single testimony of the master, which is apt to bend to the interest of his employers. It too often happens, that insurance cases depend upon the same kind of testimony. The case of *Kewley* v. *Ryan* is also, in principle, contradicted by that of *Middlewood* v. *Blakes*, 7 T. R. 162 ; Marshall 406, note b.

2d. The 2d point is, that if the plaintiffs are entitled to recover anything, they can recover only for a partial loss ; for if an actual total loss has happened, it has arisen from the negligence and misconduct of the plaintiffs, or their agents, in not doing the best in their power for all concerned. The consideration of this question will involve that of the right of the plaintiffs to abandon, at the time they offered to abandon : which is the third point in the cause.

In many instances, the practice of abandoning has been extended too far. The insured should, in no case, be permitted to abandon, where the effects insured, or the greater part of them, still exist, and are in the power of the insured. The general rule is, that the insured may abandon, in all cases, where, by means of any of the perils insured against, the voyage is totally lost, or not worth pursuing, or where the thing insured is so damaged as to
*374] be *of little or no value to the owner, or where the salvage is very high, or where what is saved is of less value than the freight, or where further expense is necessary, and the insurer will not undertake, at all events, to pay that expense. These principles are declared in the following cases : *Goss* v. *Withers*, 2 Burr. 683 ; *Hamilton* v. *Mendes*, Ibid. 1198 ; *Aguilar* v. *Rodgers*, 7 T. R. 421 ; *Story* v. *Strettell*, 1 Dall. 11 ; Park 165 ; 4 Williams' Abr. 373, 376.

The capture or arrest of a vessel, or any detention, is *primâ facie* a total loss, and immediately upon the capture, or at any time while the capture continues, the insured may abandon, and give notice, and thereby entitle himself to claim as for a total loss. But this must be done, while the insured knows of the continuance of the capture, and not after he has information of the recovery or safety of the vessel. *McMaster* v. *Shoolbred*, 1 Esp. Rep. 237 ; Marshall 494, 501. On the other hand, the re-capture does not necessarily deprive the insured of the right to abandon. For if, in consequence of the capture, the voyage is lost, or not worth pursuing, if the salvage be very high, or if further expense be necessary, and the insurer will not undertake to pay that expense, the insured may abandon. Therefore, the rule is, that if the thing insured be recovered, before any loss is paid, the insured is entitled to claim as for a total or partial loss, according to the situation of the case, at the time when he makes his claim. For there is no vested right to a total loss, until the insured elects to abandon.

There are two cases which will be cited for the defendants in error. *Pringle* v. *Hartley*, 3 Atk. 195, and *Goss* v. *Withers*, 2 Burr. 683, neither of which is like the present. In the case of *Pringle* v. *Hartley*, the salvage amounted to a moiety of the value of the vessel insured ; and there was no
*375] person present to give security, or answer for that moiety. *The case of *Goss* v. *Withers* was an insurance on the ship and goods. One-fourth of the goods were thrown overboard to preserve the vessel, and the

residue of the cargo. After this, the vessel was captured by the French. The master, mate and all the sailors, except an apprentice boy and a landsman, were taken out and sent to France. The ship remained eight days in the hands of the French, and was re-taken by a British privateer, and on the 18th of January, was carried into port for adjudication. Immediate notice was given, and an offer to abandon. But before her capture, the ship, in a storm, was separated from her convoy, and disabled for proceeding on her voyage, without going into port to refit. The residue of her cargo was spoiled, while she was refitting, after the offer to abandon, and before she could be refitted. The salvage was a moiety; the master and mariners were prisoners; the charter-party dissolved ; the freight, except for the goods saved, was lost, and the voyage was not worth pursuing.

But the situation of the Eliza was very different. She sailed from Jamaica on the 17th of August, was captured on the 22d, re-captured in less than three days, and on the 26th, was brought into Kingston, the very port from which she had sailed, only nine days before, and where the agents of the insured were. The salvage was only one-eighth, and the coffee on board. belonging to the plaintiffs, would have been more than sufficient in value to pay the whole salvage, and all the charges and costs, which did not exceed $909, even when attended with the costs of the libel, sale and commissions If they had rated the vessel at $3800, the sum insured, yet the salvage would have been only $475.

The point decided in *Goss* v. *Withers* was, that a title to restitution cannot take away a vested right to abandon, if the vessel be unfit to perform the voyage. There is nothing in the record which shows that at the time of the re-capture, the Eliza was unfit to perform the voyage.

The abandonment of a vessel is an extreme remedy, which the insured has in his power, but which he ought *not to be permitted to use, when [*376
he has another remedy which will completely indemnify him for the injury he has actually sustained. This case, we contend, ought to be decided upon the principles which governed that of *Hamilton* v. *Mendes*, 2 Burr. 1198. There, the ship was captured on the 6th of May, by a French privateer, and all her hands, excepting two, were taken out. On the 23d, she was recaptured by a British ship of war, and sent into a British port, where she arrived on the 6th of June. As soon as the insured heard of the capture, he wrote and offered to abandon to the underwriters. They refused to receive the abandonment, but offered to pay the salvage, and all the losses and charges which the insured had sustained by the capture. The question was, whether, on the 26th June, the insured had a right to abandon and recover as for a total loss. The court decided, that he had no right to abandon, and that he could recover as for a partial loss only. The principle of that case is, that if the voyage be only temporarily interrupted, the property, upon the recapture, returns to the owner, pledged to the re-captor for the amount of salvage. This doctrine is also stated in the case of *Mills* v. *Fletcher*, Doug. 210, and *Thellusson* v. *Fletcher*, 1 Esp. Rep. 73.

The actual loss which the insured sustained, was not a total loss, until rendered so, by their own negligence or misconduct, or that of their agents. It only amounted to $909, including salvage. Even if the vessel had been valued at the price insured, viz., $3800, the salvage (which by statute 33 Geo. III., c. 66, cannot exceed one-eighth) would have amounted only to

$475, which, added to the other expenses, would not have exceeded $1000. This sum ought to have been paid by the agents of the insured, who had in their possession funds of their principal, out of which it might have been paid. But it does not appear, that they made any effort or offer to pay it, or to prevent the sale; or any proposition to ascertain the value of the vessel, otherwise than by a sale. They did not do the best in their power for all concerned, but calmly stood by, and saw the vessel sacrificed, when they
*377] had the power of preventing it. *The insured, therefore, cannot, by abandonment, turn a partial into a total loss. 1 Esp. Rep. 73.

It appears upon the record, that the insured were anxious to sell the vessel, and this may account for the want of exertion on the part of their agents to prevent a sale, which would charge the underwriters with the full value of $3800.

4th. The loss of the register was not equivalent to the loss of the vessel, and was not an event against which the insurance was made. But the loss of the register might have been supplied by another document, such as a consular certificate, stating the circumstances attending the loss, which would have enabled the vessel to perform the voyage insured. *The Betty Cathcart*, 1 Rob. 184; *Christie* v. *Secretan*, 1 T. R. 198. The want of a register would not have occasioned a forfeiture of the vessel, but would only have subjected her to the inconvenience of being considered and treated as a foreign bottom.

5th. The not communicating to the underwriters the intention of going to Baltimore, vacated the policy, as the risk was thereby increased. Marsh. 347; *Carter* v. *Boehm*, 3 Burr. 1909; s. c. 1 W. Bl. 594; Millar 450.

Simms and *Swann*, contrà, contended—1. That the voyage commenced, was the voyage insured; 2. That the insured had a right to abandon and recover as for a total loss.

1. A policy of insurance, like every other written agreement, is to be construed according to the intention of the parties. The understanding in this case was, that the underwriter should take all the risk of a voyage from Jamaica to Alexandria; and consequently, they took the risk of the voyage from Jamaica to the Chesapeake Bay, through which a vessel must pass to arrive at Alexandria.

*378] *We admit the intention to deviate, after entering the Chesapeake, but we insist, that the voyage and risk insured had commenced; and that the vessel was in the actual prosecution of that voyage, when the loss happened. In such a case, although there was an intention to deviate, the insured had a right to abandon. Park 314; *Foster* v. *Wilmer*, 2 Str. 1249; Burns on Insurance 107; *Kewley* v. *Ryan*, 2 H. Black. 343; *Henshaw* v. *Marine Insurance Company*, 2 Caines 274.

In the case of *Wooldridge* v. *Boydell*, there was no intention of going at all to the place mentioned in the policy. The only point in the case of *Stitt* v. *Wardell*, 2 Esp. Rep. 610, is the difference between touching and trading at a port. In that case, there was an actual trading, but here was only an intention to trade. In *Beatson* v. *Haworth*, 6 T. R. 531, the decision was merely that if the voyage described be to B. and C., the vessel deviates by going to C. first, and afterwards to B., although C. be the nearest port. In *Way* v. *Modigliani*, 2 T. R. 30, the real ground of the opinion of

the court is an actual deviation, by the vessel having sailed for and stopped to fish on the Banks, instead of sailing directly from Newfoundland to England. The opinion of Roccus, cited in a note to Marshall 406, is contradicted by that of Emerigon, also cited in the same note; and the latter seems to be the better opinion. If the alteration of the voyage takes place before the risk is commenced, it becomes a different voyage; but if after, then it is only a deviation. Millar 117. In the present case, the risk commenced at Jamaica, and before the alteration of the voyage was contemplated. *It was to terminate at Alexandria. When the *terminus à quo* and the *terminus ad quem* are the same, the voyage is the same. [*379

2. The loss itself was, in fact, total, and unless the insured have been in fault, they ought to recover for a total loss. The loss of the register alone was sufficient to defeat the whole voyage, and if the vessel had sailed without it, and had been lost, the underwriters would have been discharged, by that very fact of the vessel sailing without proper documents. It would so increase the risk of loss by seizure and condemnation, as to vacate the policy. If she had been found sailing without a register, she would have been considered, by the British laws, as an alien vessel, and if found trading from a British colony, would have been liable to condemnation. Reeves on Ship. 46, 379, 429. Bryan & Co. were not the general agents of the defendants in error. Their authority ceased, when the vessel was dispatched, and had sailed from Jamaica for Alexandria. They were not authorized to sacrifice the property of the insured in their hands, if they had any, to raise money to pay the salvage and expenses. It is true, the master had an implied authority to do what was fit and proper for the benefit of all concerned; but he was not authorized to send out the vessel, without a register, and she could never get a new one, unless her owners (the insured) should change their domicil. No document could supply the place of that which itself never could have been obtained, and to which the party was not entitled.

The exception is to the refusal of the court to give the instruction prayed. This instruction would have been improper, for two reasons :

1. It would have been conclusive of the whole cause ; and no such instruction can be given, unless all the evidence is stated, and unless the bill of exceptions avers it to be the whole evidence. This bill of exceptions does not contain the whole evidence, nor such an averment.

*2. The instruction prayed involves the decision of a fact, which the jury only were competent to find, viz., whether the damage amounted to more than half the value of the thing insured. *Mills* v. *Fletcher*, Doug. 230. This fact is not stated in the bill of exceptions, nor any other fact from which the court can infer it. It contains no evidence that the master had funds to pay the salvage and charges. The evidence shows the loss to be actually total. The information of the capture, recapture, libel for salvage, and sale to a stranger, all came to the insured at the same time ; and there is no evidence of fraud or collusion. The only allegation is, that the master did not do everything in his power to prevent a total loss. But this allegation is unsupported by evidence. Even if, by a sacrifice of the cargo, he had raised money enough to pay the salvage, expenses, costs, charges and repairs, he must have obtained a new crew, and then could not have sailed without a register. The voyage was completely destroyed ; and, upon an abandonment, which the insured had a right to make, relief [*380

would have been refused to the underwriters, even in equity. *Pringle* v. *Hartley*, 3 Atk. 195 ; Marshall 485.

C. Lee, in reply.—There are two bills of exception to the opinion of the court. 1st. To the instruction given in favor of the plaintiff below, that there was no deviation from the voyage insured, and that the voyage insured was actually commenced. 2d. To the refusal of the court to instruct the jury, that if the facts stated in that bill of exceptions should be proved to their satisfaction, they ought not to find a verdict for a total, but at most for a partial loss.

1. The voyage insured was a direct voyage from Kingston, in Jamaica, to Alexandria, in Virginia. But the voyage commenced was a voyage from
*381] Kingston to Baltimore, and from thence to Alexandria. Baltimore *not being in the direct course from Kingston to Alexandria, the voyage commenced was not a direct voyage from Kingston to Alexandria, and therefore, was not the voyage insured. There can be no necessity of referring to authorities to show that, in a policy, a voyage from one place to another always means a direct voyage in the usual course ; because, upon this principle is founded the whole doctrine of deviation. But the cases of *Beatson* v. *Haworth*, 6 T. R. 531 ; *Delaney* v. *Stoddert*, 1 Ibid. 22 ; and *Middlewood* v. *Blakes*, 7 Ibid. 162, show with what strictness it has been maintained.

If the direct voyage was not commenced, the commencement of an indirect, circuitous voyage, will avail nothing. The voyage insured was not commenced. *Wooldridge* v. *Boydell*, Doug. 16 ; *Way* v. *Modigliani*, 2 T. R. 30. Even if the risk is diminished by the circuitous course, it is not a justification of the voyage, and will not support the policy. Millar 377, 382.

The case of *Kewley* v. *Ryan*, 2 H. Bl. 343, is relied upon by the defendants in error. But the law of that case is doubted by Marshall 232, who refers to the case of *Stott* v. *Vaughan*, decided in the king's bench, in 1794, and is opposed to the case of *Wooldridge* v. *Boydell*. *Kewley* v. *Ryan* differs essentially from the present case. The intention in the former was only to touch at Cork, in the way to Liverpool. Whether Cork is not usually touched at in such voyages, does not appear ; but no cargo was on board to be delivered at Cork. The only port of delivery was Liverpool. In the present case, a considerable cargo was received on freight, deliverable at Baltimore. The intention, therefore, was not merely to touch, but to trade at Baltimore : it was one of the principal objects of the voyage. To touch at a port, differs essentially from delivering a cargo, and trading at a port. *Williams* v. *Smith*, 2 Caines 8 ; referring to *Stitt* v. *Wardell*, decided by Lord Kenyon, in 1797 ; Marshall 187. After clearing for Alexandria,
*382] to receive a cargo for *Baltimore, to be delivered there for trade, and to sail with intention to go to Baltimore first, was a complete alteration of the voyage insured. The opinion in *Kewley* v. *Ryan*, if understood rightly, does not decide this case against the underwriters. The court says, "where the *termini* of the intended voyage are really the same as those described in the policy, it is to be considered as the same voyage." The word *termini* does not mean merely the beginning and end of a thing, but all the limits ; and in regard to a voyage, it means also the intermediate ports of

delivery for any part of the cargo. In the present case, the policy expresses but one port of delivery; the voyage commenced was to two, one of which was out of the course to that mentioned in the policy.

The case of *Way* v. *Modigliani* was not decided on the ground of deviation, but expressly on the ground of non-inception. Upon this point, the opinion of BULLER, J., is full. *Wooldridge* v. *Boydell* was not decided on the fact that there was no intention of sailing to the point mentioned in the policy, but upon the fact that the vessel had actually sailed for a different port. The weight of the case of *Kewley* v. *Ryan*, therefore, is diminished: 1. Because it stands contradicted: 2. It differs essentially from the case before the court, and is not decisive: 3. It may be reconciled with the doctrine advanced in this case by the plaintiffs in error, and, if so understood, is in their favor: *4. If understood as the defendants in error contend it ought to be, it is not law. [*383

2d. The second bill of exceptions states a case, which would justify the instruction prayed by the defendants below.

Bryan & Co. were the agents and correspondents of the owners. Patton also was an agent, having gone out in the vessel as supercargo, and the owners are answerable for their negligence. On the 24th of September, Bell, the master, and Patton, the supercargo, by their protest, abandoned the vessel and cargo to the underwriters, when both were safe in the harbor of Kingston, liable only to a small salvage, and to some expenses; and when the coffee belonging to the defendants in error, and then on board, was more than sufficient to pay all the demands against the vessel. There was no necessity of selling the vessel: her value might have been ascertained in some other mode. Upon application to the court of admiralty, appraisers would have been appointed. But the agents neither attempted to agree with the re-captors for the amount of the salvage, nor applied to the court to appoint appraisers, but suffered the expenses to be increased unnecessarily, by the admiralty process, and by the commissions on the sale.

The agents of the owners ought to have done as much to increase the amount saved, as if no insurance had been made: it was their duty to do the best for all concerned. If they did not, and if, by their negligence, the loss has been converted from a partial to a total loss, the underwriters ought not to suffer. Their contract was a contract of indemnity against unavoidable loss, and the insured were bound to use the same care and diligence which a prudent man would use in securing his own property.

As to the loss of the register, it would not have been a cause of condemnation. The law cited from Reeves applies only to a vessel which never had a register, and *not to one whose register has been destroyed by accident. [*384

March 4th, 1806. MARSHALL, Ch. J., did not sit in the trial of this cause. The other judges, except CHASE, J., whose ill health prevented his attendance, gave their opinions *seriatim*.

JOHNSON, J.—Upon the trial of this cause, in the court below, two grounds of defence were assumed by the plaintiffs in error. 1. That the policy had been avoided, by a deviation from the voyage insured. 2. That if the insured were entitled to recover at all, it could only be for an average, not a total loss.

In the argument before this court, the first ground was varied, and the plaintiffs in error contended, "that the risk insured was never entered upon." Without considering the propriety of entering upon the discussion of a question so materially different from that made in the bill of exception, I will only remark, that it was judicious in the counsel, to abandon an opinion, as inconsistent with natural reason, as it is with the established doctrine of the law of insurance. An intent to do an act, can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance, until she reaches the point of divergence, and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British courts from the case of *Foster* v. *Wilmer* to the present time.

The doctrine now insisted on by the plaintiffs in error, was probably suggested by some incorrect expressions attributed to Lord MANSFIELD in the
*385] case of *Wooldridge* *v. *Boydell.* It is said, that the judge, in that case, expressed an opinion, that "if a ship be insured from A. to B., and before her departure, the insured determine that she shall call at C., which is out of the usual course of the voyage from A. to B., this is rather a different voyage than an intended deviation." This opinion was certainly in no wise material to the decision of that case, and is expressly contradicted by the case of *Kewley* v. *Ryan*, and a case, which I consider with much respect, decided in the state of New York, between *Henshaw* and *The Marine Insurance Company of New York.* We can only vindicate the accuracy of his lordship's opinion, in the case which he states, by supposing that his mind was intent upon those cases of intended deviation, in which a *suppressio veri* or necessary increase of risk, are the grounds of decision.

The ordinary rule for ascertaining the identity of a voyage insured, is by adverting to the *termini.* A rule which is certainly correct, so far as it extends, but in the rigid application of which, it is easy to conceive, that cases may occur, in which it would bear injuriously upon the insurer. If it has any defect, it is in not extending far enough the claim to indemnity, as the *terminus ad quem* may, in many instances, be relinquished, without any possible increase of risk, or even without varying the risk, except only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown, in Maryland.

Whether the risk insured against in this case ever was incurred, I would test by the question, whether, if the Eliza had arrived in safety, or even had sailed for Europe, the insured might have legally demanded a return of the premium? I presume, not. The insurance being at and from the port of Kingston, the risk commenced during her stay in port, and cannot be apportioned, when thus blended, but was wholly and indefeasibly vested in the
*386] underwriters, although the vessel *had forfeited her policy, by shaping her course for Europe, the moment she had left the port of Kingston. In the case before us, she adhered to her ultimate destination, and the forfeiture of her insurance could not have been incurred, until after entering the Chesapeake, and actually bearing away farther eastward than was consistent with her course to the Potomac.

2. With regard to the question, whether it be a case of total or average loss, a very few observations will suffice to satisfy the mind that the judgment below is correct. If, under every combination of circumstances, the insured is bound to procure money, at whatever interest, or to raise it, at whatever sacrifice of property, to defray the disbursements for repairs, re-shipping a crew, salvage, costs of suit, and every incidental expense, this will be shifting the loss from the insurer to the insured. Should it be admitted, that in the case before us, the insured were under any greater obligation to ransom and refit the vessel than the insurer, the circumstances in evidence are sufficient to excuse him. Unsuccessful attempts had been made to dispose of both vessel and cargo, and as to raising money on bottomry, who would have accepted the security of a vessel, embarrassed by the loss of her register, to a degree, the extent of which could not possibly be forseen; a bond for money to become due on the arrival of a vessel, which, perhaps, might never be able to sail, or if she did sail, without her necessary documents, would be exposed to innumerable hazards, and among them, the forfeiture of her insurance for that very cause.

It is true, that a case of capture and re-capture, where the two events are communicated, before an election to abandon has been actually communicated to the underwriters, will not, of itself, sanction an abandonment. Yet, it is equally true, that in a case of capture, a re-capture alone will not deprive the party of his right to abandon. The consequences of the capture and re-capture, the effect produced upon the fate of the voyage, must govern the right of the parties. This effect is always a matter of evidence, and must rest much upon *the discretion of a jury. This doctrine is well illustrated in the cases of *Pringle* v. *Hartley*, and *Goss* v. *Withers*. [*387

In the case before us, the information of the capture, re-capture and sale, was communicated in the same letter. The loss was then certainly total, and as the insurers cannot charge the insured with any premeditated design to involve the vessel in the difficulties which broke up the voyage, I think, they ought to bear the loss.

Much has been said about the liability of the insured for the misconduct of his agents, but as all amounts to a charge that they did not make use of forced means to raise money for the release of the vessel, an obligation not incumbent upon them, it does not appear to me, that the extent of the liability of the insured for the acts of the master or supercargo, after the death-stroke is given to the voyage, need be considered.

Washington, J.—There are but two questions in this cause, which I deem worthy of particular consideration; for the last exception is, to the refusal of the court to give an opinion upon a matter of fact, and for which no foundation was laid by the evidence spread upon the record, even if it had been proper for the court, in such a case, to give an answer to the question propounded. I also lay out of the case, the award mentioned in the declaration, not only because no breach is assigned which applies to it, but because no opinion was asked of, or given by, the court, respecting it.

The first subject which claims attention is, whether, upon the facts stated in the second bill of exceptions, the court below was right in the direction given to the jury, that there was no deviation, at the time of capture, from

the voyage insured, and that the voyage insured was actually commenced. The facts, material to the decision of this point, are, that the Eliza cleared out at Kingston, for Alexandria, and a bill of lading was signed by the master, to deliver her cargo at Alexandria. That after her *clearances *388] were obtained, she took in a cargo for Baltimore, and bills of lading were signed, for delivering the same at that port. That the master sailed from Kingston, with an intention previously formed, of proceeding first to Baltimore, and there landing part of her cargo, and then to go to Alexandria, but she was captured, before her arrival at the dividing point between Baltimore and Alexandria.

It is admitted, that this is not a case of deviation, because the intention, formed at Kingston, before the voyage commenced, of going first to Baltimore, was never carried into execution. The only question then is, whether the voyage described in the policy was changed or not? As to this, there is no difference of opinion at the bar, respecting the legal effect of an alteration of the voyage, on the contract of indemnity; it is, and must be, conceded, that the policy never attached. But the difficulty is, in determining what circumstances do, in point of law, constitute such an alteration as will avoid the policy.

The criticisms of the counsel for the plaintiffs in error, upon the rule contended for by the defendants, ought not, in my opinion, to avail them, if that rule be firmly established by uniform decisions: for in questions which respect the rights of property, it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason.

The first case we meet with, upon this subject, is that of *Carter* v. *The Royal Exchange Assurance Company*, which is cited in *Foster* v. *Wilmer*, decided in 19 Geo. II. The former was an insurance on a ship from Honduras to London, and the latter on a ship from Carolina to Lisbon, and at and from thence to Bristol. In both, a cargo was taken in, to be delivered at an intermediate port; but the loss having happened, before the ship had arrived at the dividing point, the insurers were held liable, upon the ground that nothing more was intended than a deviation, which, not being carried into execution, did not avoid the policy.

*The case of *Wooldridge* v. *Coydell* is next in point of time. This *389] was an insurance on a ship, at and from Maryland to Cadiz. She cleared for Falmouth, and a bond was given to land the whole cargo in Britain. No evidence was given, that the vessel was bound to Cadiz; she was taken, before she came to the dividing point. At the trial of this cause, Lord MANSFIELD told the jury, that if they thought the voyage intended was to Cadiz, they were to find for the assured; but if there was no design to go to that port, then they were to find for the defendant, and the ground upon which the court decided the motion for a new trial was, that there never was an intention to go to Cadiz. But it is plain, that if Cadiz had been intended as the ultimate port of destination, the clearing out for an intermediate port, with an intention to land the cargo there, would not have been considered as anything more than an intended deviation.

Way v. *Modigliani* was decided in 1787, and was an insurance, at and from the 20th October 1786, from Newfoundland to Falmouth, with liberty

to touch at Ireland. She sailed, on the 1st of October, from Newfoundland, went to the Banks, and fished until the 7th, and then sailed for England, and was lost on the 20th. The reasons assigned for the decision of this case, give it the appearance of an authority unfavorable to the doctrine laid down in the above cases. But the weight of it is greatly diminished, if it be not destroyed, by the following considerations: 1st. That as there was a clear deviation, it was unnecessary to decide the other point, that the policy did not attach; and 2d. That this latter opinion seems to have been entertained only by one of the court, and even this judge seems to have relied very much upon the fact, that the vessel sailed to the Banks; 3d. From what is said in *Kewley* v. *Ryan*, it would appear, that the ship, when she left Newfoundland, did not sail for England, and of course, the voyage insured never was commenced.

Kewley v. *Ryan*, decided in 1794, was a policy on goods, from Genoa to Liverpool. The ship sailed on that voyage, but it was intended, as plainly appeared by the clearances, to touch at Cork. She was lost, however, before she arrived at the dividing point; and the decision conformed to those given in the preceding cases, the **termini* of the intended voyage being really the same as those described in the policy. [*390

The case of *Stott* v. *Vaughan*, decided at *Nisi Prius*, in 1794, before Lord KENYON, seems opposed to the principles laid down in the preceding cases, and, if we have an accurate report of it, is inconsistent with the decisions of the same judge in *Kewley* v. *Ryan*, and other cases.

Murdoch v. *Potts*, decided in 1795, was, in principle, as strong a case of a change of voyage, as that of *Wooldridge* v. *Boydell*, but equally contributes to explain the general doctrine laid down in all the cases. For in this, the *terminus ad quem* was, most obviously, St. Domingo, where the freight insured was payable, or some port, other than Norfolk, where the ship was to call for the sole purpose of receiving orders.

The last English case which I shall notice, is that of *Middlewood* v. *Blakes*, decided in 1797. It was an insurance on the Arethusa, at and from London to Jamaica, for which place she cleared out; but the master was bound by orders, to call at Cape St. Nichola Mole, in order to land stores there, pursuant to a charter-party. She was captured, after she had passed the dividing point of three several courses to Jamaica, but before she had reached the subdividing point of the continuing course to Jamaica and that leading to the Mole. The whole court considered this as a case of deviation only, and LAWRENCE, J., was so strongly impressed with the weight of former decisions, that, not attending to this obvious objection to the plaintiff's recovery, but considering the *termini* of the voyage intended, to be the same with those mentioned in the policy, his first opinion inclined to the side of the plaintiff.

The case of *Henshaw* v. *The Marine Insurance Company*, decided in the supreme court of New York, confirms the principles of the above cases, and would command my respect, were it opposed to them.

The rule, then, which I consider to be firmly established, by a long and uniform course of decisions, is, that if the ship sail from the port mentioned in the policy, with an intention to go to the port or ports also described *therein, a determination to call at an intermediate port, either with a view to land a cargo, for orders, or the like, is not such a change of [*391

the voyage as to prevent the policy from attaching, but is merely a case of deviation, if the intention be carried into execution, or be persisted in after the vessel has arrived at the dividing point.

The next question is, whether the court below erred in refusing to instruct the jury, that if they believed the facts stated in the first bill of exceptions, they were to find an average and not a total loss? The defendants in error contend, that by the capture and re-capture of the vessel, under the various circumstances of loss of crew, inability to pay the salvage and expenses, loss of register, &c., the voyage insured was completely defeated, and therefore, the assured had a right to abandon and demand as for a total loss. On the other side, it is insisted, that the master might, in a variety of ways, have prevented the sale of the vessel, and that if he had done the best in his power for the interests of all concerned, he might have liberated the vessel from the lien of the captors, and have performed his voyage in safety to Alexandria, without any other inconvenience than this temporary interruption, and the payment of salvage and expenses. If so, that it was not competent to the assured, under these circumstances, to convert a loss, partial in its nature, into a total one.

Whether the assured had a right to abandon, and recover as for a total loss, or not, was a question of law, dependent upon the point of fact, whether, upon the whole of the evidence, the voyage was broken up, and not worth pursuing; and in consideration of this question, the jury would, of course, have inquired, amongst other matters, whether the master had done what was best for the benefit of all concerned. The court might, with propriety, have stated the law arising upon this fact, whichever way the jury might find it, and indeed, such would have been their duty, if a request to that effect had been made. But the court very correctly refused to give the direction as prayed, because, by doing so, they would have decided the important matter of fact, upon which the law was to arise, which was only proper for the de-
*392] termination of the jury. In the case of *Mills* *v. *Fletcher*, which turned upon the question, whether the master, by his conduct, had not made the loss a total one, Lord Mansfield would not decide, whether the loss was total or not, but informed the jury, that they were to find as for a total loss, if they were satisfied that the master had done what was best for the benefit of all concerned.

Upon the whole, then, I am of opinion, that the judgment ought to be affirmed.

Paterson, J.—This action was brought on a policy of insurance, which John and James H. Tucker, being British subjects, residents at Alexandria, had effected on the body of the sloop Eliza, her tackle, apparel and furniture, to the value of $3800, at and from Kingston, in the island of Jamaica, to Alexandria, in the state of Virginia. The policy bears date the 1st of September 1801.

The first question to be considered is, whether the voyage on which the sloop Eliza set out, was the same or a different voyage from the one insured? By the terms of the policy, it is stipulated, that the Eliza was to sail from Kingston to Alexandria; and it is stated in the bill of exceptions, that she did sail from Kingston, but with an intention to go first to Baltimore, and there deliver twenty hogsheads and ten tierces of sugar, and then to proceed

to Alexandria, which was the port of destination described in the policy. She cleared out at the custom-house in Kingston, on the 10th of August 1801, for Alexandria, and the master signed a bill of lading to deliver her cargo at that place; after which, he took in the sugar, to be delivered at Baltimore. It is contended, on the part of the insurers, that the taking in the sugar, to be landed at Baltimore, constituted a different voyage from the one agreed upon, and vitiates the policy; or, in other words, that the voyage which was the subject of the contract, was never commenced. From a review of the cases which have been cited, the principle is established, that where the *termini* of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage. In the present case the *termini*, or beginning and ending points of the intended *voyage, were precisely the same as those specified in the policy, to wit, from Kingston to Alexandria, and, in legal estimation, form one and the same voyage, notwithstanding the meditated deviation. [*393

The first reported case on this subject is *Foster* v. *Wilmer*, in 2 Str. 1249, in which Lee, Ch. J., held, that taking in salt, to be delivered at Falmouth, a port not mentioned in the policy, before the vessel went to Bristol, to which place she was insured, was only an intention to deviate, and not a different voyage. And the Chief Justice, in delivering his opinion, mentioned the case of *Carter* v. *Royal Exchange Assurance Company*, where the insurance was from Honduras to London, and a consignment to Amsterdam; a loss happened before she came to the dividing point between the two voyages, for which the insurer was held liable. The adjudication in Strange was in the 19 Geo. II., and from that time down to the year 1794, we find no variation in the doctrine.

A remarkable uniformity runs through the current of authorities on this subject. In *Kewley* v. *Ryan*, 2 H. Bl. 343, Trinity term 1794, the principle is recognised; and in *Henshaw* v. *Marine Insurance Company*, February 1805 (2 Caines 274), it is fortified and considered as settled by the supreme court of New York. In a lapse of sixty years, we find no alteration in the doctrine, which is sanctioned, and has become too deeply rooted and venerable by time, usage and repeated adjudications, to be shaken and overturned at the present day. It has grown up into a clear, known and certain rule, for the regulation of commercial negotiations, and is incorporated into the law-merchant of the land. Where is the inconvenience, injustice or danger of the rule? It operates in favor of the insurers, by a diminution of the risk, and not of the insured, who have the departure in contemplation; for if the vessel, after she has arrived at the point of separation, should deviate from the usual and direct road to her port of destination, the insurers would be entitled to the premium, and exonerated from responsibility. An intention to deviate, if it be not carried into effect, will not avoid the policy; there must be an actual deviation. The policy being "at and from," the risk commenced; there was also an actual inception of the voyage described; for the Eliza sailed from Kingston for Alexandria, was captured in a *direct course to the latter, before she reached the dividing point; and, therefore, the underwriters became liable for the loss. [*394

The second point in the cause is, whether the insurers were liable for a total or a partial loss? And here a preliminary question presents itself.

Was the abandonment made in proper time? When the Tuckers received information of the loss, it became incumbent on them to elect whether they would abandon or not; and if they intended to abandon, it was incumbent on them to give notice of such intention to the underwriters. Our law has fixed no precise period within which the abandonment shall be made, and notice of it shall be given to the insurers; but declares, that it shall be done within a reasonable time. In the case before us, it appears that John and James H. Tucker received information of the capture and re-capture of the Eliza, at the same time, in a letter from W. & B. Bryan & Co., dated on the 26th September 1801; but it does not appear when the letter came to hand. On the 26th of November 1801, the Tuckers offered to abandon the Eliza to the insurers, which offer was rejected. Can it, under these circumstances, be pretended, that the Tuckers were guilty of neglect, or that the abandonment was not made according to the settled rule? It was made within a reasonable time, and no neglect can justly be imputed to them. We must have some facts whereon to build the charge of negligence, for it is not to be presumed; and the intervening period between the date of the letter and the time of abandonment, after making a due allowance for the passage of the letter, does not afford sufficient ground on which to raise the imputation of neglect.

This brings us to the great question in the cause, whether the insurers were liable for a total or an average loss. On the 22d August 1801, the Eliza was captured by a Spanish armed schooner, in the usual course from Kingston to Baltimore and Alexandria, and a day or two afterwards, was re-captured by a British sloop of war, and carried into Kingston, on the 26th of the same month. The mere acts of capturing and re-capturing are not, of themselves, sufficient to ascertain the nature and amount of the loss sustained. The loss may be total, though there be a re-capture. *Hamilton* v. *Mendes*, 2 Burr. 1198; *Aguilar and others* v. *Rodgers*, 7 T. R. 421. Whether the loss be partial or total, will depend upon the particular *circumstances of the case, which it becomes necessary to take into view.

*395]

The Eliza was consigned to Bryan & Co., at Kingston, who were authorized to dispose of her; they endeavored to sell her, but without effect; and it is stated, that they could get no offer for her, before she sailed from Kingston, nor since that time. Bryan & Co. put on board ten tierces of coffee, of the value of $1000, belonging to the Tuckers, to be delivered at Alexandria; and when she was captured, all the seamen, except Bell, the ostensible master, and one man, were taken on board the Spanish schooner. The Eliza was navigated under a British register, during the voyage; which register was lost, by reason of the capture and re-capture, and has never been found. After the re-capture, the Eliza and her cargo were libelled in the vice-admiralty court for salvage; a claim was put in by Bryan & Co., as agents for Eli Richards Patton, the real and navigating master and supercargo; and the sloop and cargo were adjudged to be lawful re-caption on the high seas, and ordered to be restored, on paying to the re-captors one full eighth part of the value of the sloop and cargo, for salvage, with full costs; and to ascertain the value, it was further ordered, that the sloop and cargo should be forthwith sold by the claimants, unless the value should be otherwise agreed upon. The sloop was insured for $3800, and sold for $915; the

coffee sold for $1000; and the costs, charges and commissions amounted to $909, which almost absorbed the sum for which the sloop was sold. It is not found, that the sloop had sustained no damage by the capture and re-capture; and, considering the difference between $3800, the value insured, and $915, the price for which she sold, the jury might, without other evidence, have presumed that she had received considerable injury.

From these facts, taken together, the inference is rational and just, that the voyage was broken up and destroyed, and that the underwriters were liable for a total and not for an average loss. To repel this inference, and remove responsibility from the insurers, it has been urged in argument, that the agents for the Tuckers were guilty of gross neglect and misconduct. If Bryan & Co. ceased to be agents, after the sailing of the sloop, then [*396 *the master became clothed with an implied authority to do what was fit and right, and most conducive for the interest and benefit of all the concerned; and therefore, whether the agency of Bryan & Co. continued, or, being at an end, devolved, by operation of law, on the master, is perfectly immaterial; for the question still recurs, whether the actual or implied agent had been guilty of fraud, negligence or other improper conduct, which will exonerate the insurers. I am not able to discern any misconduct on the part of the agent, that would exculpate the underwriters, and prevent their being responsible for a total loss. And indeed, this was a point proper for the decision of the jury, agreeable to the case of *Mills* v. *Fletcher*, in Doug. 230, and therefore, the exception taken to the opinion of the court was not well founded.

The sloop could not be sold at private sale, and, by reason of the capture and re-capture, she might have sustained considerable damage. To sell the coffee, which constituted the cargo for Alexandria, to satisfy the salvage and costs, would have been an imprudent measure; for the redemption would have absorbed the whole proceeds, and then she would have returned to Alexandria, without a cargo, as the master had no funds to purchase one; and besides, she must have sailed without a register, which would have exposed her to great and unnecessary danger. Prudence dictated the sale as a safe step, and most for the benefit of the concerned.

The error set forth in the third bill of exceptions is, that the court below refused to instruct the jury, that the loss of the register, by means of the capture and re-capture, was not sufficient, in law, to defeat the voyage from Kingston to Alexandria, and might have been supplied by special documents. Though the register did not impart any physical ability to the sloop in regard to her sailing; yet, it was a document which tended to communicate safety, as it designated her character, individually and nationally. It is a necessary paper, and operates as a national passport; for, without it, she might be seized as an unauthorized rover on the ocean, and in certain cases, would have been liable to confiscation. The register is a document [*397 *of such a special and important nature, that its loss cannot be fully made up by other official papers. It would have been a very imprudent step, for the master to have proceeded on his voyage, without a register; if he had, he would have been justly charged with improvidence, negligence and culpable misconduct.

Cushing, J.—I consider this as clearly a case of intentional, not actual

deviation ; but not as a case of non-inception of the voyage insured. This is proved by a number of cases cited ; and contradicted by none.

What a case of non-inception is, is shown by the case of *Wooldridge* v. *Boydell*, Doug. 16, where the ship was insured from Maryland to Cadiz, having no intention at all of going there ; but that is totally different from the present case, where the vessel was cleared out at Jamaica for Alexandria, with a cargo taken in for Alexandria, and intended to go there. It is true, sugars were taken in for Baltimore, and the master intended going there first. That amounts only to an intent to deviate ; but no deviation, unless executed.

This is proved by divers authorities. *Middlewood* v. *Blakes*, 7 T. R., 162, B. R., a ship insured at and from London to Jamaica, and the master had orders (exactly like the case at the bar) to touch at Cape St. Nichola Mole, to land stores, pursuant to charter-party. Upon which, one of the judges (LAWRENCE) gave an opinion, that if the vessel had been captured, before she came to the dividing point between the northern and southern courses to Jamaica, the insurers would have been liable. And the other judges agreeing with Judge LAWRENCE, to lay the whole stress of the cause in favor of the insurer, upon the master's not exercising his judgment at the time, upon which was the best and safest of the three courses (whose judgment the insurers had a right to have the benefit of), but taking the northern course, merely in pursuance of orders, to land stores at Cape St. Nichola Mole. All this shows that had the master exercised *his judgment in going the northern course, as being the best and safest, the whole court would have held the insurer liable, as the vessel was captured before she came to the dividing point between the course to the Cape and to Jamaica.

*398]

Another case, more direct and decisive, is *Foster* v. *Wilmer*, 2 Str. 1248, 1249, where the ship was insured from Carolina to Lisbon and to Bristol, and the master took in salt, to deliver at Falmouth, before going to Bristol, repugnant to the specification of the policy, yet, being captured before arriving at the dividing point between Falmouth and Bristol, the insurer was held liable, which seems exactly the present case. The mere taking in goods for another port does not, of itself, make a deviation. It may, however, if it materially vary the risk, and be a circumstance designedly concealed and suppressed, excuse the underwriters. In the present case, it does not appear, materially, to vary the risk, any more than in taking in stores to land at Cape St. Nichola Mole, in the case of *Middlewood* v. *Blakes*, varied the risk, which was not suggested by court or counsel, that it did ; or the taking in salt to land at Falmouth, in the case of *Foster* v. *Wilmer*. It did not delay the voyage, in the present case ; the vessel sailed with convoy, as soon as it was ready, and was afterwards captured in the proper course, before deviating.

The award may be laid out of the case, for more reasons than one. I think it void for uncertainty.

As to the loss, whether total or average, the jury, who had the whole evidence before them, have, in effect, found a total loss, and the voyage broken up. It is not certified by the court, that the bill of exceptions contains the whole evidence ; and as strong circumstances (I think conclusive ones) are stated, that show the voyage could not be safely pursued, or could

not be pursued at all, in consequence of the loss of register and loss of hands by the capture, either of which, it does not appear, could be supplied, I think, we are not warranted to overrule the verdict, or reverse the judgment.

Judgment affirmed.

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*United States *v.* Heth. [*399

Collector's commissions.

The collector of the district of Petersburg was not, by the act of the 10th of May 1800, restricted to a commission of two and a half per cent. on the moneys by him collected and received, after the 30th of June 1800, on account of bonds, previously taken for duties arising on goods imported into the United States.[1]

This was a case certified from the Circuit Court of the fifth circuit, holden in the district of Virginia, where a question arose upon which the opinions of the judges were opposed.

The question was, whether the defendant, as collector of the customs for the district of Petersburg, was restricted to a commission of two and a half per cent. on any, or all of the moneys collected and received by him after the 30th of June 1800, on account of bonds previously taken for duties arising on goods, wares and merchandise, imported into the United States.

This question arose upon the 2d section of the act of congress, entitled "an act, supplementary to an act, entitled an act to establish the compensation of the officers employed in the collection of the duties on import and tonnage;" passed on the 10th of May 1800. (2 U. S. Stat. 72.) The words of which are, "that in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors for the districts of Alexandria, Petersburg and Richmond, respectively, two and a half per centum on all moneys which shall be collected and received by them," "for and on account of the duties arising on goods, wares and merchandise, imported into the United States, and on the tonnage of ships and vessels."

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[1] "Courts of justice agree, that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared, or is to be necessarily implied; and pursuant to that rule, courts will apply new statutes only to future cases, unless there is something in the nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough, in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." Twenty per Cent. Cases, 20 Wall. 187; s. p. Sohn *v.* Waterson, 17 Id. 598–9. This is the construction that ought to have been given to the legal tender acts; the writer fully concedes the constitutionality of these laws, but he is of opinion, with Judge Grier (8 Wall. 626), that they have no application to existing contracts; the words of those statutes would be fully satisfied, by applying them to future cases only. The decision, however, in Hepburn *v.* Griswold, 8 Wall. 603, that they did not so apply, was overruled by the same court, in Knox *v.* Lee, 12 Id. 457; two new judges having been appointed with reference to their known opinions upon this question. From that time forth, the confidence of the people in the decisions of that high court, has steadily decreased; and culminated in the action of one of those judges, as a member of the Electoral Commission of 1877, of which both of the judges who composed the majority in Knox *v.* Lee, were members.

Breckenridge (Attorney-General), in behalf of the United States, observed, that the words of the act appeared to him so plain, that they could not be elucidated by argument. He understood the language of the act to be, that only two and a half per cent. should be allowed on moneys received after the 30th of June. Although the collector may have done the greater part of his duty, by taking bonds for the duties, yet they were neither collected nor paid before that day. It cannot be deemed an unconstitutional act, as being *ex post facto*, because the prohibition of the constitution extends to criminal cases only. *Calder* v. *Bull*, 3 Dall. 386.

*400] *Heth*, defendant, *in propriâ personâ*.—Although it is a sound rule of construction, that when the words of a statute have a plain, distinct and reasonable meaning, no recurrence is to be had to intendment, inference or implication; yet, when the words of a statute admit of two constructions (as in the present case they evidently do, or they would not now be under discussion), it cannot be improper to have reference to similar laws, and to inquire how they have been construed.

The first section of the act of 14th February 1795 (1 U. S. Stat. 416), says, "that in lieu of the commissions heretofore by law established, there shall be allowed to the collectors of the duties on import and tonnage, on all moneys by them respectively received on account of the duties aforesaid, arising on tonnage, and on goods, wares and merchandise, imported after the last day of March next, to wit," "to the collector of Bermuda Hundred" (which office was then holden by the defendant), "two per cent." This act raised his commission from one to two per cent.; which two per cent. he charged only on the duties that arose on importations made after the last day of March 1795; and one per cent. only on the money received on bonds, payable after that day for goods imported before.

The act of 3d March 1797 (1 U. S. Stat. 502), raised the defendant's commissions from two to three per cent. in precisely the same language as that of the last act; and of course, it received from him the same construction, and in both instances, that construction was acquiesced in by the treasury department.

The next act upon the subject, and that which next precedes the act in question, is that of 2d March 1799 (1 U. S. Stat. 704), entitled "an act to establish" (a word not used in the titles of the former acts) "the compensations of the officers," &c., the second section of which runs thus: "that from and after the last day of March next, and in lieu of the fees and emoluments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers, and surveyors, the fees following, that is to say," &c. (to the collectors of sundry ports, not including the defendant),

*401] *"and to the collectors of all other districts, three per cent. on all moneys by them respectively received on account of the duties arising on goods, &c., imported into the United States, and on the tonnage of ships and vessels," whereby the defendant's commissions were established at three per cent. A difference of phraseology will be observed between this and the two former laws. This section says, "that from and after the last day of March next," certain commissions shall be "allowed and paid" on all moneys received on account of duties arising on goods "imported into the United States," and not as before, "imported after the last day of March, next."

Yet this difference of phraseology made no difference at the treasury, in the construction of this law, until very lately.

The next act is that upon which the present question arises; the second section of which says, "that in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors, &c., two and a half per centum, on all moneys which shall be collected and received by them, for and on account of the duties arising on goods, wares and merchandise, imported into the United States, and on the tonnage of ships and vessels." There is no difference between the words of this act, and those of the act of 1799, excepting that the present act uses the words "collected and received," and the act of 1799, uses the word "received" only. But the word "collected" is believed to be merely an accidental tautology, which cannot alter the meaning of the section.

Neither of the last two, like the former laws on the same subject, confines, by express words, the commissions to the moneys received for duties arising on goods imported after a certain date; but the word *after*, is placed in a different part of the sentence; yet all these laws received the same construction at the treasury, for at least five months after this last act had passed; a construction which, as the defendant still contends, was perfectly correct.

*The collector can receive no higher or lower commission upon the moneys "collected and received," upon the duties arising on the tonnage of a vessel, than upon the merchandise imported in such vessel. The section of the law in question confines the change of commissions to the money arising on goods imported after the 30th of June, and on the tonnage of vessels, as strongly as if the words "after the 30th of June," had immediately followed the word "imported." The participle "arising," must refer to the time when the section is to take effect, *i. e.*, "from and after the 30th of June next." The duties arise when the goods are landed, and when the bonds are taken. To what time the words "arising" and "imported" relate, is not, perhaps, at first view, very obvious; but the date is found in the preceding part of the section. The only period mentioned throughout is "the 30th day of June." [*402

The true reading of this section must be thus: "There shall be allowed on all moneys to be received for duties arising on goods imported after the 30th of June next." To speak of duties "arising" after the 30th of June 1800, on goods imported and landed before that day, would be absurd; for the duties "arise" as soon as secured, though not received until a distant period. The word "imported," stands without any sign of time, and may be past, present or future, with equal propriety, unless resort be had to inference, and to the context. The language, to have been precise, should have been either "which may have been imported," or "to be imported." The word, however, standing without the explanatory signs, must receive that construction which is most consonant to justice, reason, and common sense.

By the 63d section of the collection law of 2d March 1799, it is enacted, "that the duties imposed by law on the tonnage of any ship or vessel, shall be paid to the collector, at the time of making entry of such ship or vessel; and it shall not be lawful to grant any permit, or to *unlade any goods, wares, or merchandise whatever, from such ship or vessel, until the said tonnage duty is first paid." [*403

It being admitted by the attorney-general, that the import-duties and the tonnage-duties must go hand-in-hand, no one can be at a loss for the time when the duties on the goods imported in any ship or vessel arose. It would be absurd, to say that the defendant was entitled to three per cent. upon the money received for the duties on the tonnage of the vessel which arrived and entered on the 20th of June, and only two a half per cent upon the moneys which might fall due, and be collected and received by him after the 30th of June, for and on account of the duties which had arisen on the 20th of June, upon the goods imported in the same vessel.

Had it been the intention of congress to have raised the commissions of some collectors, and to have reduced those of others, for like services performed under a former law, they would have said, "that from and after the 30th day of June next, the commissions hereby allowed, shall be upon all moneys by them respectively received, for and on account of the duties on goods, &c., which may be then due to the United States, and outstanding upon bonds, or which shall arise on goods, &c., imported into the United States. But had such been the language of the law, it would have been unconstitutional, because *ex post facto*, and tending to impair the obligation of the contract which was made between the United States and the collectors, by the act of 1799. Yet the construction now contended for by the attorney-general, will give the law the same effect, as if its language had been as just stated; for it will take from the collector one-half per cent. on the amount of bonds, which were outstanding at his office on the 30th of June 1800, and which, of course, had been taken under the preceding act of 1799, by which his commission was established at three per cent.

This construction will also involve both absurdity and oppression. *404] *Suppose, a person, on the 29th of June 1800, had secured duties, by bonds, to the amount of $500, payable at eight, ten and twelve months; and that ten other citizens had made entries on the same day, the duties on which amounted only to $49 each, which, being under $50, they were each obliged to pay down, and upon which the collector immediately received his commission of three per cent; yet, if the late construction of the treasury be correct, the collector was entitled to receive only two and a half per cent. upon the bonded duties, although his responsibility and services were much greater than in the other cases, in which he received his three per cent. on duties which arose at the same time, on goods imported at the same time, and in the same vessel, and although the bonds were taken under the same law of 1799, which expressly established a commission of three per cent., from and after the last day of March, upon all moneys received for duties arising on goods imported into the United States, until a new provision should be enacted and go into operation; that is, in effect, until the 30th day of June 1800; for it never could have been the intention of congress, that compensation laws should apply to other cases than such as should originate after such laws should go into operation.

Another case will show how the present construction of the treasury might have proved extremely oppressive to the defendant. Suppose, that when he rendered his quarterly account to the treasury, up to the 1st of April 1800, there were then outstanding bonds for duties in his office, to the amount of $150,000. He had a right to calculate upon receiving, in the course of the year, $4500 for his commissions thereon, and to make his en-

gagements accordingly. After making such engagements, the law interferes, to the utter ruin, perhaps, of the collector, who relied upon the faith of his government. If congress have a right to take away one-sixth part of the collector's compensation, for services already rendered, they may take the whole. The laborious and responsible part of those services is performed, when the bonds are taken. It consists in receiving the entries of merchandise, examining invoices, classing and estimating duties, and taking bonds, with responsible sureties, &c. Indeed, the residue of the services is mere matter *of form, in many instances, for the bonds so taken are lodged in the bank where the moneys are "collected and received," though [*405 the collector acknowledges the receipt of them in his weekly returns. It can never be permitted to the United States, after these services are rendered, to say, we have changed our mind; instead of three per cent. you shall have but two and a half per cent. Such a conduct on the part of an individual would be treated with contempt and indignation; or were this a case between a state and one of its citizens, and the state should come into this court for relief, the court would not hesitate to compel the state to perform its contract. The constitution of the United States, Art. I., § 10, says, "no law impairing the obligation of contracts shall be passed."

If the treasury construction prevails, it will, in almost every instance, confine the operation of the act of 1799 to three months, instead of allowing it to operate until the next law took effect; for one-third of all the bonds taken in July 1799, for duties on European goods, and all the bonds taken for duties on wines and teas, did not fall due until July 1800.

Suppose, the law had contained such a clause as this, "that from and after the 30th day of June next, in lieu of the duties heretofore imposed by law, on goods, &c., imported from Europe, subject to a duty of twelve and a half per cent. *ad valorem*, there shall be charged only a duty of ten per cent. *ad valorem*, upon all such goods, &c., imported into the United States." Suppose, a ship from London had arrived on the 13th day of June 1800; that all the cargo had been duly entered and discharged, before the end of the month, except one consignment of considerable value, and that, after the expiration of fifteen working days, such goods had been taken from on board, and stored agreeable to law. Upon the 1st of July, the assignee appeared before the collector, with his entry duly made out, and his sureties ready to enter into bonds for the duties. The collector contended for the duties at twelve and a half per cent. *ad valorem;* the consignee offered to secure the duties at ten per cent. ad valorem. Would this court say, that he was not bound to pay the twelve and a half per cent. duties, because, from *neglect or design, he did not secure the payment of the duties, [*406 and take away his goods when the other importers did?

The difference of phraseology between the two former and two latter laws, on the same subject, was not the effect of a design to benefit one collector, and to injure another; but was merely owing to the different manner in which different men will ever express themselves, in defining the same subject-matter.

Breckenridge (Attorney-General), in reply.—No argument, in favor of the defendant can be drawn from the act of 1795 (1 U. S. Stat. 416), for the words there are expressly "on goods, &c., imported after the last day of

March," but the words of the present act differ very materially; instead of saying, on goods imported after the 30th of June, it says, on moneys collected and received after the 30th of June. The difference of phraseology used by the legislature, when legislating on the same subject, evidently implies a difference of intention.

The word "arising," makes no difference in the construction of the sentence. It would have the same meaning, if that word were entirely left out. The expression "duties on goods" is the same, in effect, as the expression "duties arising on goods." That part of the sentence is only descriptive of the subject, or fund, out of which the moneys were to be received. The words of the act of 1797 (1 U. S. Stat. 502), which gave the defendant a commission of three per cent. are "on all moneys received on account of the duties arising on tonnage, and on goods, wares and merchandise, imported after the last day of March, in the present year." Here is the same remarkable difference in language, which was observed in the act of 1795; and which adds strength to the argument, that the variation of the expressions was not accidental, but intended to convey a different signification.

The words of the act of 1800 are not, that the collector shall receive only two and a half per cent. on the duties arising on goods imported after the 30th of June; but on all moneys collected and received, after that day, on
*407] goods imported at any time. Moneys due, by bond, *are not moneys collected and received. The actual collection and receipt of the money, was the only act which could entitle the collector to his commission, under either law; and if collected and received after the 30th of June, only two and a half per cent could be demanded.

Johnson, J.—This is an amicable suit, instituted to try the question, whether the defendant, lately collector of the port of Petersburg, was, after the 30th day of June 1800, entitled to retain three per centum on the amount of sums received by him after that time, upon bonds for duties taken between that period and the last day of March 1799. The claim of the defendant is founded upon the act of March 2d, 1799, "to establish the compensations of the officers employed in the collection of the duties," &c. And the opposition on behalf of the government, is founded on the act of May 10th, 1800, supplementary to the one mentioned.

The whole difficulty results from the vague signification of some of the expressions made use of in the latter act; which, so far as may be material to the present decision, are contained in the following extract from the 2d. section: "That in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors for the districts of Alexandria, Petersburg and Richmond, respectively, two and a half per centum on all moneys which shall be collected and received by them," "for and on account of the duties arising on goods, wares and merchandise imported into the United States, and on the tonnage of ships and vessels."

On behalf of the United States, it is contended, that the rights of the collectors of duties, with regard to their compensation, are absolutely submitted to the will of congress; that congress has uniformly increased or diminished that compensation, as circumstances suggested the expediency of

such a measure, without regarding any supposed limitation of their right to do *so, imposed by the claims of their officers; that it has been the [*408
uniform policy of the government, to apportion the commission to the actual receipt of money; and therefore, whatever may have been the proportion of their labor or responsibility, their right to compensation was not consummated, before the actual receipt of the duties, and the amount of their commission remained liable to be increased or diminished, at the will of congress; that in passing their act of May 10th, 1800, they had a right to give it a retroactive operation; and the latter words of the 2d section, "arising on goods imported," will bear, and ought to receive, such a construction.

At the same time, that I admit the correctness of the prefatory observations of the attorney-general, my mind is led to adopt a conclusion unfavorable to the construction which he contends for. The rights of the collectors of duties, as to their compensation, are certainly submitted to the justice and honor of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature, to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.

That it is the policy of the United States, in granting compensations to her revenue officers, to limit the consummation of their right to the actual receipts of money, is evident, from a view of all her acts on that subject. But it is observable, that every end of that policy is answered, in this case, because the claim of the defendant is founded upon the actual receipt of money *arising upon bonds taken while the compensation was at three per [*409
cent. His claim has no relation to the amount bonded, but to the amount actually received upon the bonds taken prior to the last act.

Upon considering the question, therefore, upon the construction of the act, I confine myself to the single inquiry, how far the government has exercised its power, in reducing the compensation to the defendant, from three to two and a half per cent. The words of the act, "arising on goods imported," although, in themselves, very indefinite in point of time, will receive a precise signification in this respect, by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it be necessary, that the court should make an election between these words, in order to complete the sense, its choice will be immediately determined, by recurring to two well-known rules of construction, viz., that it ought to be consistent with the suggestions of natural justice, and that the words should be taken most strongly "*contra proferentem.*"

But there are other considerations which will lead to a conclusion, without supplying any supposed deficiency in the wording of the sentence. There is nothing, either in the terms made use of, or in the professed object of the law, necessarily retrospective; but the general intention of the act, as well as the signification of the word arising, both point to a future opera-

tion. Besides which, where it can be shown, that a government has once adopted a certain rule of justice for its conduct, it is fair to infer, that in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed; and in the act of March 3d, 1797, which varies the compensation of the revenue officers in several particulars, that alteration is expressly restricted to take effect only with regard to future importations. I am of opinion, that the defendant shall have judgment.

*410] *Washington, J.—The point submitted by the circuit court of Virginia to this court is, whether the defendant, as collector, was restricted to a commission of two and a half per cent. on any, or all of the moneys collected and received by him, after the 30th of June 1800, on account of bonds previously taken for duties arising on goods, &c., imported into the United States.

The solution of this question must depend upon another: does the 2d section of the act of the 10th of May 1800, extend to duties which arose upon goods imported before, and received after, the 30th of June, in that year? or is it to be restricted to duties arising on goods which should be imported after that period?

I am strongly inclined to the opinion, that every part of this section is future, and that a literal construction will render it entirely prospective upon the whole subject. The time at which the substitution of two and a half for three per cent. is to take place, as well as that of collection and receipt, are certainly future, and there is, I think, as little doubt, that those receipts can only apply to duties which should arise after the same period, the word arising being clearly future, in relation to the time specified in the section. The word "imported," though past, in relation to the duties which were to arise on the goods imported, may, nevertheless, be future, in relation to the period when the charge of commissions was to take effect, and I think it ought to be so construed in this case, because the duties arise either immediately upon the importation of the goods, or upon the performance of some acts which, in contemplation of law, are immediately to follow the importation.

This construction is, I think, considerably strengthened by a reference to former laws upon the same subject. The act of March 1797, is plain and express upon this point, by fixing the commissions allowed by that law to moneys received on goods imported after the last day of that month. The 2d section of the act of March 1799, was obviously intended to increase the *411] commissions *of some collectors, and to vary the relative compensations which had been allowed to the several collectors, by the former law; but there is no reason to believe, that it was intended to change the objects for which this compensation to the collectors generally was to be allowed. Yet this law does not, in express terms, confine the commissions to duties arising on goods imported after the specified day, as had been done in the preceding act, but is worded, in this respect, precisely like the law immediately under consideration.

It is hardly to be imagined, that over and above the increase of commissions allowed by the last law, for services after the 31st of March, to be wholly rendered, the legislature intended to increase the commissions allowed by the act of 1797, for services which had been in part performed before the

31st of March 1799, without an expectation of such increase, and where nothing remained to be done but to receive the money. Yet this would be the case. if the increase be not restricted to goods imported after the specified day, The change of expression in the latter law, I take to be perfectly accidental; and, in construing one of them by the other, both being *in pari materia*, I feel myself constrained to read the latter, as if it had been expressed thus: "That after the last day of March 1799, there shall be the following commissions allowed on all moneys received by the collectors respectively, on account of duties arising on goods, &c., imported into the United States, after that day," &c.

The 2d section of the act of 1795 was clearly intended to diminish the compensation of some, and to increase that of other collectors, and can, with as little reason as in the former case, be construed to change the objects for which this compensation was allowed. Such a construction would have the of effect raising the compensation of some collectors, and depressing that of others, for services partly performed at the same time, and in some instances, where those which remained to be done, in order to consummate the right to the commissions, were transferred from the collectors to the banks. This would I think, be unreasonable, *and in the instances of diminished commissions, would be unjust. [*412

That the services performed, preparatory to the collection or receipt of the duties, were considered, by the legislature, as equal, at least, to the receiving of the money, is proved by the 4th section of the law of 1799, which provides, that whenever any collector should die or resign, the commissions to which he would have been entitled on the receipt of all duties by him bonded, shall be equally divided between the collector resigning, or the legal representatives of the deceased collector, and his successor, whose duty it is made to collect the same.

I cannot, therefore, consent to such an interpretation of this law, as to give it a retrospective operation, so as to deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation, and to be in their nature severable, from the ultimate act of the money being received or collected, provided those acts are in reality performed. My opinion is, that the defendant is entitled to three per cent. on all moneys collected and received by him, after the 30th June 1800, on account of bonds previously taken, for duties arising on goods imported into the United States.

Paterson, J.—The basis of this action is the statute of congress of the 10th of May 1800; and the question is, whether the defendant is restricted to a commission of two and a half per cent. on moneys collected and received after the 30th of June 1800, by virtue of revenue bonds, executed previously to that date? The words of the statute are, "that in lieu of the commission, heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors of Alexandria, Petersburg and Richmond, respectively, two and a half per cent. on all moneys which shall be collected and received by them, for and on account of the duties arising on goods, wares and merchandise imported into the United States, and on the *tonnage of ships and vessels." The defendant was late collector of the customs for the district of Petersburg, in the state of Virginia. [*413

Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.[1] This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

The word "arising" refers to the present time, or time to come, but cannot, with any propriety, relate to time past, and embrace former transactions. As to the word "imported," it may comprehend the past or future, or both, according to the subject-matter, and the words with which it is associated. Thus the word "arising," coupled with the words "on goods imported," shows, that the whole clause has a future bearing and aspect, and will not justly admit of a retroactive construction. According to this view of the subject, the commission of two and a half per cent. is to be restricted to moneys received by the collector of Petersburg, on account of the duties arising on goods, wares and merchandise which shall be imported after the 30th of June, when the act went into operation.

To fortify the foregoing construction, it may be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers.

CUSHING, J.—The question referred to this court by the circuit court is, whether the defendant, as collector, by the act of the 10th of May 1800, was restricted to a commission of two and a half per cent. on any or all of the moneys collected and received by him, after the 30th June 1800, on account of bonds previously taken for duties arising on goods, wares and merchandise imported into the United States.

There was a prior act of congress, entitling the defendant to three per cent. on all moneys received on account *of duties arising on goods imported into the United States, within his district; which act was in full force during the time those duties arose, and until the subsequent act in question of the 10th of May 1800, was to come into operation, which was the 30th of June following; and the question is upon bonds previously taken for duties arising on goods imported before the 30th of June. Upon this question, I am of opinion, that the collector has a right to the three per cent. allowed by the former law, on all moneys secured by bonds previously taken as aforesaid, for duties arising on goods imported before the 30th of June 1800; and that he is not restricted by the latter law to two and a half per cent. And that the general and true intent of the latter law was, to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to have a retrospective effect, to divest vested rights of the collector; it being unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose.

*414]

[1] Quoted and approved by Justice BRADLEY, in Sohn *v.* Waterson, 17 Wall. 598. And see Harvey *v.* Tyler, 2 Id. 347.

Whether the words "from and after the 30th of June," are in the beginning, middle or end of the sentence, the meaning, in this respect, appears to me the same; to give the collector a new allowance on goods imported after that time. When the former duties were secured by bond, the laws, I think, consider them, as far as regards the collector's allowance, as collected and received; the principal services being already done by securing the duties by bond.

MARSHALL, Ch. J., being one of the judges whose opinions were opposed in the court below, did not sit at this hearing.

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*MANELLA, PUJALS & Co. *v.* JAMES BARRY. [*415

Agents and factors.

If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders, the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders.

ERROR to the Circuit Court of the United States for the district of Maryland.

The action was brought by the plaintiffs in error, to recover from the defendant, Barry, the price of three cargoes of tobacco, purchased and shipped by Barry, for account of the plaintiffs, but which were captured on their way to Spain, and condemned. The ground of the claim was, that Barry had not strictly pursued his instructions as to the shipments.

The transcript of the record contained two bills of exception. In the first bill of exceptions, all the material facts of the case were stated, but the exception was taken only to the opinion of the court, who refused to suffer a witness to be sworn to prove the jury, to what was the true translation of a certain part of the Spanish instructions, as to which the parties differed, although the plaintiffs and defendant consented that the witness should be so sworn. This opinion, it is understood, was founded upon the idea, that the court, and not the jury, was the proper tribunal to decide the meaning and construction of all written evidence.

The facts stated in the first bill of exceptions, and which were referred to in the second, presented the following case: On the 27th of January 1798, Bernardo Lacosta, of Cadiz, in Spain, for and on behalf of the plaintiffs, who were also Spanish subjects, wrote and transmitted to the defendant, by the hands of Juan Alonzo Menendez Conde, a letter in the Spanish language, the following translation of which, purporting to be made by a sworn translator, was read in evidence to the jury.

*"Cadiz, 27th January 1798. [*416

"To Mr. James Barry, Baltimore.

"My most esteemed friend:—I derive a particular satisfaction in introducing to you the bearer of this letter, Mr. Juan Alonzo Menendez Conde, who goes to Baltimore, as agent of the house of Messrs. Manella, Pujals & Co., of this place, principally interested in the importation of tobacco for this

kingdom. The confidence I have always had in you, and the friendship you have on all occasions manifested for me, warrant the conclusion, that you will view this measure as your own, and will execute it with your wonted zeal and efficacy. Being an undertaking of considerable magnitude, a proportionable degree of economy should be observed in the purchases, the shipments and the reimbursements, because the least neglect may cause an enormous loss. By the last accounts from America, I find, that tobacco has risen to a great price, but I hope this was only momentary. However, upon a reasonable calculation, it will not answer them, at more than ten dollars per quintal, in America; these are the limits to which they can go, without exposing themselves to too much loss. You will, however, consult the bearer, Mr. Menendez, or he with you, and in case you should determine on an advance of one-fourth or one-half a dollar more, to prevent delay, you may do so, if you think proper, being fully convinced, if you can do it for less, that you will omit nothing that may advance the interest of my friends. With this, the said Mr. Menendez takes an order for 20,000 quintals to be shipped for this place, in seven or eight vessels, and not less than six, under which condition, the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law.

"For the greater perspicuity, the shipments will be made in the following manner:

"1. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them to this place, alternately to me, to Messrs. Gahn & Company, and to Messrs. Pablo, Greppi, Marliani & Company.

*417] "*2. Your letter, by the vessel, will state that the consignment is made on your account; that you order her to Cadiz, where you hope that the consignees may be able to sell, but that if the government should not permit the sale, or the English prevent her entry, that then the vessel is to proceed to Genoa.

"3. That the captain carry no other letters than those relating to the cargo, but he must have one for Charles Longhy, of Genoa, to whom the consignment will be made, in the supposed case of not being suffered to enter this port, or be permitted to sell here.

"4. Should the captain be prevented entering here, he will put into the nearest Spanish port to this, and send an express to the consignee.

"5. The captain will bring the charter-party, and the letter to cover the shipment; that, as well as the bill of lading, should specify two freights one for Cadiz, and the other as though the vessel was in fact destined for Genoa.

"6. In the invoice by the vessel, you will insert all the charges, except the commission, which is understood shall be five per cent. to be hereafter added.

"7. By the way of England, you will transmit the true invoices, adding thereto your commission.

"8. Great care should be taken, in the *role d'equipage*, as to the birth, age, size, &c., of the seamen, and that it agree in date and number with the shipping articles.

"9. Admitting that the vessel cannot enter here, there must not be any

excess of freight, on her going to another Spanish port; but this condition must be confidential with the captain, and must not appear in any document.

"10. The vessels should have Mediterranean passes, and, in a word, all other necessary documents, that we may have no difficulties with the privateers there; and if you could have the papers examined by the French, *English and Spanish consuls, in your country, it appears to me, it might serve as a great protection. [*418

"11. The bills of lading will be remitted, by triplicates, by the way of London or Lisbon, to Messrs. Pablo, Greppi, Marliani & Co., of this place.

"As to your reimbursements, you may draw as follows, to wit: $80,000 on Don Juan de la Chappeaurouge & Urgulla, of Hamburg; $40,000 on John Gore & Co., of London; $40,000 on Lorla & Co., of Amsterdam; $40,000 on A. E. & I. E. Metzeuca & Koosen, of Lisbon—$200,000; which sum you will dispose of according to your wants, advising the persons on whom you draw, that it is on account of, and by order of, Messrs. Pablo, Greppi, Marliani & Co. You will take special care to avoid drawing too large a sum at once, and that the bills on those places be at ninety days' sight; it being always understood, that in case you are able to negotiate upon Spain, you will draw on that country, in preference, on Manella, Pujals & Co., of this place, and at sixty days' sight, and then you will specify whether it is to be paid in cash or in *vales reales*. Although I have already mentioned, that the insurance should be made here, yet you will make that charge in the invoice sent, as though it had been effected by you. I refer you to the verbal communications of the bearer, on this subject, who is sent on purpose to superintend the shipments; and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen.

"You will determine the quality of the tobacco to be shipped, with the said Mr. Menendez. It should be well assorted, very sound and dry, though it does not appear necessary, that it should be all of the best quality.

"In order to avoid every unforeseen accident, in case any of the said houses should not accept the drafts above mentioned, which I do not apprehend, you will point out to the holders, to present them to Messrs. Greppi, Marliani & Co., who will accept and domicil *them with our friends of the same place, as has been agreed on, and the said Messrs. Greppi have written to this effect, to their correspondents. But we all flatter ourselves, that this case will not occur. I remain, as always, your affectionate friend. [*419

(Signed) BERNARDO LACOSTA."

This letter was delivered by Menendez, on the 22d of March 1798, to the defendant, who, in pursuance thereof, purchased 1528 hogsheads of tobacco, containing, in the whole, 1,838,393*lbs.* and amounting, exclusive of charges, to the sum of $180,824.77, and including charges, other than freight, insurance and commissions, to the sum of $204,077.77. This tobacco was shipped in the following manner.

On the 28th of April 1798, sixty-two hogsheads, amounting, with cost and charges, to $8846.36, by the Moorish brig Muqueni, regularly docu-

mented as a Moorish vessel, and navigated by subjects of the emperor of Morocco, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 18th of May 1798, 270 hogsheads, amounting to $27,868.35, by the brig Minerva, a Danish vessel, regularly documented as such, navigated by Danish subjects, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Pablo, Greppi, Marliani & Co., at Cadiz.

On the 26th of May 1798, 500 hogsheads, amounting to $60,914.56, by the ship Polly and Nancy, an American vessel, regularly documented as such, and navigated by citizens of the United States, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

*420] *On the 10th of July 1798, 100 hogsheads, amounting to $13,876.48, by the schooner Felicity, an American vessel, regularly documented as such, and navigated by American citizens, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 23d of July 1798, 117 hogsheads, amounting to $17,269.77, by the brig Susanna, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Pablo, Greppi, Marliani & Co., at Cadiz.

On the 16th of August 1798, 288 hogsheads, amounting to $43,064.54, by the ship Henrietta, an American vessel, regularly documented, and navigated by citizens of the United States, for the account and risk of Don Carlos Longhy, of Genoa, and consigned to Bernardo Lacosta, at Cadiz.

And on the 8th of November 1798, 191 hogsheads by the brig Fly, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

The Moorish brig Muqueni was captured by the British, and condemned at Gibraltar, together with her cargo, as enemy's property. The Danish brig Minerva was captured by the French, and, together with her cargo, condemned as good prize, by a French consul at Malaga, in Spain. The ship Henrietta was captured by the British, and, with her cargo, condemned at Halifax, as enemy's property. The other four vessels arrived safe, and their cargoes were received by the plaintiffs, and applied to their own use and profit. The bills drawn by the defendant, to the amount of $204,

*421] 073.72, were duly paid, and the proceeds came to the hands of *the defendant, and were applied to the purchases of the tobacco. The cost and charges of the tobacco, which arrived safe, exceeded the sum to which it would have amounted at $10 per quintal, by the sum of $5478.27.

The defendant produced the letters of Menendez, of which the following are translated extracts:

"City of Washington, 28th May 1798.

"Mr. James Barry, Baltimore: Esteemed Sir: By your favor of 27th inst., I am informed relative to the purchases of tobacco, and the affreightments entered into for its shipment, all of which you have executed with that zeal and efficacy which you are accustomed to, and I therefore approve of the exact-

itude of your operations. At same time, I flatter myself that you will continue successively with equal activity, until the total compliance of 20,000 quintals ordered; and you may rest assured, as to my particular errand, that the payments shall be realized in London."

"Washington, 29th May 1798.

"Under date of yesterday, I wrote you a letter, approving of all your operations relative to the tobacco purchases, and affreightment for its shipment. The contents thereof I now confirm, you having done everything to my entire satisfaction, and as I would have expected from your exactitude and zeal. On the score of placing the funds in London, you may rest satisfied, because you well know that this is the principal object which has compelled me to go to Spain. I hope that in the next order, we shall be able to effect the purchases to more advantage, and with less trouble."

*"Capes of Virginia, on board the ship Polly and Nancy, 14th June 1798. [*422

"Dear Friend—The 4th instant, we sailed from Alexandria, and ever since have we been in the river, detained by calms and contrary winds, which has made me very impatient. By the last accounts which I have observed in the newspapers, I am persuaded, that war is as much as declared between the United States and France. This novelty troubles me much, for which reason, if it be agreeable to you, and equally convenient, to have the future shipments made on Danish or Swedish flags, and in the name of Charles Longhy, of Genoa, you acting as his agent, you may do it so, by declaring in the bills of lading and invoices, that the cargoes are for the account and risk of said Longhy, and by giving letters to the said captains for Messrs. Greppi, Lacosta, or Gahn, of Cadiz, of the following tenor:

"'Gentlemen: In virtue of orders I have received from Mr. Charles Longhy, of Genoa, to remit him a cargo of tobacco, on his proper account and risk, I have loaded in the ship ——, captain —— [so many] hogsheads of tobacco, and I have given orders to said captain to touch at your port (if not blockaded) and to call upon you with a view to get permission from your government to sell a parcel; should the captain succeed in entering your port, and that you can obtain leave to dispose of the whole or part of his cargo, you will please to do so, for the best advantage of the said Mr. Longhy, remitting him the proceeds to Genoa. And in case that you cannot obtain a sale, you will please to direct the captain to proceed on to the said port of Genoa, supplying him with the means therefor,' &c.

"In this way, it will be proper for you to charge your commission in the invoice. I contemplate that by making the further shipments in this mode, the property will go with more security, said Longhy being a neutral subject; and should the vessel be met by French cruisers, *the cargoes would go secure, as the property would not appear to be American. [*423 I also believe, that nothing of this would affect the insurances; and at all events, it is best, because the insurances will be done on neutral ships and neutral property, so that the property also sounds as neutral. Should you, since my departure from Baltimore, have chartered any American vessel, you can make the shipment in the same way; because, in case a French cruiser should capture the vessel, the cargo may be saved, on account of its not appearing to be American property; so that the only thing subject to

condemnation, in that case, will be the vessel and her freight; whereas, if the property goes in your name, both vessel and cargo will be condemned, if under American colors; but, if on a Danish or Swedish vessel, then the cargo only would be condemned. Therefore, whenever you can meet a Danish or Swedish vessel, and by making the shipment as for account of Longhy, the neutral subject, there can be no risk. Therefore, it appears to me very proper and consistent, in order to obviate these risks, in every case, that the further shipments do not sound in your name, but in that of said Longhy; or if not, in that of Messrs. Ghan & Co., of Cadiz, or of Mr. Gould, your brother-in-law, provided the French and the Portuguese come to a good understanding, which I am informed is the case, and that matters have been accommodated between them.

"Finally, you know, better than I do, the critical circumstances of the day, and for this reason, I am satisfied, you will be attentive in making choice of the mode which may be best calculated to save any shipment you may make. I can only say, that of this vessel, I have much fear and apprehension, notwithstanding she sails fast.

"In case you should act conformably to what I have here mentioned, as to further shipments, I, from this moment approve thereof; and that it may appear, and to save you from any accident that may occur, as also to prove that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order that at no time whatever you should be chargeable with the consequences.

*424] *"You will encharge the captains to wait the opportunity of a fresh N. W. wind, in order the sooner to get clear of the coast, and the danger of cruisers, the same we had in view. You will also direct them to make for the first port of Spain, be it which it may, as the great object is, to save the cargoes."

This letter was received by the defendant, before the shipment by the Henrietta was made.

On the same 14th of June 1798, Menendez wrote a letter also to Robert Barry, the nephew, and principal clerk and assistant of the defendant in his business, of which the following are translated extracts:

"By what I wrote your uncle, under this same date, you will be informed of all that I have recommended. In addition to which, I shall mention to you, that you will perceive in the copy of the private instructions, what I am directed to do, on the score of the tobacco shipments, and you will see, in one article thereof, that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of the neutral subject. In the present day, it may be said, that war is declared between these states and the French republic; for which reason, we may view the thing in a different light.

"When you make up the general invoice, you will recollect to charge in that which you are to forward to Bernardo Lacosta, two and a half dollars per quintal of tobacco, over and above the real costs and charges, adding a note to the bottom thereof, that you do not charge insurance, nor loss on the reimbursements, such being to be done in Europe, and that you do not know to what amount they may ascend. The general invoice containing the real costs and charges you will remit to Mr. Joseph Anthony de Sola, adminis-

trator-general of the king's tobacco stores, at Cadiz, or directed in my name, which letter for me will always come to the hands of said Sola. You already know, that the other fictitious invoice is intended to be exhibited at Madrid, but that no other person shall know anything of the other that is to contain the real cost and charges, by which only we the concerned *are to be governed. The invoice you are to remit to Bernardo Lacosta, in which the two and a half dollars per quintal is to be overcharged, is also to be delivered to Joseph Anthony de Sola, which you will remind him of." [*425

This last letter was received by Robert Barry, within a few days after its date, and before the shipment by the Henrietta, and was by him delivered to the defendant.

It was also proved, that Menendez, on his first arrival at Baltimore, declared to the defendant that he had private instructions, not contained or specified in the said letter of the 27th of January 1798; and that those private instructions authorized, among other things, a shipment of the tobacco to be purchased, in neutral vessels, generally, without confining the same to American vessels. That Robert Barry saw in the possession of Menendez, soon after his arrival in Baltimore, a written paper in the Spanish language, purporting, and declared by Menendez to be a paper containing such private instructions. That Menendez read a part of them to Robert Barry, who looked at the paper at the same time, and saw that he read correctly, and that what he read was of the purport aforesaid.

That at the time of taking up the Moorish brig and Danish barque, the defendant found it impossible to procure suitable American vessels. That Menendez knew of, and approved, the shipments in the Moorish brig and Danish barque, at the time they were made. That the defendant constantly communicated with Menendez, during his stay in Baltimore, on the subject of the said purchases and shipments, and therein acted with his entire approbation and concurrence. That Menendez urged the necessity of making the shipments of the tobacco speedily, even if the price should be greater than $10 per quintal, calculating, as he said, that if the tobacco should arrive in Spain at $15, the concern would clear $100,000, and that for his share or interest therein, which was one-tenth, he should clear $10,000. That the aggregate of all the purchases of tobacco, excluding insurance, freight and commissions, *did not exceed $10.50 per quintal, and that Menendez approved the prices at which they were made. That Danish and Moorish vessels were neutral vessels, and that the tobacco was really shipped for the actual account and risk of the plaintiffs. [*426

Whereupon, says the first bill of exceptions, "the plaintiffs, by their counsel, offered to swear a witness, to prove to the jury, that the said paper, at first read in evidence to the jury by them, as a true translation of the said letter of the 27th of January 1798, is not a correct translation of the said letter, in that part of it which is contained in the following words, '*para presentiar la expedicion*,' and that the true construction of the said words is, 'to be present at, or assist in, the shipments,' and not 'to superintend the shipments,' as in the said paper is stated; to the swearing which witness, for the purpose aforesaid, the defendant, by his counsel, consented, but the court would not admit such evidence to be given to the jury, on the trial of such

issue, to determine the true import and legal construction of the said words." To which opinion, the counsel for the plaintiffs excepted.

The second bill of exceptions began as follows: "And upon the aforegoing statement, prefixed to the first bill of exceptions in this case, the plaintiffs, by their counsel, prayed the directions of the court, that if the jury believed the matters so offered and given in evidence by the plaintiffs, then the plaintiffs are entitled to recover, in their action, the amount of the price, costs and charges of the tobacco, shipped as aforesaid on board" the Moorish brig Muqueni, the Danish brig Minerva, and the American ship Henrietta, and also the sum of $5478.27, being the excess in the price, costs and charges of the four cargoes shipped by the defendant, and received by the plaintiffs as aforesaid, over and above the price limited by the letter of the 27th of January 1798. "But the court were of opinion, and did direct the jury, that by that letter, the defendant was authorized to make the shipments of to-
*427] bacco on board of other than American vessels, or *vessels belonging to citizens of the United States, agreeable to the laws thereof, and that the shipment of the tobacco in the Moorish and Danish vessels, as stated in this bill of exceptions (the said vessels being admitted to be neutral vessels as aforesaid), was not in violation of the instructions in the said letter, and that the plaintiffs have not sustained the present action for the recovery of damages for such shipments on the said Danish and Moorish vessels, against the said defendant. And the court were also of opinion, and did accordingly direct the jury, that by the said letter of instructions, the defendant was authorized to make the shipment of tobacco in the ship Henrietta, as above stated in this bill of exceptions, and to consign the said tobacco for the account and risk of the said Don Carlos Longhy, as stated in the said bill of exceptions. And the court were also of opinion, and did direct the jury, that if the defendant had not such discretion, by the said letter, yet if the jury believed, that the said several shipments of tobacco, on board the said Moorish and Danish vessels, and the said American ship Henrietta, were made as herein before stated, by the direction, and with the approbation of the said Menendez, or were afterwards ratified by him, as agent of the plaintiffs, as herein before stated, the plaintiffs have not sustained their present action for the recovery of damages for such shipments. And the court were of opinion, and directed the jury, that the evidence was sufficient in law to establish that the said shipments were made by the direction of the said Menendez, as agent of the plaintiffs, and were also ratified and confirmed by him, as agent as aforesaid. And the court were also of opinion, and directed the jury, that the price of $10.50 for each quintal of tobacco, limited by the said letter of the 27th of January 1798, for the purchase of tobacco by the defendant, was the price that the defendant might give in America, exclusive of charges of every kind, and that as the price of the said tobacco, shipped by the defendant, did not average so much as $10.50 per quintal, the plaintiffs have not sustained the present action to recover damages for the excess of price given, including charges." To which several opinions, the plaintiffs excepted.

*428] *The verdict and judgment were for the defendant, and the plaintiffs brought their writ of error into this court.

Harper, for the plaintiffs in error, observed, that the duty which he was

now called upon to perform, was more painful than any which had occurred in the course of his professional practice. He was called upon to urge a claim against an honorable and respectable man, to the amount, perhaps, of his whole fortune. A claim founded upon no charge of dishonorable conduct or intentional injury, but upon an excess of authority in undertaking to judge for the plaintiffs, where the plaintiffs meant to judge for themselves. A loss has happened, and the question is, upon whom shall it fall? If the defendant has violated his instructions, though with the purest intention, he has taken the responsibility upon himself.

The first point made in the court below was, that the jury, and not the court, was to ascertain the true translation of the Spanish instructions. The question, what ideas a man meant to convey, is a question of fact, to be decided by a jury. But what is their legal effect, is matter of law. To enable the jury to say what ideas are, by the custom or usage of a nation, annexed to certain words or phrases, they must inquire by witnesses.

But this is a question not material to the merits of this case, and admitting, for the sake of argument, that the court was the proper tribunal to translate the instructions, two questions will arise: 1. Whether the defendant has deviated from the strict letter and prohibition of his instructions? and 2. Whether, if he has, he was justified by any authority contained in the letter of Lacosta, or by the orders and assent of Menendez?

*1. He has deviated from the letter of his instructions, in shipping the tobacco in Danish and Moorish vessels, which could not be commanded by American masters. The words of the instructions are, "you will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law;" evidently contemplating none but American vessels, and the obvious reason was to guard against British captures. For this purpose, it was believed, that the property would be safer in American, than in foreign ships. American produce, in foreign vessels, would be considered *primâ facie* by the British as enemy's goods. [*429

2. In the case of the Henrietta, he violated his instructions, by not shipping the tobacco for his own account and risk, but for that of Longhy, of Genoa. That the property should be shipped in his own name, as a citizen of the United States, is the alpha and omega of the instructions. It is true, that we were in a state of limited hostility with France. But it being, in fact, Spanish property, and Spain being the ally of France, there was no danger of French condemnation. At that time, too, Great Britain hoped and expected that the United States would have joined her in the war. There was less probability, therefore, that she would commit depredations upon American property, than upon that of any other nation. That Genoa was either a province of France, or a very humble and submissive ally. To ship the property, therefore, as that of a Genoese, was to place it in the most dangerous situation possible as to British cruisers. This was done, no doubt, with good intentions, but with a weakness of judgment, truly astonishing, and in direct violation of instructions.

2. The 2d question is, was he justified by any part of the letter in substituting his own judgment for that of his principals, in opposition to the positive injunctions of his instructions? He was to exercise his judgment only in cases not provided for by those instructions; but where they were

precise and positive, he had no discretion. The great object of the whole
*430] letter *was, that the property should not appear to belong to a foreigner. Language is useless, if it is not to be regarded. No man can be safe in commerce, if his orders are not to be obeyed: all confidence will be destroyed, and commerce must cease. The general expression of the letter cannot be supposed to revoke all the specific orders, and give unlimited powers. For what purpose were those specific orders given, if a general and unlimited authority was conferred? The general expressions mean no more than this: we depend upon your fidelity and judgment in executing our orders. All the parts of the letter are to be taken together, so as to give effect to the whole. He has not pursued his instructions with respect to the price. *Expressio unius est exclusio alterius.* By naming a price, they must be understood as restricting the defendant to that limit.

The defendant, then, is not justified by anything in the letter itself. Is he justified by the authority of Menendez? It is not proved, that Menendez was an agent; or that, if he was, he had any power to dispense with the precise instructions contained in the letter of 27th of January. His declarations are not evidence, unless he is first proved to be an agent. It does not appear, what authority he had. His private instructions might be very limited. It is not to be presumed, that he had authority to vary the particular instructions contained in the letter. If he had, can it be believed, that the defendant did not require him to produce them? He knew that he was about to act contrary to his instructions, and that he was taking a great responsibility upon himself. He ought to have taken a copy. The burden of proof lies on him.

But why not produce the testimony of Menendez? The cause has been pending five years in the court below. [It was answered, that he had gone to Spain; that a commission had been sent there, but the commissioners refused to act, or the witness kept out of the way.] Does the letter itself show
*431] such an authority *vested in Menendez? It calls him agent, and refers the defendant to his verbal communications. But how agent? for what purpose? To see that their orders were duly executed; and to make verbal communications not inconsistent with written orders. If agent, will that convert the letter into a set of hints instead of instructions? If he was their general agent, with full powers, why write particular instructions to the defendant? The agent would have kept the instructions in his pocket. They would have been written to him, and not to the defendant.

But how was he agent? 1st. As to the price; 2d. To superintend the shipments, within the limits of the instructions; 3d. To select tobacco of the proper quality to suit the Spanish market. His duty and authority were like those of a supercargo. He was an agent, even if he had only a particular authority. In order to constitute an agent, it is not necessary that he should have general powers. If his powers are not to be considered as restricted, we must violate that rule of construction which would give effect to the whole instrument, if possible. "*Para presentiar la expedicion.*" The word *expedicion* means shipment, not the whole enterprise. He was to communicate with the defendant, as to the whole enterprise, but not to control it. But supposing the expression to mean, that Menendez was to superintend the enterprise, it can only mean that he should see that the enterprise was conducted according to the instructions, and not that he should sanction

a violation of them. It was to see that they should be fulfilled, not disobeyed. But the phrase *para presentiar*, does not mean "to superintend;" it only means that he should assist. It is translated into the French language by the word *assister*, to be present at, to partake of. But if we take the English meaning of the word assist, the question occurs, how assist? Certainly, according to the instructions. The very next sentence in the letter contradicts the idea of a general agency. The words are, "and you" (in the singular number) "will, upon the whole, act for the advantage of the interested." The discretion, if any, was given to the defendant himself, and not to Menendez. *He was only to be consulted and advised with. [*432
In any point of view in which it can be placed, it does not justify the idea, that a power was given to control the orders to give the property an American character.

W. Pinckney and *Martin*, contrà.—The points of this case are few, and float upon the surface. They depend upon the construction of the orders, and the authority of Menendez. Menendez was not the casual bearer of the letter of instructions to the defendant, but sent on purpose; his sole business was to superintend this transaction. The defendant agreed to undertake the business; he entered upon his duty, and endeavored to discharge it with fidelity. This action is, therefore, grounded on the ungracious idea, that in performing his duty to the best of his judgment, he has erred. The defendant is not charged with fraud or intentional injury. It is, therefore, an action *stricti juris*.

When the nature of this transaction is considered, the fraud meditated upon the Spanish government by the double sets of invoices, and the neutral cover attempted for the property, the plaintiffs come with an ill grace into a court of justice, to charge a loss upon the defendant, for a mere error of judgment, while acting with honor and fidelity, and exercising his discretion for their advantage, to the best of his ability.

If there was any ambiguity in the letter, it was the fault of the plaintiffs; and to take advantage of it now, would be fraudulent. If that ambiguity was intended, it would be base and dishonorable. The plaintiffs ought to have explained themselves. The defendant, at 3000 miles distance, could not consult them, and he cannot be chargeable for an error, if any, upon a point of the instructions in itself ambiguous. *Verba fortius accipiuntur contra proferentem.*

The demand consists of three items; *1. The excess of price be- [*433
yond that limited by the instructions. 2. The price of the cargoes shipped in the Moorish and Danish vessels. 3. The cargo of the Henrietta, not shipped in the defendant's own name, but in that of Don Carlos Longhy, of Genoa.

1. We had supposed, that the question of price had been abandoned. We contend, that the price limited, meant clear of all charges, subsequent to the purchase in this country. The limitation was to guide the defendant in his purchases; but he could not say, at the time of purchase, what charges might arise upon it, before it would be in his power to ship it. We contend also, that it meant the average of the whole, and not of any particular parcel.

2. The demand for the cargoes shipped in the Moorish and Danish ves-

sels, rests on the allegation that the defendant was bound by his instructions to employ American vessels only. The only word in the instructions relative to this point, has been misinterpreted by the counsel for the plaintiffs. He has supposed that the orders were to find "captains of fidelity, American born." But the letter only directs him to "seek" such, but he was not bound to find them. The bill of exceptions shows that he sought for American vessels, but they could not be found. It is on the letter, not on the spirit of the instructions, that the plaintiffs will put their case.

The defendant was bound to prevent delay; if he could not find American captains of the description mentioned, he was not justified in waiting. The only condition was, that the shipment should not be made in less than
*434] six vessels. In no other part of the letter are the *vessels designated; yet there is another part, where it might have been expected. The simulated insurance was to be made in America, the real in Europe. The conditions of the real insurance are stated; but it is not one of them, that the property should be shipped in American vessels. There was no necessity to discriminate between American and other neutral vessels. The policy of Great Britain was to conciliate all neutral nations, particularly the northern. And having never given up the principle upon which American as well as British naval greatness depends, the right to take belligerent property out of neutral ships, she would search for it as strictly in American, as in Danish or Moorish vessels. But our vessels were not absolutely neutral as to France. Our flag was suspected of covering enemy-goods by one party, and was the object of plunder, if not of hostility, to the other. There was no reason, therefore, for preferring our vessels. The insurance would be made upon property in neutral vessels generally.

But it is said, that it would be a suspicious circumstance, that American property should be shipped in any other than American vessels. This is by no means a strong argument; because our tonnage is not always sufficient for our commerce.

3. As to the shipment by the Henrietta. Was it justified, either by the instructions or by the authority of Menendez. The great object of the instructions was to cover the property as neutral. The defendant was bound to keep this constantly in view. When, therefore, in August 1798, America had ceased to be neutral, be was not only not bound to ship the tobacco in his own name, but would have been liable to an action, if he had. The reason of shipping it in his own name had ceased: he was no longer an unsuspected neutral, but a belligerent. Affairs with France had come to a crisis: actual hostilities had commenced: the state of things was materially
*435] changed. What was he to do? He could not consult *his principal. If, in such circumstances, he acted with good faith, and according to his best judgment, pursued the spirit of his instructions, they who would subject him to an action ought to blush.

It would be strange, indeed, if he should not, in such a case, have some discretion. Every agent must, in the nature of things, have a discretion to vary from the precise letter of his instructions, to carry into effect their general intent. But he has this discretion in express terms: "You will, upon the whole, act for the advantage of the interested." We do not contend for an unlimited discretion. We admit, that it is limited by the general scope and spirit of the instructions. If he had given a belligerent

character to the property, then, indeed, he would have been liable. The injunction to keep the business secret, was only "to prevent a rise in" the American "market." It applied only to the transactions in this country. Let us then see how the defendant conducted himself in this unforeseen state of things. As he could not consult his principals, he took the advice of Menendez, their acknowledged agent, who had come for the sole purpose of superintending this expedition, who the plaintiffs said in their letter would communicate verbally with the defendant upon that subject, who was the bearer of the particular instructions to the defendant, and who alleged that he had private instructions from the plaintiffs, and authority to give the orders which he gave.

If the letter to the defendant was ambiguous, who so capable of explaining its meaning as Menendez, the confidential agent of the plaintiffs? Their letter to the defendant, by Menendez, was a letter of credit and confidence. The defendant was bound to place confidence in the representations of Menendez. If he exceeded his authority, they, and not the defendant, must suffer. How could the defendant know, when he was imposed upon by Menendez? What reason had the defendant to doubt the truth of his verbal communications, when the plaintiffs themselves had referred him to those verbal communications? He had no cause of suspicion; the advice of Menendez was reasonable, it was judicious, *and consistent with the general scope of the enterprise. If the law will not protect a man acting [*436
honorably, under such instructions, and in such circumstances, the law is a system of fraud.

Don Carlos Longhy, of Genoa, was the person pointed out by the plaintiffs themselves, as the person to whom the tobacco should be ostensibly consigned, in a certain event. He was, therefore, a person in whom the plaintiffs could place confidence. He was a neutral, while the defendant was not. When Menendez ordered the shipment to be made in his name, the defendant had no cause to suspect that he exceeded his authority. But if he did exceed his authority, who ought to suffer? The plaintiffs, who placed their confidence in him, or the defendant, who was required by the plaintiffs to give him credit?

But we are asked, why have we not examined Menendez as a witness? We answer, that a commission has been sent to Spain for that purpose; the commissioners have refused to act, and have sent back the commission. But the question may be retorted upon the plaintiffs. Why have they not examined Menendez? Nay, why have they not brought their action against him? If any injury has been done, he is the author of it. He directed, and he approved all the acts of the defendant.

But the plaintiffs themselves have affirmed the very conduct of the defendant of which they complain. The two shipments by the Felicity, and the Susanna, were made in the same manner as that by the Henrietta, and were received by the plaintiffs. By what rule can they affirm his conduct, when it turns out for their benefit, and disaffirm the like conduct, when a loss has happened?

P. B. Key, in reply.—We admit, that words are to be construed most strongly against him who uses them, and that where ambiguity exists, the construction will be against him who ought to have explained himself. But

the question is, whether any ambiguity exists? whether this is not a clear
*437] limited agency? The defendant *was limited as to the subject, the price, the consignment, the name of the shipper, the vessels, the captains, and the crew; there was nothing left but a discretion bounded by these limitations: and the authority of Menendez did not exceed that of the defendant. They had either a general discretionary power, or they were limited by the letter of their instructions. If they had a general discretion, why give special and precise instructions?

It is plain, that no vessels were contemplated by the plaintiffs but American vessels. We do not contend, that the strict letter of the instructions directs the defendant to find captains, American born, but we say that such is the spirit and meaning of the instructions. That the whole transaction, from beginning to end, was to bear the appearance and stamp of the American character. But how unnatural must it appear, to see an American cargo shipped on board a Moorish vessel. This circumstance is so singular, as in itself to be a strong ground of suspicion, especially, as our vessels are seeking for employment in every part of the world.

But in the case of the Henrietta, the very letter, as well as spirit, of the instructions, has been violated. The instructions are precise and positive, that the defendant should ship the tobacco for his own account and risk. To justify a departure from these positive orders, it is incumbent on the defendant to show a clear authority in Menendez to dispense with them. No such authority has been proved, and none can be presumed. The specific instructions contradict such a presumption. For why give the defendant special orders, if the whole general agency was in Menendez? Or why were they sent to the defendant, if he was not to be bound by them? The fair presumption is, that the verbal communications referred to, were to be only a further detail of the same plan, and not a general dispensation from the orders already given.

*438] *The general expression which is relied on, that the defendant should, "upon the whole, act for the advantage of the interested," is, in the same breath, qualified by the directions to keep it secret, that the business was on account of foreigners, and by the positive injunction that it should always appear to be on his own account as an American citizen. This is in perfect conformity to the request in the beginning of the letter, "you will view this measure as your own," and shows most clearly their determination to risk their property under an American cover only. The same limitation also applies to the reference which the plaintiffs make to the verbal communications of Menendez; it is included in the same sentence, and is evidently intended to apply as well to those verbal communications, as to the general power to act for the advantage of the concerned. The defendant, therefore, had no right to presume that Menendez had authority to alter the principal character of the risk, and to compel the plaintiffs to accept a Genoese, instead of an American cover.

The defendant derived no sanction to his conduct from the plaintiffs' receiving the cargoes of the Felicity and the Susanna; that circumstance was unknown to the defendant, at the time of the shipment by the Henrietta.

The limitation of price meant to include all the costs and charges in America. The words are, "it will not answer them at more than ten dol-

lars per quintal, in America." The costs and charges in America make part of its price in America. It is no argument to say, that the defendant could not regulate his purchases, if the price, including those charges, was to be limited, because those charges were uncertain. The usual and customary charges were well known to the defendant, and he was bound to calculate his purchases accordingly. If, indeed, any accidental and unusual charge had been necessarily incurred, this would have been properly chargeable to the plaintiffs, but the letter evidently meant that the tobacco should *not amount to more than $10 a quintal, including customary charges. [*439

Upon the whole, then, we contend, that the defendant has violated not only the letter, but the spirit of his instructions, and that he was not justified by the authority of Menendez.

February 26th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—The court has endeavored to bestow on this cause the attention to which it is alike entitled, by its own importance, by the situation of one of the parties, who is a stranger to our language and our laws, and by the ability and zeal with which it has been argued at the bar.

The action claims from the defendant the value of three cargoes of tobacco, purchased by him as the agent of the plaintiffs, which were captured on a voyage to Europe, and condemned as prize. The foundation of the claim is, that he deviated from the instructions which were given for the government of his conduct, and is, therefore, liable for the loss which has been sustained.

That an agent is bound to pursue the orders of his principals, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law, which has not been drawn into question; and the only inquiry in this case is, has the defendant obeyed or deviated from his instructions? The circuit court was of opinion, that they sanctioned his conduct, and it is the propriety of that opinion, which is now to be reviewed in this court.

It depends on the true construction of the letter of the 27th of January 1798, written by Bernardo Lacosta, on behalf of the plaintiffs, of which Juan Alonzo Menendez Conde was the bearer, and on the testimony which is stated in the bills of exceptions. *This letter introduces Menendez as the agent of the plaintiffs, who were principally concerned in the importation of tobacco into Spain, and declares a confidence that the defendant will embrace the business as his own, and execute it with his wonted attention. [*440

After some general observations, which relate to the proposed transaction, and which seem to be founded on the idea that the defendant and Menendez are to be associated in the business, the letter becomes more definite. The writer says, "with this, the said Mr. Menendez takes an order for 20,000 quintals (of tobacco) to be shipped for this place, in seven or eight vessels, and in not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews conform to the most rigorous ordinances. For greater clearness the shipments (*las expediciones*) will be made according to the following formalities: 1st. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them,"

&c. This instruction is followed by ten others, which seem principally designed to conceal the real character of the cargoes, and to facilitate their escape from cruisers. At the close of these instructions, the following words are added: "I refer you to that which the bearer will communicate to you verbally, respecting this business, who is sent on purpose to superintend the shipment (*va solo para presenciar la expedicion*), and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen."

In the execution of this commission, the defendant shipped two cargoes, the one on board a Danish and the other on board a Moorish vessel, each of which was captured and condemned as prize, the one by the French, and
*441] the other by the English. *These shipments were made with the full approbation of Menendez, and it is in proof, that American vessels were not, at the time, to be procured.

Before the order was completed, the government of the United States adopted such measures, for repelling the hostile aggressions of France, as to justify an opinion, that open and declared war between the two nations would soon take place. Under the impression of these measures, Mr. Menendez considered the American name as no longer affording a neutral character to the cargo, and directed it to be shipped on account and risk of Charles Longhy, of Genoa, who was a correspondent of the plaintiffs. These instructions were complied with.

The tobacco, so shipped, which came safe, was received without complaint; but a large quantity, shipped in the Henrietta, was captured by a British cruiser, carried into Halifax, and there condemned as prize. For the price of these three cargoes, this action is brought. The inquiry respecting the two first, will rest both on the instructions given to the defendant, and on the power of Menendez: that respecting the last, rests solely on the power of Menendez.

It is alleged, that the orders under which the defendant acted, enjoined him to employ only American vessels, and that in employing those of other neutral powers, he violated these orders. But there is certainly not one syllable in the letter, which contains any instruction to the defendant, relative to the employment of vessels, or which confines the transportation of the tobacco to be purchased to American vessels. The court thinks it a fair construction of the letter, that full powers, in this respect, were confided to Menendez, and that Barry might counsel with him, but was to comply with his directions. Menendez is declared to be the agent of the plaintiffs, and the full extent of this term is not limited in any part of the letter. He brings with him an order for 20,000 quintals, to be shipped in six, seven or eight vessels, under which condition the insurance is to be made in Spain.

*442] *These are not instructions to Barry; they are communications to him of the instructions given to Menendez, so far as was necessary for his understanding the views of the plaintiffs, and facilitating those views, under the authority of Menendez. The order, of which Menendez was the bearer, was for himself; and the degree of aid expected from Barry, is described in the letter. Barry might have been unable, or unwilling, to undertake the business. In any event of that kind, the enterprise was not, cer-

tainly, at an end ; but Menendez might obtain other assistance. From the nature of the case, therefore, as well as from the expression of the letter, the order was in the possession and power of Menendez, the agent, to whom directions relative to the shipment of the tobacco, in a certain number of vessels, had been given, and who is declared to have been sent to America, for the purpose of superintending those shipments. Having made this explanation of the business confided to Menendez, the letter adds, " you will take care to seek captains of fidelity, American born," &c. Those inquiries, Barry, an American merchant, could make much more successfully than Menendez, a foreigner, and therefore, was directed to make them. But respecting the character of the vessel to be employed, no agency, on the part of Barry, was necessary, further than to comply with such directions as he might receive, and no directions respecting the vessels to be employed were given him, because those directions were given to Menendez. The instructions to Barry, to seek for American captains, are founded, not upon instructions to employ American vessels, which were given to him, for none such were given, but upon the instructions which were given to Menendez. They are founded on the idea, that American vessels would be employed ; but as circumstances might render the employment of them ineligible, it was reasonable to suppose that some discretion would be allowed to Menendez in this respect ; accordingly, the private instructions, as stated in the bill of exceptions, only directed him to employ neutral vessels.

The idea that the power on this subject was completely in Menendez, and not in Barry, is confirmed, by observing, that in the extended and minute rules, which are, for greater clearness, laid down for his government respecting the transportation of the tobacco, not one syllable *is said concerning the character of the vessels in which it was to be shipped, a [*443
direction which would certainly not have been omitted, had the subject not been confided to the general agent. It is also apparent, from the letters in the bill of exceptions, that the subject was so understood by both Menendez and Barry. When to these circumstances, it is added, that American vessels were sought for at the time, and could not be obtained, it seems to the court perfectly clear, that with respect to the tobacco shipped in the Moorish and Danish vessels, the conduct of the defendant, being sanctioned by Menendez, was free from all exception.

The claim for the cargo of the Henrietta stands on stronger ground, because the defendant was explicitly instructed to lade the vessels in his own name, stating that the cargoes were shipped on his own account and risk. On this part of the case, the defendant must seek for a justification in the full powers of Menendez, to vary the orders given to him. These orders have been said to be free from all obscurity, and in themselves, they unquestionably are so. Barry could not have doubted the positiveness of his instructions, to ship the tobacco as his own property. The defence he sets up is, that he was justified in conforming to the directions of Menendez, varying those instructions.

An examination of this defense leads to a still more critical investigation of the letter of the 27th of January. It has been already observed, that Menendez is stated in the letter, introducing him to Barry, to be the agent of the plaintiffs, and the bearer of their orders for the tobacco, which was to be purchased. As it was not unreasonable to expect, that a person,

crossing the Atlantic in this character, would have some discretionary power to change instructions, with a change in circumstances, so as to be enabled to adapt his conduct to those circumstances, ready faith would be given to all expressions which would convey this idea; and if no such power was intended, no expressions ought to have been used, which could excite and cherish the idea.

The rules stated to Mr. Barry, as those by which his conduct would be
*444] governed, are declared to relate to the *part he was expected to take in the "*expedicion*," which the court translate transportation, or conveyance, of the tobacco to Europe. One of these being, that the tobacco was to be shipped in his own name, it follows, that this part of the subject was included in the Spanish term "*expedicion*." All these rules conclude with a reference to verbal communications, to be made by the agent himself, who is expressly declared to go to the United States, for the sole purpose of attending to this very part of the transaction, "*va solo para presenciar la expedicion*." This reference to the verbal communications of Menendez, unqualified by any restriction whatever, is a declaration of complete confidence, placed, at least, in his veracity, by the plaintiffs, and is a full authority given by them to Barry, to credit the representations which he should make. How else is it to be understood? What right could Barry have to say to those who had referred him to the verbal communications which their agents should make to him on a particular subject, that he did not believe those communications?

It is argued, that although no limitation is expressed to the credit which Barry was to give to the representations of Menendez, yet it must be necessarily understood, that he could not change those things which were expressly directed; that the verbal communications referred to, were to be conformable to, not subversive of, the written instructions; that on the idea of a power to alter the written instructions, it was useless to give them, and was only necessary to send out Menendez with a full authority to govern the whole transaction.

But in the course of human affairs, it is not unusual, for a principal to give, in detail, his ideas of the line of conduct to be observed by his agent, and yet to allow a departure from that line of conduct, under particular circumstances. It would not have been extraordinary, had these rules for the conduct of Barry, been followed by a declaration, that, in a total change of circumstances, as in the event of America's becoming a belligerent, he was to ship the tobacco, not as American, but as neutral property. Had Barry been the sole agent, this right to exercise his discretion, if intended
*445] to be placed in him, would have *been mentioned in his letter. But Barry was neither the sole nor the principal agent. He was known to the plaintiffs only by recommendation, and while he was employed, because an American merchant could make the proposed purchases to greater advantage, and because an American name was required to cover the property, Menendez was the confidential agent, known to and trusted by the plaintiffs, who brought with him the order for the purchases, and came on purpose to attend to the conveyance of the tobacco to Europe. In the instructions to Menendez, therefore, would any discretion relative to the transportation of the tobacco be found, and it was enough, that Barry was referred to his verbal communications.

The words which follow the reference to the verbal communications of Menendez, though not those which decide the opinion of the court, are not absolutely unimportant: they are, "and you will, upon the whole, act for the advantage of the parties interested." To what do these words, "upon the whole," refer? Unquestionably, to the verbal communications as well as to the written instructions. They were both to regulate the conduct of the defendant.

The caution which follows those words, is understood by the counsel for the plaintiffs, to limit their extent, and to direct, that in acting for the advantage of the interested, he was yet to keep secret that the tobacco belonged to foreigners. There is, unquestionably, great force in this observation: and if the justification of Barry rested solely on the power given him in this clause, to act for the best, it would be doubtful, how far it would avail him. The court, however, considers those words principally applying to the purchases, and as indicative of an expectation that a state of things would remain, in which the tobacco was to retain the character of American property, rather than as limiting the powers of Menendez over this part of the subject, in the event of such revolution as would make America a belligerent. The court forbears to make a critical examination of the words, because its opinion is formed on the character in which Menendez came to America, as stated in the letter introducing him to Barry. That letter warranted the belief that he was the principal *and confidential agent of the plaintiffs; that he had particular instructions for the [*446
government of his conduct, and that Barry was to receive and trust his verbal communications, especially, on the subject of expediting the tobacco to Spain.

It is impossible to read the letters from Menendez to Barry, which form a part of the bill of exceptions, without feeling a conviction that this was the understanding of the parties. He approves the conduct of the defendant, in the style of a man whose approbation gave a sanction to it, and when he directs the shipments to be made in the name of Charles Longhy, of Genoa, he says, "if you act conformably to what I have here mentioned, as to further shipments, I, from this moment, approve thereof, and that it may appear, and to save you from any accident that may occur, as also, that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order, that at no time whatever, you should be chargeable with the consequences." Such was the opinion which the confidential agent of the plaintiffs, in possession of their private instructions, entertained of his own powers.

He was not mistaken in their extent; at least, the defendant had no right to believe him mistaken. On his arrival, he declared to Barry, that he was in possession of private instructions, distinct from those which were contained in the letter of the 27th of January. He produced those instructions. The chief clerk of Barry read so much of them as related to vessels; and they did not require that the shipments should be made in American, but in neutral vessels; and in the letter of Menendez to the chief clerk, dated on the 14th June, and accompanying that of the same date addressed to the defendant, directing him to ship the tobacco as the property of Charles Longhy, of Genoa, he says, referring to a copy of his private instructions, "you will see, that I am expressly ordered to make the shipments in neutral

vessels, and that the property shall appear as that of a neutral subject." What right had he to suspect that the confidential agent of the plaintiffs, to whose verbal communications they referred him, had forged instructions which he produced as those of his principals?

*447] The counsel for the plaintiffs question the existence of these private instructions, and demand their production. *But how were they to be authenticated? Only by Menendez himself. Are not then their contents to be proved by the declarations of Menendez, by his stating them, and by the chief clerk of Barry, who read a part of them. To the court, it appears, that in such a case as this, the proof respecting them is as ample and satisfactory as ought to be required.

After taking this extensive view of the case, of the powers of Menendez, and of the confidence the defendant was bound to repose in him, it only remains briefly to observe, that the directions he gave were not such as to awaken suspicion. On the 14th of June 1798, when these instructions were given, America had ceased to be a neutral power. War, it is true, was not formally declared, but it had commenced in fact, and hostilities were authorized by that department of the government which is invested with the power of making war. In such a state of things, the course which prudence would have dictated to the plaintiffs, had they been themselves in the United States, certainly was, to cover the tobacco as neutral, not as American property, and when their agent, possessing private instructions, directed the property to be shipped as neutral, not as American, the defendant would have been culpable in thwarting him.

It is scarcely necessary to add, that Menendez stated himself to be, and probably was, something more than an agent: he declared himself to be interested in the cargoes. This declaration, under all the circumstances of the case, was not to be discredited. Upon that, however, the judgment of the court is not founded. The letter of the 27th of January, represented him as the principal and confidential agent of the plaintiffs, whose verbal communications were to be trusted. He declared himself to possess particular instructions respecting a transaction which he came to superintend, and under those instructions, he gave orders which the defendant has obeyed. The court is of opinion, that in so doing, the defendant is justifiable, and no error has been committed in the court below, in so instructing the jury.

*448] *Upon the other part of the exceptions, the price given for the tobacco, it is unnecessary to say more than that there is no error in the opinion of the court.

Affirmed.

Ex parte Burford.

Commitment.

A warrant of commitment by justices of the peace, must state a good cause certain, supported by oath.[1]

Ex parte Burford, 1 Cr. C. C. 276, reversed.

John Atkins Burford, a prisoner confined in the jail of the county of Alexandria, in the district of Columbia, petitioned this court for a *habeas corpus*, to inquire into the cause of his commitment, alleging that he was confined under and by color of process of the United States, and praying for a *certiorari* to the clerk of the circuit court of the district of Columbia, for the county of Washington, to certify the record by which his cause of commitment might be examined, and its legality investigated. To the petition was annexed a copy of his commitment, certified by the jailer of Alexandria county.

Hiort, for the petitioner, observed, that he was aware of the decision of this court in the case of *Marbury* v. *Madison* (1 Cr. 137), that a *mandamus* would not lie in this court, when it operated as an original process; but there is a vast difference between a *mandamus* and a writ of *habeas corpus*. The former is a high prerogative writ, issuing at the discretion of the court, but this is a writ of right, and cannot be refused. The constitution of the United States, Art. I. § 9, declares, "that it shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

By the 14th section of the judiciary act of 1789 (1 U. S. Stat. 81), it is enacted, "that all the before-mentioned courts of the United States" (including the supreme court) "shall have power to issue writs of *scire facias* **habeas corpus*, and all other writs," &c. "And that either of the [*449 justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment." If a single justice of this court has the power, it would be a strange construction of the law, and of the constitution, to say that the whole court cannot exercise the same power.

The reason why this court would not exercise its appellate jurisdiction in a criminal case, was stated in the case of *United States* v. *More* (*ante*, p. 159), to be, because no mode of exercising it had been appointed by law, the writ of error extending only to civil cases. But if this is an exercise of its appellate jurisdiction, the mode by *habeas corpus* is expressly provided by the statute for that purpose.

March 4th, 1806. Marshall, Ch. J.—There is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of *United States* v. *Hamilton*, 3 Dall. 17, is decisive. It was there determined, that this court could grant a *habeas corpus*; therefore, let the writ issue, returnable immediately, together with a *certiorari*, as prayed.

Upon the return of the *habeas corpus* and *certiorari*, it appeared, that on the 28th of December 1805, Burford was committed to the jail of Alex-

[1] Ex parte Bennett, 2 Cr. C. C. 612.

andria county, by a warrant under the hands and seals of Jonah Thompson, and ten other justices of the peace for that county; which warrant was in the following words:

Alexandria County, ss.

Whereas, John A. Burford, of the county aforesaid, shopkeeper, has been brought before a meeting of many of the justices of the peace for the said county, and by them was required to find sufficient sureties, to be bound *450] *with him in a recognisance, himself in the sum of four thousand dollars, and securities for the like sum, for his good behavior towards the citizens of the United States, and their property; and whereas, the said John A. Burford hath failed or refused to find such sureties; these are, therefore, in the name of the United States, to command you, the said constables, forthwith to convey the said John A. Burford to the common jail of the said county, and to deliver him to the keeper thereof, together with this precept; and we do, in the name of the said United States, hereby command you, the said keeper, to receive the said John A. Burford into your custody, in the said jail, and him there safely keep, until he shall find such sureties as aforesaid, or be otherwise discharged by due course of law. Given under our hands and seals, this 28th day of December 1805.

To any constable, and the jailer of the county of Alexandria.

On the 4th of January 1806, the circuit court of the district of Columbia, sitting in the county of Washington, upon the petition of Burford, granted a *habeas corpus*, and upon the return, the marshal certified, in addition to the above warrant of commitment, that Burford was apprehended by warrant, under the hands and seals of Jonah Thompson, and thirteen other justices of the county of Alexandria, a copy of which he certifies to be on file in his office, and is as follows:

Alexandria County, ss.

The undersigned, justices of the United States, assigned to keep the peace within the said county: To the marshal of the district, and all and singular the constables, and other officers of the said county, Greeting: Forasmuch as we are given to understand, from the information, testimony and complaint of many credible persons, that John A. Burford, of the said county, shopkeeper, is not of good name and fame, nor of honest conversa- *451] tion, but an evil-doer and disturber of the *peace of the United States, so that murder, homicide, strifes, discord and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby. Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the body of the said John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient surety and mainprize for his good behavior towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided. And this you shall in no wise omit, on the peril that shall ensue thereon: and have you before us this precept. Given under our hands and seals, in the county aforesaid, this 21st day of December 1805.

The circuit court, upon hearing, remanded the prisoner to jail, there to remain until he should enter into a recognisance for his good behavior for one year, himself in the sum of $1000, and sureties in the like sum.

Hiort, for the prisoner, contended, that the commitment was illegal both under the constitution of Virginia, and that of the United States. It does not state a cause certain, supported by oath. By the 10th article of the bill of rights of Virginia, it is declared, that all warrants to seize any person whose offence is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted. By the 6th article of the amendments to the constitution of the United States, it is declared, "that no warrants shall issue, but upon probable cause, supported by oath or affirmation." *By the 8th article, it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him; and the 10th article declares, that excessive bail shall not be required. [*452

In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of that arrest, but of his commitment to prison. The question is, what authority has the jailer to detain him? To ascertain this, we must look to the warrant of commitment only. It is that only which can justify his detention. That warrant states no offence: it does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him, of their own knowledge or suspicion, or upon the oath of any person whomsoever. It does not allege that witnesses were examined in his presence, nor any other matter whatever, which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for the malicious prosecution? or whom could he indict for perjury? There ought to have been a conviction of his being a person of ill fame. The fact ought to have been established by testimony, and the names of the witnesses stated. Boscawen on Convictions, 7, 8, 10, 16, 110; Salk. 181.

But the order was oppressive, inasmuch as it required sureties in the enormous sum of $4000, for his good behavior for life.

If the prisoner had broken jail, it would have been no escape, for the marshal is not answerable, unless a cause certain be contained in the warrant (2 Inst. 52, 53), and the reason given by Blackstone (1 Com. 137), why *the warrant must state the cause of commitment, is, that it may be examined into upon *habeas corpus*. And in vol. 4, p. 256, speaking of the power of a justice to require sureties for good behavior, he says, "But if he commits a man, for want of sureties, he must express the cause thereof, with convenient certainty, and take care that such cause be a good one. *Rudyard's Case*, 2 Vent. 22. [*453

Swann, on the same side, was informed by the court, that he need not say anything as to the original commitment by the justices, but might confine his observations to the recommitment by the circuit court, upon the *habeas corpus*.

He observed, that the circuit court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited its duration to one year. It passed no new judgment, but merely remanded the prisoner; it heard no evidence; it was not a proceeding *de novo;* it gave no judgment; it convicted the prisoner of no offence. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit court, is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality.

The Judges of this Court were unanimously of opinion, that the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath. If the circuit court had proceeded *de novo*, perhaps, it might have made a difference. But this court is of opinion, that that court has gone only upon the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain. If the prisoner is really a person of ill fame, and ought to find sureties for his good behavior, the justices may proceed *de novo*, and take care that their proceedings are regular.

The prisoner is discharged.

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*454] *Hopkirk *v.* Bell.

Statute of limitations.

The treaty of peace between Great Britain and the United States, prevents the operation of the act of limitations of Virginia, upon British debts, contracted before that treaty.[1]

An agent for collecting of debts merely, is not a factor, within the meaning of the 13th section of that act.

This was a case certified from the Circuit Court for the fifth circuit, and Virginia district, in chancery sitting, in which the opinions of the judges (Marshall, Ch. J., and Griffin, District Judge) were opposed, upon the following question: "Whether the act of assembly of Virginia for the limitation of actions, pleaded by the defendant, was, under all the circumstances stated, a bar to the plaintiff's demand, founded on a promissory note given on the 21st day of August 1773?"

The certificate contained the following statement of facts agreed by the parties, viz: That David Bell, the defendant's testator, had considerable dealings with the mercantile house of Alexander Spiers, John Bowman & Co. (of which house the plaintiff was surviving partner), in the then colony of Virginia, by their factors, who resided in that colony, and on the 14th of March 1768, gave his bond to the company for 633*l.* 8*s.* 11½*d.*, conditioned for the payment of 316*l.* 14*s.* 5¾*d.*, on demand. That he also became farther indebted in a balance of 121*l.* 0*s.* 4½*d.* on open account, for dealings afterwards had with the company by their said factors. That on the 21st of August 1773, Henry Bell, the defendant, made his writing or promissory note, under his hand, attested by two witnesses, in the following words, to wit:

[1] Re-affirmed, in 4 Cr. 164; s. p. Dunlop *v.* Alexander, 1 Cr. C. C. 498.

"I do hereby acknowledge myself to stand as security to Messrs. Alexander Spiers, John Bowman & Co., of Glasgow, for the sum of four hundred and thirty-seven pounds, fourteen shillings and ten pence, current money of Virginia, being a debt due them by my father, David Bell. Given under my hand, this twenty-first day of August, one thousand seven hundred and seventy-three. I am not to pay the above, till it is convenient."

*That the said Alexander Spiers, John Bowman & Co. were, at that time, British subjects, merchants, residents in Glasgow, in the [*455 kingdom of Great Britain, and have never been resident within the limits of the then colony, now state of Virginia, and that James Hopkirk, the surviving partner, now is, and always has been, from the time of his birth, a British subject, resident in the kingdom of Great Britain, and was never within the limits of the commonwealth of Virginia. That the company had a factor or factors resident in the commonwealth of Virginia, on the 21st of August 1773, when the note was given, and from that time to the commencement of the American war, viz., on or about the first of September 1776. That the company had neither agent nor factor in this country, authorized to collect their debts, from the commencement of the war in 1776, until the year 1784. That on or about the 10th of September 1784, and ever since, an agent has resided in this commonwealth, authorized by power of attorney, generally, to collect all debts due to the company in this commonwealth.

That by the fourth article of the definitive treaty of peace, between the United States and his Britannic majesty, made on the third of September 1782, "it is agreed, that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." And by the second article of the convention between his Britannic majesty and the United States, made on the 8th of January 1802, "the said fourth article (of the treaty of peace) so far as respects its future operation, is recognised, confirmed, and declared to be binding and obligatory," "and the same shall be accordingly observed with punctuality and good faith, and so as that the said creditors shall hereafter meet with no lawful impedent to the recovery of the full value in sterling money, of their *bonâ fide* debts."

That by the acts of the Virginia assembly, passed on the ——— ———, and the practice of the courts, British creditors, their agents and factors, were prevented from suing with effect for their debts in the courts of this commonwealth, from the ——— *day of April 1774, until the [*456 year 1790, and that this suit was commenced on the 4th of January 1803.

By the 4th section of the Virginia act of limitations (p. 107), actions upon the case, on accounts, are to be brought within five years after the cause of action. By the 12th section, there is a saving of persons beyond seas; but by the 13th section it is provided, "that all suits hereafter brought in the name or names of any person or persons residing beyond the seas, or out of this country, for the recovery of any debt due for goods actually sold and delivered here, by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this act for bringing the like suits, and not after, notwithstanding the saving herein before con-

tained, to persons beyond the seas, at the times their causes of action accrued."

C. Lee, for the plaintiff.—The question is, whether the act of limitations, which had once begun to run, was an impediment removed by the treaty? This raises another question; did the treaty of peace repeal the laws of the several states which operated as legal impediments to the recovery of British debts, or was an act of each state necessary for that purpose?

It may be conceded, without injury to this case, that the act of limitations began to run against this claim, before the war, and that the war did not suspend its operation, but that it continued to run in the same manner as against a person who is in the country at the time the cause of action accrues, and who goes beyond seas, before the limitation is complete, or against a woman who was *sole* when the cause of action accrued, and who married within the five years.

The plea of limitations can defeat the remedy only: the debt remains. But if the bar had been complete, yet it was for ever removed by the treaty. This was a *bonâ fide* debt, contracted before the treaty, and the act of limitations is a legal impediment which it is endeavored to oppose to its recovery. But the *treaty says, that the creditor shall meet with no legal impediment; and the constitution of the United States declares the treaty to be the supreme law of the land. The act of limitations, therefore, must yield to the treaty.

*457]

In the case of *Ware* v. *Hylton*, 3 Dall. 199, this court, upon very solemn argument, decided, that the treaty not only repealed all the state laws which operated as impediments, but nullified all acts done, and all rights acquired, under such laws, which tended to obstruct the creditor's right of recovery. Similar adjudications were also made in the cases of *Hamilton* v. *Eaton*, in 1796, by Ch. J. Ellsworth and Judge Sitgreaves, in North Carolina, *Page* v. *Pendleton*, in 1793, by Chancellor Wythe (Wythe's Reports 127), and by this court in *The State of Georgia* v. *Brailsford*, 3 Dall. 1.

The second article of the convention of 1802, between the United States and Great Britain (8 U. S. Stat. 197), was produced by the difference of opinion at the board of commissioners for carrying into effect the sixth article of the treaty of 1794. The ideas of the United States, as to the effect of the treaty in removing all impediments arising from legislative acts, are expressed in the answer to *Cunningham's claim*, in page 15 of the printed report of the proceedings of the board.

The basis of the convention was the American construction of the sixth article of the treaty of 1794. A sum of 600,000*l.* sterling was stipulated to be paid by the United States for all losses under the sixth article of the treaty of 1794, and the creditors were to recover from their debtors, whatever they could in the ordinary course of justice; all legislative impediments having been removed by the treaty of peace, which is recognised and confirmed by the convention.

*March 4th, 1806. The Court ordered the following opinion to be certified to the circuit court.—Upon the question, in this case, referred to this court from the circuit court, it is considered by this court, that the said act of limitations is not a bar to the plaintiff's demand on the said note; and this court is of opinion, that the length of time from the giving

*458]

the note to the commencement of the war, in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States, of 1783, does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar: and is also of opinion, that the agent merely for collecting debts, mentioned and described in the said state of facts, is not to be considered as a factor within the meaning of the said act of assembly, so as to bring the case within the proviso of said act. But this the court is not to be understood as giving an opinion on the construction of the note, as to the time of payment.

William Maley *v.* Jared Shattuck.

Marine trespass.—Sentence of foreign prize court.

The commander of a United States ship of war, if he seize a vessel on the high seas without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel be taken out of his possession by a superior force; and the owner is not bound to resort to the re-captor, but may abandon, and hold the original captor liable for the whole loss.

A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation.[1]

Shattuck *v.* Maley, 1 W. C. C. 245, affirmed.

On the 20th of August 1804, Jared Shattuck exhibited his libel in the district court of the United States for the district of Pennsylvania, in the following form.(*a*)

*To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania. [*459
The libel of Jared Shattuck, merchant, most respectfully showeth:

That your libellant, being a subject of his majesty the King of Denmark, some time in or about the beginning of the month of May, in the year of our Lord, 1800, at St. Thomas, one of his said majesty's West India islands, loaded a certain schooner or vessel called the Mercator, being an unarmed merchantman, fitted out at St. Thomas aforesaid, for trade only, and being then and there *bonâ fide* the property of your libellant, with a cargo of merchandise, consisting of provisions, wines and dry goods, for the sole and *bonâ fide* account of your libellant, said cargo amounting to $13,920, or thereabouts, on a voyage to Jacmel and Port Republican, in the island of St. Domingo, which he consigned to Toussaint Lucas, also a Danish subject, then and there master of the said schooner Mercator, who was instructed by your libellant, to dispose of the said cargo at Jacmel or Port Republican aforesaid, to the best advantage, for account of your libellant, invest the proceeds in coffee of good quality, and return therewith to the said island of St. Thomas.

(*a*) As there are so few forms of admiralty proceedings in print, it is hoped, that a recital of a considerable part of the record in this case, will be acceptable to the profession; particularly, as it is not a libel *in rem*, but for restitution in value, for not bringing in the vessel and cargo for adjudication.

[1] S. P. Fitzsimmons *v.* Newport Ins. Co., 4 Cr. 185; Lambert *v.* Smith, 1 Cr. C. C. 361; Vanderheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; Kemble *v.* Rhinelander, 3 Id. 130; Goix *v.* Low, 2 Id. 480; New York Firemen's Ins. Co. *v.* De Wolf, 2 Cow. 56; Vasse *v.* Ball, 2 Dall. 270.

And your libellant further saith, that on or about the 6th day of the said month of May, the said Toussaint Lucas sailed in the said schooner from the said island of St. Thomas, upon the said voyage, for Jacmel and Port Republican, having on board the said cargo, and also a private adventure belonging to the said Toussaint Lucas, together with all such necessary papers and documents, for ascertaining the property and neutrality of the said vessel and her cargo, as are usually carried by vessels belonging to Danish subjects; and proceeded on her said voyage, until on or about the 14th day of the said month of May, when, in endeavoring to enter the said port of Jacmel, the said schooner Mercator was met with by a certain schooner, called the Experiment, a public armed vessel belonging to the government of the United States of America, and commanded by William Maley, a lieutenant in the navy of the said United States, who unlawfully, and in violation of the law
*460] of nations, took possession of the said schooner Mercator, and put *on board of her a prize-master, and four seamen, who carried the said schooner Mercator, and her cargo, to places unknown to your libellant. And so it is, may it please your Honor, that neither the said William Maley, nor any person or persons acting under him, have brought the said schooner Mercator, or her cargo, to legal adjudication in any court of the United States, having admiralty jurisdiction.

To the end, therefore, that complete justice may be done to your libellant in the premises, may it please your Honor to direct a monition to issue out of this honorable court, directed to said William Maley, Esq., commanding him forthwith to proceed in due form in this honorable court, against the said schooner Mercator and her cargo, in order to obtain a legal adjudication of the same, in due course of admiralty proceedings, or in default thereof, to appear before your Honor, at such time and place as to your Honor shall seem fit, to answer your libellant in the premises, and show cause why, by the said honorable court's final sentence and decree, he shall not be adjudged to make restitution in value, and pay to your libellant the whole amount of his loss aforesaid, with full damages and costs, and that such further justice may be done to your libellant in the premises, as to this honorable court shall ever seem meet, and your libellant shall ever pray &c.

PETER S. DU PONCEAU, for the libellant.

To this libel, Maley appeared,(a) and filed the protest following:

To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania. The protest of William Maley, Esq., late commander of the schooner Experiment, a public armed vessel of the United States of America, appearing here in court, to
*461] avoid all, and all manner of contempt, contumacy and *default, under this his protest, against the libel filed by Jared Shattuck, merchant.

This protestant, saving and reserving to himself all, and all manner of exception to the manifest uncertainties, imperfections and insufficiencies in the said libel contained, and protesting that he ought not, in any wise, to be required to appear thereto, or to proceed against the schooner Mercator and

(a) It does not appear that a monition issued. The appearance of Maley seems, by the record, to have been voluntary.

her cargo, as is therein prayed, nevertheless, for the reasons aforesaid, and as cause why the said libel should be dismissed, without further appearance or answer, avers, propounds and says:

That true it is, that the said protestant, while commanding the said schooner Experiment, a public armed vessel of the United States of America, under a lawful commission and authority from the government of the said United States of America, did, on or about the 15th day of May 1800, meet on the high seas, and take possession of the said schooner called the Mercator, in the said libel mentioned, and put on board an officer, and four seamen. But this protestant denies, that by so doing, he acted unlawfully and in violation of the law of nations; for he avers, propounds and says, that since the passing of the act of the said United States of America, entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," and before the said 15th day of May 1800, that is to say, on ——— day of ———, in the year 1799, the said schooner, called the Mercator, being an American registered vessel, owned, hired and employed by a person or persons resident within the said United States, or by citizens thereof, resident elsewhere, sailed and departed from the port of Baltimore, within the said United States, and at the time of her being met and taken possession of by this protestant as aforesaid, and before her return within the said United States, was proceeding directly, or from some intermediate port or place, to Jacmel, a port or place within the island of St. Domingo, within the territory or dependencies of the French republic.

And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, she was steering a direct course for the said port of Jacmel, and not for Port-au-Prince, whereas, the letter of instructions *from the said [*462
Jared Shattuck, the libellant, and all the other papers exhibited to this protestant, by Toussaint Lucas, the master of the said schooner Mercator, or found on board thereof, falsely, fraudulently and colorably represented and declared among other things, that the said schooner was bound on a voyage from the island of St. Thomas to Port-au-Prince, a place then in the power and possession of the British troops, and not within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, the master thereof appeared to be a Frenchman (although this protestant has since heard, but does not admit, that he is an Italian), and the crew consisted chiefly of Portuguese and Italians, nor was there then, nor at any time before or since, exhibited to this protestant, any burgher's brief or brief, or other evidence whatsoever, that the said master or crew, or any part thereof, had become burghers of the said island of St. Thomas, or were otherwise naturalized subjects of the King of Denmark, without which this protestant avers, that the said master and crew could not lawfully command and navigate a Danish vessel, according to the laws and usages of Denmark.

And this protestant further avers, propounds and says, that the said Jared Shattuck, the libellant, alleging himself to be the owner of the said schooner Mercator and her cargo, and to be a burgher of the island of St. Thomas (neither of which allegations is admitted by this protestant), was born in

the state of Connecticut, one of the United States aforesaid, nor did it satisfactorily appear to this protestant (considering the many other proofs and causes of suspicion to the contrary), at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, nor has it so appeared at any time since, that the said Jared Shattuck, the libellant, had, by any lawful act of expatriation, or otherwise, at any time, become a subject or citizen of any other government or nation, and ceased to be a citizen of the said United States, owing fidelity and allegiance thereunto; but admitting it to be true, that the said Jared Shattuck, the libellant, was an inhabitant of the said island of St. Thomas, this protestant did then, and does still,
*463] verily believe, that the said Jared Shattuck had repaired to the *said island of St. Thomas, or remained there, for the purpose of carrying on an illicit and clandestine commerce with ports and places within the territory and dependencies of the French republic, during the hostilities which were then waged between the United States and the French republic, and also between the King of Great Britain and the said French republic.

And this protestant further avers, propounds and says, that believing, from all the appearances, circumstances and reasonable and just causes of suspicion, herein before averred and propounded, touching the original American character of the said schooner Mercator, the voyage on which she was actually proceeding, the false destination declared and represented in the said letter of instructions, and other papers exhibited and found on board, the description of the master and crew, and the birth-place and original allegiance of the said Jared Shattuck, the libellant, that the said schooner Mercantor was a registered vessel of the said United States, voluntarily carried or suffered to proceed to a French port or place as aforesaid, and to be employed as aforesaid, contrary to the intent, and in defiance of the prohibitions of the said act of the congress of the United States, entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof;" this protestant, in obedience to the said act of congress, and to his official instructions, took possession of the said schooner as aforesaid, with a view to such further examination and proceedings as the law of nations, and the laws of the United States, should warrant, justify and require. But this protestant avers, that such possession was taken lawfully, upon the just and reasonable causes, motives and designs aforesaid, and with the utmost care, caution and solicitude, that the said schooner Mercator and her cargo, should thereby suffer no injury, damage or spoliation; and that the real national character, and the real commercial objects of the said schooner Mercator, of her pretended owner, and of the said master and crew, while prosecuting her said voyage, should be more fully examined and satisfactorily ascertained, without any unnecessary detention or delay, this protestant, at the time of placing on board of the said schooner Mercator, an officer and four seamen as aforesaid, did not remove, nor take therefrom, the said master and crew of the said schooner Mercator,
*464] or any of *them, nor remove, take away, cancel or destroy, any of the papers and documents of said schooner Mercator and her cargo, but ordered the officer, so put on board of the said schooner, having on board her said master and crew, and all the documents and papers of the said schooner and cargo, to make the best of his way to Cape Francois, there to

deliver all his letters to Silas Talbot, Esq., then commodore and commander of the public vessels of the said United States, upon that station, and to wait the orders of the said Silas Talbot, with express instructions, also, to pay particular attention to everything belonging to the said schooner Mercator and her cargo, seeing that nothing should go to waste, and to deliver the said schooner to the said master thereof, if the said Silas Talbot, commodore and commander as aforesaid, should clear her.

And this respondent further avers, propounds and says, that in a short time, not exceeding the space of six hours, or thereabouts after the said schooner Mercator had parted from the said schooner Experiment, destined for Cape Francois as aforesaid, under the orders aforesaid, the said schooner Mercator was captured on the high seas, as prize, by a British private armed vessel of war, called the General Simcoe, commanded by Joseph Duval, who thereupon forcibly took the said schooner Mercator and her cargo, from and out of the possession, care, custody and control, as well of the said master and crew of the said schooner Mercator, as of the said officer and men who had been put on board of her as aforesaid, by this protestant, and who were thereupon, taken out of and removed from the said schooner Mercator, into and on board of the said British privateer, and the said schooner Mercator and her cargo, sent to the island of Jamaica, under the charge of a prize-master and men belonging to the said British privateer, without the assent, connivance, assistance, negligence or fault whatsoever of this protestant, or of the officer and men whom he had put on board of the said schooner Mercator as aforesaid, for the causes, and with the intentions, aforesaid.

And this protestant further avers, propounds and says, that the said schooner Mercator, and cargo, being so as aforesaid captured on the high seas, as prize, and sent to the said island of Jamaica, by the said British privateer, a libel, in due form of law, was exhibited and filed by the said captors, in the court of vice-admiralty, lawfully established in the *said island of Jamaica (being a court of competent jurisdiction in all matters of prize), alleging and charging, that the said schooner Mercator and cargo were the property of France, or of the King of Spain, or of some person or persons being subjects of France, or of the King of Spain, or inhabiting within some of the territories of France, or of the King of Spain, and were good and lawful prize, inasmuch as hostility and war then notoriously subsisted between the King of Great Britain, on the one part, and the said French republic and the King of Spain, on the other part; and thereupon, the said captors, in their said libel, prayed that the said schooner Mercator and her cargo, might be adjudged lawful prize, and be confiscated and condemned. [*465

And this protestant further avers, propounds and says, that notwithstanding the denial of the said Jared Shattuck, in his said libel contained, he, the said Jared Shattuck, received speedy and full notice that the said schooner Mercator and her cargo were captured as prize, and sent into the said island of Jamaica as aforesaid, and there prosecuted by the said captors as prize, in manner aforesaid; and thereupon, a claim was exhibited, and a defence made, by and for the said Jared Shattuck, the alleged owner of the said schooner Mercator and her cargo. And upon hearing of the parties, by their respective advocates, and upon examining all the ship's papers and documents, together with other evidence and proofs in the cause, the judge

of the said court of vice-admiralty was pleased to adjudge and decree, that the said schooner Mercator, and her general cargo, were good and lawful prize, and did therefore adjudge, order and decree, that the same be condemned and confiscated to the use of the said captors, &c. From which sentence, the said Jared Shattuck, the libellant, prayed leave to appeal, which was granted. But this protestant avers, that this appeal has not been duly prosecuted by the said Jared Shattuck, but has been altogether waived and abandoned.

And this protestant further avers, &c., that at the time of the capture of the said schooner and cargo by the British privateer as aforesaid, and at the time of the libel and of the condemnation, and of the appeal as aforesaid, peace and amity notoriously subsisted between the United States of America and the King of Great Britain and the King of Denmark; and also between
*466] *the said King of Great Britain and the King of Denmark, and their respective citizens and subjects: and therefore, this protestant avers, that if the allegations contained in the libel of the said Jared Shattuck had been true, sentence of condemnation and confiscation, as prize, could not, and would not, have been pronounced as aforesaid, against the said schooner Mercator and her cargo, by the said court of vice-admiralty, having competent jurisdiction upon all matters of prize, as aforesaid, and therein proceeding according to the law of nations and the faith of treaties.

Wherefore, this protestant prays that the said libel may be dismissed with costs, &c.

A. J. Dallas, for the protestant.

The replication of Shattuck was as follows:—

To the Honorable Richard Peters, Esq., judge of the district court of the United States in and for the district of Pennsylvania. In the case of the schooner Mercator and her cargo, Toussaint Lucas, master. The replication of Jared Shattuck, late owner of the said schooner Mercator and her cargo, to the protest of William Maley, Esq., late commander of the public armed schooner of the United States Experiment.

This replicant, not confessing or acknowledging any of the facts, matters and things, by the said William Maley, in and by his said protest set forth, propounded and alleged, and also saving and reserving to himself all and all manner of exception to the manifold uncertainties and insufficiencies in the said protest contained, and to the informality thereof, and protesting on his part, that the said William Maley ought to have appeared absolutely, and not under protest, and made direct answer, upon oath or affirmation, to the charges in this replicant's libel contained, or to so much thereof as he has been advised to be material for him to reply unto; doth aver, allege, pro-
*467] pound and say, that this replicant was born in *the state of Connecticut, in the year 1774, and when he was between fifteen and sixteen years of age, viz., about the end of 1789, or beginning of 1790, the United States then being at peace with all the world, he migrated to the island of St. Thomas, one of the dominions of the King of Denmark and Norway, with a view to settle and establish his permanent residence in that island. That he served his apprenticeship there, with a mercantile house, for about six years, and from his first arrival, has constantly and permanently resided, and now continues to reside there. That on the 10th of April 1797, the

United States being still at peace with all the world, he became a naturalized Danish subject, and burgher of the said island, and shortly afterwards, intermarried with an inhabitant of that place, by whom he has several children, all living in that island. That he did acquire, and now hold reals estate there, and is there permanently settled and established, and carries on the trade and business of a merchant.

The replication then went on to deny that he went or remained there for the purpose of illicit trade. It averred, that during the war between France and Great Britain, which terminated by the treaty of Amiens, he was largely concerned in trade, at and from St. Thomas to foreign ports, and had a number of vessels, navigating under the Danish flag, in the West India seas. That several of his vessels were taken as well by British as French cruisers, carried into their respective islands, and there acquitted, and his neutral character, and that of his property, was acknowledged by the tribunals of both nations.

That in May 1800, he loaded the Mercator, as mentioned in his libel, and sent her on a voyage to St. Domingo, consigned to the said Toussaint Lucas, who was also a *bonâ fide* subject. That the original destination of the vessel was for Port-au-Prince, alias Port Republican, a place then in the power, and under the dominion of the negro General Toussaint, not of the British troops, as stated in Maley's protest. That, at that time, commerce was lawfully carried on between the United States and ports of St. Domingo, which were in the power of General Toussaint. That on the 3d of May 1800, he gave *written instructions to Lucas, to proceed with his vessel to Port-au-Prince, but as she was ready to sail, he was informed that the forces of General Toussaint had taken Jacmel from General Rigaud, who held for the French republic. That Jacmel is a port of the island of St. Domingo, which lies between the island of St. Thomas and Port-au-Prince, and is in the way between the former and the latter. That the distance from Jacmel to Port-au-Prince is, by land, only between thirty and forty miles, but by sea, upwards of one hundred leagues. That conceiving it to be advantageous to try the market at Jacmel, before proceeding to Port-au-Prince, he gave verbal directions to Lucas for that purpose. [*468

It denied that anything false or colorable was intended, and that any of the Mercator's papers were false or colorable, and that he gave any orders to Lucas to deny or conceal his intention of going into Jacmel.

It admitted, that after the passage of the act of congress, "further to suspend," &c., and before the 15th of May 1800, the Mercator was an American registered vessel, owned by a citizen of the United States, and sailed from Baltimore, but denied, that when taken by Maley, she was navigating contrary to the laws of the United States. It averred, that on the 26th of November 1799, he purchased her *bonâ fide* at St. Thomas, for the sum of $8500, which he had actually paid and took a bill of sale, which was on board, at the time of her capture. That from the day of purchase, until her capture, he was *bonâ fide* the sole owner, and that no other person had any interest in her or her cargo. That almost the whole shipping of the island of St. Thomas consisted of vessels built in the United States, and in the island of Bermuda, and brought to the former island for sale.

That at the time of her capture, the Mercator was navigated as a *bonâ fide* Danish vessel, and had on board every paper and document which the

law required to prove her neutrality; and especially that she had, 1st. The king's passport, in the usual form; 2d. The certificate of measurement; 3d. Her muster-roll, or official list of her crew; 4th. The bill of sale; 5th. *479] The burgher's *brief of her master Toussaint Lucas; 6th. Her clearance; 7th. The invoice and bill of lading of her cargo, duly attested, as to the ownership and neutrality thereof; 8th. The master's instructions, or sailing orders; and 9th. A certificate, upon oath, of several respectable merchants of the island, attesting the fact of Shattuck's citizenship and residence in the island. That the crew consisted of eleven persons, viz., the master, the mate, seven seaman, the cook and a boy, who were all, by birth, Italian or Portuguese. That the master was a native of Leghorn, in Tuscany, was a Danish subject, and had resided seven years in St. Thomas. That very few Danish seaman are to be had in the Danish islands; and that, except the officers of government, there are very few Danes in the islands of St. Thomas and St. Croix, the inhabitants being chiefly native English and Americans, with some French and other foreigners.

It denied, that by the laws of Denmark, a vessel could not be lawfully navigated by others than Danish or naturalized Danish sailors, and averred, that the crew might be subjects of any nation whatever, provided that, in time of war, not more than one-third thereof be native subjects of one or other of the belligerent powers. It denied, that any of the crew of the Mercator were subjects of any of the belligerent nations; and that at the time of her capture, there was any reasonable cause of suspicion that she was an American vessel carrying on an illicit trade. It submitted to the court, whether Maley had a right, by the law of nations, to arrest a vessel on the high seas, sailing under the protection of his Danish majesty's royal passport, under pretence of a violation of a municipal law of the United States. It suggested, that Maley acted *malâ fide*, and offered to prove, that he was in the habit of violating the law of nations, and the instructions of his government, with respect to neutral vessels and property, and that he was dismissed from the service of the United States, principally on that account.

With respect to the capture by the British privateer, it admitted, that the Mercator was so captured, while under the protection of the United States, *470] and their national *flag, but did not admit, that it was without the connivance or fault of Maley, or the officer whom he put on board. It admitted, the condemnation as prize; but averred, that it was the duty of the officer and men to have resisted the capture, and to have demanded of the court of vice-admiralty, at Jamaica, restitution of the vessel and cargo, on the ground, that the same had been unlawfully, and in violation of the respect due to the national vessels of the United States, and to the flag thereof, taken from the possession, and from under the protection, of the commander of one of the public vessels of war of the United States.

It admitted, that Lucas filed a claim for the vessel and cargo, before the vice-admiralty court at Jamaica, and that they were condemned as prize, but alleged, that the sentence of condemnation was contrary to the evidence. It admitted also, that an appeal was entered, and exhibited an exemplification of the proceedings. It denied, that Lucas was bound to exhibit a claim, or to appeal from the condemnation, and that Shattuck was bound to prosecute the appeal, but averred, that the whole should have been done by or in behalf of the United States, to whom alone the vessel and cargo would legally have

been restored, as having been taken from their possession, and from under their protection.

It averred, that Shattuck, as soon as he received notice of the capture and condemnation, gave information thereof to the governor-general of the Danish West India islands, and to Richard Soderstrom, charged with the consular functions for the King of Denmark, in the United States, who communicated the information, without loss of time, to the government of the United States, and claimed reparation. That the government of the United States expressed a wish that the appeal should be prosecuted, in compliance with which Shattuck, without delay, forwarded the necessary papers to England; but when they arrived, he was informed by his proctors, that it was useless to prosecute the appeal, because the prize-money had been distributed, and the prize-agent had died insolvent.

*It denied, that the vessel and cargo would not have been condemned, if they had been really and *bonâ fide* neutral property, [*471 and averred, that they really were such as stated in his libel, and did not admit, that he was precluded by the sentence of the court of vice-admiralty of Jamaica from showing the same.

It concluded, "that for aught that has been said and alleged by the said William Maley, in his protest aforesaid, this replicant ought not to be precluded from obtaining the benefit of the prayer of his said libel; he, therefore, prays, that the said William Maley may, by the interlocutory decree of this honorable court, be ordered to appear absolutely, and without protest, before your Honor, so that further justice may be done by this honorable court in the premises, as to right shall appertain."

(Signed) JARED SHATTUCK.

Jared Shattuck, being duly sworn according to law, on his oath, doth say, that all and singular the facts, matters and things, by him in the foregoing replication stated, as far as they relate to his own acts, and matters within his own knowledge, are true; and inasmuch as the same relate to the acts of others, he verily believes them to be true.

(Signed) JARED SHATTUCK.

Sworn before me, the 26th of May 1804,
(Signed) RICHARD PETERS.

The rejoinder of Maley was as follows:—

This rejoinant, saving and reserving to himself all and all manner of exception to the manifold uncertainties and insufficiencies in the said replication contained, and not confessing or acknowledging any of the facts, matters and things by the said Jared Shattuck in and by his said replication set forth and alleged, but denying the same, saith, that the facts in this rejoinant's protest set forth, are true and sufficient to excuse him *from [*472 further appearance and answer to the libel of the said Jared Shattuck.

(Signed) A. J. DALLAS, for William Maley.

Whereupon, it was adjudged, ordered and decreed, that the libel be dismissed, with costs. From which decree, Shattuck appealed to the circuit court. Upon the appeal, the circuit court,(*a*) being of opinion that the

(*a*) Holden by Judge WASHINGTON, in May 1805. See 1 W. C. C. 245.

appellant was entitled to restitution, with damages and costs, reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely, without protest, before the district court, to whom the cause was remitted for further proceedings. In the district court, upon the remission of the cause, the following entry was made:

And now, to wit, this 9th day of August 1805, the said William Maley, by Alexander James Dallas, his proctor aforesaid, having appeared absolutely as aforesaid, comes here into court, and for answer to the libel of the said Jared Shattuck, propounds and says, that the facts by this respondent in his said protest set forth are true, and to the intent that justice may be done in the premises, this respondent prays that the said Jared Shattuck may be called upon to declare, on his solemn oath, to whom, and when, and in what manner, he paid for the said vessel called the Mercator, and whether the original American owner hath any interest therein, or in the restitution in value, by the said libel prayed for; and whether any correspondence, and what, took place between the said Jared Shattuck and the captain of the said vessel, or any other person, after she was carried into Jamaica; and
*473] whether any correspondence, *and what, took place between the said Jared Shattuck and any persons, and whom, relative to the prosecution of an appeal from the decree of condemnation in Jamaica; and whether the said Jared Shattuck made any, and what application, and when, to the American government, relative to the capture of the said vessel by this respondent, as aforesaid, &c.

A. J. Dallas, for the respondent.

And thereupon, the said Jared Shattuck, under all legal protestations and reservations, for replication to the answer of William Maley above mentioned, saith, that all and singular the facts, matters and things by him, this replicant, in his libel, and in his replication to the answer under protest of the said William Maley, filed in this honorable court, are true. Without this, that the facts by the said respondent, in his said answer under protest set forth, are true. He, therefore, humbly prays, that this honorable court, by its final decree in this cause, will be pleased to order, adjudge and decree, that the said defendant, William Maley, make restitution to this replicant of the value of the schooner Mercator, her rigging, tackle, apparel, &c., and of her cargo, at the time of her capture by the United States' armed schooner Experiment, under the command of the said respondent; and that the said respondent pay to the said replicant the amount of the damages by him suffered, by reason and in consequence of the capture and loss of the said schooner Mercator, and her cargo; the said value and damages to be inquired of, estimated and reported to this honorable court by the clerk, taking to his assistance two merchants, in the usual form; and that the said respondent pay the costs of this suit, &c.

Peter S. Du Ponceau, proctor for libellant.

The clerk having returned an estimate of the value and damages, amounting to $41,658.67, Maley filed the following exceptions to that report.

*474] *1. That the respondent is charged with the expense of papers and outfits, advances to mariners, provisions and stores for the voyage, and labor of sailors, before the shipping.

2. With the certificate of neutrality of property, duties at St. Thomas, commission on shipping the cargo, and insurance, without proof that any insurance was actually paid.

3. With expenses at Jamaica, and for copies of the proceedings in the court of admiralty, and of the appeal papers.

4. With expenses of Mr. Soderstrom.

5. With too much interest.

6. That there was no proof of the actual price of the schooner, other than the bill of sale on board.

7. That there was no proof of the value of the cargo, other than the invoice on board.

In the district court, judgment was entered, by consent, in favor of the libellant, for the amount reported by the clerk, saving all exceptions upon the appeal. In the circuit court, the following answer of Shattuck to the exceptions to the report of the clerk was filed.

1st. To the first exception, he answers, that these expenditures of outfits, &c., made after the purchase, and after the sailing of the vessel, increased the value thereof, and are properly charged as a part of the said value. The same were allowed in the case of the Charming Betsy; confirmed by a decree of this court (the circuit court) and not appealed from.

2d. To the second exception he answers, *1. As to the insurance, that it is a regular mercantile charge, the owner being considered as his own insurer. That it is generally admitted in mercantile accounts. That it is peculiarly admissible, in the case of an unjust capture like the present, however it might be in a case of lawful capture, or capture with sufficient probable cause. 2. The commission on shipping is also a regular mercantile charge; the said commission, the duties of exportation paid at St. Thomas, and the certificate of neutrality, would have been charged on the goods, had the vessel arrived at the port of her destination. The present being a case of unjust capture, the respondent conceives that the commissioners would have been justified in allowing to him all the loss of possible profit, and to have taken into view the profit which he, could have made, had the vessel arrived at the port of her destination, whereas, they have only indemnified him for his actual losses, and he conceives that he ought not to be debarred from any part of his said indemnity. [*475

3d. To the third and fourth exceptions, he answers, that the said expenses are reasonable, and the like were allowed and confirmed in the case of the Charming Betsy.

4th. To the fifth, he answers, that the interest is not overcharged.

5th. To the sixth and seventh, he answers, that the evidence of the papers found on board is sufficient in law, in prize causes, unless contradicted by other evidence. That it is confirmed, in this case, by the oath of the party, contained in the pleadings in this cause. And as to the ship, is again confirmed by the oath of the same party, taken a second time on special interrogatories of the appellant, William Maley.

The answer of Shattuck, upon oath, to the several interrogatories contained in the answer of Maley to the libel, stated, that he purchased the schooner Mercator, at St. Thomas, on the 26th of November 1799, of one

John Liddel, of Baltimore, for the sum of $8500, *which, at the time of purchase, he actually and *bonâ fide* paid to the said John Liddel, in Spanish milled dollars. That the original owner had not then, nor had had, at any time since the purchase thereof by the respondent, directly or indirectly, by way of trust, cover or otherwise, any interest therein, nor in the restitution in value, or damages prayed for in the libel.

That to the best of his recollection, the said schooner was taken by the British privateer, on the 15th of May 1800, was carried into, and arrived at Jamaica, and libelled on the 23d of the same month, and condemned as lawful prize on the 28th of June following. That the respondent was informed of the capture, by a letter from Lucas, and that Dick, McCall & Co. had taken the necessary steps to defend the property. That he was informed, afterwards, by the arrival of a Mr. Grigg, in the beginning of August 1800, that the schooner was condemned, and that an appeal had been entered. That the respondent had no opportunity of writing to Lucas, during the trial. That immediately upon receiving notice of the condemnation, he applied to the commandant-general of the Danish West India islands to use his endeavors to obtain reparation from the American government, to which he received an answer (which is lost), together with a letter for the secretary of state of the United States, which he forwarded.

That being advised that the United States were the proper party to prosecute the appeal, and fearing that his further interference might prove prejudicial to his interest, he did not prosecute the appeal, until he received from Mr. Soderstrom, a copy of a letter from the secretary of state of the United States, to him, dated the 26th of November 1800, by which he understood that the government of the United States wished him to prosecute his appeal, in consequence of which, he wrote for that purpose to his correspondents in London, by whom he was informed, that they had taken the necessary steps to procure a reversal of the decree of condemnation; but that, in the meantime, the proceeds of the sales of the prize had been paid to the prize-captain, who had died insolvent, so that no redress was finally had.

*477] *On the 29th of January 1806, the circuit court affirmed the sentence of the district court, except as to the first and second items in the report of the clerk, and decreed restitution of the value and damages, amounting to $33,244.67, and costs. From this sentence, Maley appealed to this court. The libellant also appealed as to so much of the sentence as disallowed those two items of the clerk's report.

Breckenridge (Attorney-General), for the appellant, and *Harper*, *Key* and *Martin*, for the appellee.

Argument for the *appellant*.—Two grounds were taken by the attorney-general: 1st. That Maley had committed no act *malâ fide*, but was in the performance of an authorized public duty, and was, therefore, justified. 2d. That the claim to reparation is without merit, and without law.

1. The act being done in the execution of a public duty, cannot, in our courts, be considered as done *malâ fide*. It was the policy of the times, to prevent our citizens, whether resident here or abroad, from trading directly or indirectly with the French; and that policy ought to be kept in view, when the several acts of congress on this subject are under consideration. These acts are June 13th, 1798 (1 U. S. Stat. 565); 9th February 1799 (Ibid. 613);

and 27th February 1800 (2 Ibid. 7). These laws being all *in pari materia*, are to be taken into one view, and although some of them had expired, yet it is proper that they should be considered, when deciding upon the construction of subsequent statutes on the same subject.

All the acts went, successively, to cut off the intercourse more effectually. The fifth section of the act of February *1799, authorizes the president to give instructions to the commanders of the public armed [*478 ships to stop, examine and send in ships suspected. (1 U. S. Stat. 615.) This was going a step farther than the act of June 1798, which did not authorize any such instructions. The act of February 1800 (2 Ibid. 7), goes farther still, and extends the prohibition of intercourse to citizens of the United States residing abroad; and expressly prohibits the Island of Hispaniola, excepting such ports as should be excepted by the proclamation of the president.

Under the act of 1799, the president caused the instructions (*a*) of 12th of March 1799, to be issued to the commanders of the public armed vessels of the United States, by which their attention was particularly called to the practice of covering the illicit trade, under the Danish flag. The direction not to injure or harass the fair, neutral commerce, implies a right to stop and examine; and if, upon such examination, they should have reasonable cause to suspect that the vessel was engaged in violating the law, the instructions, as well as the law, required them to seize and send her in for adjudication. There was, therefore, a clear right (at least, a right which our courts cannot deny) to detain the vessel a reasonable time for examination, and if it was a doubtful case, to send her for further examination to the commanding officer on that station.

That there was probable cause, sufficient to justify such a measure (however it might be in a case of actual seizure, and sending in for adjudication), can scarcely be doubted.

1. Shattuck was a native American citizen, resident in a place suspected by our government. The certificate of the merchants of St. Thomas, respecting his burghership, naturally led to suspicion. It appears, by the letters in the record, that although his neutrality had been respected in Tortola, yet it had not been respected in Jamaica.

*2. The vessel was known to have been built in the United States, and to have lately belonged to American citizens. She had sailed [*479 from Baltimore, after the passing of the act of congress.

3. The ship's papers showed her destination to be to Port-au-Prince, a place not prohibited; but she was stopped, as she was entering Jacmel, a forbidden port. An attempt is made to account for this, by verbal orders, but there is no proof of them; and it does not appear, that Lieut. Maley was informed of such orders, at the time of the detention, nor of the fact that Toussaint had possession of the place. But if Maley had known of the verbal orders, the reason assigned by Shattuck for those orders, was, in itself, a strong ground of suspicion. The reason was, that he had heard that Toussaint had possession of Jacmel. If the vessel and cargo were *bonâ fide* Danish property, he might, with equal safety, have traded there, while the place

(*a*) See these instructions at length, cited in the case of Little *v.* Barreme, 2 Cranch 171.

was in possession of Rigaud, as while in that of Toussaint. The reason could only apply to American property, upon the presumption that the United States would take off the prohibition, when it should be known that Jacmel was no longer under the acknowledged jurisdiction of France.

4. All the material papers were not produced. The master did not produce his burgher's brief, showing him to be a Danish subject; and a Danish vessel cannot lawfully sail, but under a Danish master. The attestation of his burgher's brief is dated long after the vessel was stopped.

It must be remembered, that Maley did not seize the vessel as a prize, or as a forfeiture, but only detained her for further examination. The question, therefore, is not, whether there was probable cause of seizure, but probable cause for further examination. The master was not dispossessed of his vessel; none of the crew were taken out; her papers were not removed; no violence or outrage was committed. But *while detained for further examination, the vessel was seized by a stronger hand, and carried away by a superior force.

*480]

If it be objected, that no resistance was made; it is answered, that none could be made. The vessel was not armed; and the officer was bound by his instructions, to permit the right of search by all the belligerents, except France. If it be said, that Maley ought to have claimed the vessel in Jamaica; the answer is, that he had no right to seize, unless it was really an American vessel. If she was a fair neutral, Shattuck's claim must prevail. If she was an American vessel, she would not be condemned; if she was anything else, he was not interested. Maley's possession, therefore, was lawful and *bonâ fide*. If a loss has happened, it has been produced by the *vis major* of another, to whom the injured party ought to look for reparation. 4 Rob. 284. Maley's possession being *bonâ fide*, he cannot be answerable for the *malâ fide* act of another. He detained the vessel only six hours; and she was sailing towards Port-au-Prince, the ostensible place of her destination, when captured by the British ship of war.

Even if Maley was mistaken, but acted with good faith, he is not answerable for the loss. *The Betsey*, 1 Rob. 18. That was an American ship and cargo, taken by the English, at the capture of Guadaloupe, in April 1794; and retaken by the French, in June following. The American claimants libelled the English captors for restitution in value. The captors defended themselves by an allegation that the ship had broken the blockade. Sir William Scott, after deciding that there was no defence, on the ground of breach of blockade, stated the question to be, whether the original captors were exonerated of their responsibility to the American claimants. *"It is to be observed," says he, "that at the time of re-capture, America was a neutral country, and in amity with France. I premise this fact, as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal *bonâ fide* possession? And 2d. whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal? For, on both these points, the law is clear, that a *bonâ fide* possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. This is the law, not of this court only, but of all courts.

*481]

and one of the first principles of universal jurisprudence." He then notices two cases very much in point: "*The Nicholas and Jan* was one of several Dutch ships taken at St. Eustatius, and sent home, under convoy, to England, for adjudication. In the mouth of the channel, they were retaken by the French fleet. There was much neutral property on board, sufficiently documented," and a demand of restitution, in value, was made by the neutral owners, on the first captors. One of the grounds of the demand was, that the captors had wilfully exposed the property to danger, by bringing it home, when they might have resorted to the admiralty courts, in the West Indies; but on this point, the court was of opinion, that under all the circumstances, they had not exceeded the discretion necessarily intrusted to them by the nature of their command. It was also urged against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on those grounds, the English courts rejected their claims. The other case which he cites, *The Hendrick and Jacob*, is still more like the present. A Hamburghese ship was erroneously taken as Dutch, and retaken by a French privateer, and was lost going into Nantz. *On demand for restitution, against the British captor, the lords of appeal decided, that as it was [*482 a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French re-captor had a justifiable possession, under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands. That if the property had been saved, indeed, the claimant must have looked for redress to the justice of his ally, the French; but since that claim was absolutely extinguished, by the loss of the goods, the proprietor was entitled to indemnification from the original captor. After citing these authorities, Sir W. Scott inquires, whether, in the case then before him, the original seizure was so wrongful as to induce that strict responsibility, which attaches to a tortious and unjustifiable possession. He then states some grounds of suspicion, which might have appeared to the captors, as to the fairness of the neutrality, and proceeds to inquire, whether any conduct of the captors, after the first seizure, had rendered them liable to the strictest responsibility. "On this point," says he, "I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit, there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on re-captors, to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors." In the conclusion of his opinion, he says, "if the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice." So we say, in our case, there is no reason that the American officer, who merely stopped the vessel for examination, should pay for British injustice.

2. That the claim to reparation is without merit, and without law. *Shattuck was himself the cause of the suspicious circumstances which led to the detention of the vessel by Maley, who would have been [*483 guilty of a neglect of duty, and disobedience of orders, if he had done otherwise than he did. There was no improper conduct on his behalf, and the

whole detention was only six hours. The British were bound to restore the vessel and cargo, without salvage, and with damages and costs, if it was really the property of a neutral, and this would have been done, without doubt, if Snattuck had prosecuted his appeal, and been able to prove his property. But having acquiesced in the decree of condemnation as enemy-property, he can never deny the fact. It is conclusive evidence against him. If not conclusive, it is still evidence of probable cause of suspicion. Upon the evidence which caused Maley to suspect, the court of admiralty condemned. This is surely sufficient to justify his detention of six hours for examination.

Argument for the *appellee.*—Unless the taking was lawful, or with probable cause, the captor is liable for all the loss. This principle is admitted by the argument for the appellant. The case of the *Charming Betsy*, 2 Cranch 64, was stronger in favor of Captain Murray than this is in favor of Lieutenant Maley; and yet, in that case, this court decided that Captain Murray was a trespasser, and liable for damages and costs. It is no answer, to say, that the loss does not appear to have been the consequence of Maley's act. If the taking was unlawful, he is liable, at all events. It is like the case of deviation, which throws the loss upon the assured, although the loss was not the consequence of the deviation. It is sufficient, if it exposed the property, in any manner, to a liability to danger. But here, it is evident that the loss would not have happened, if the vessel had not been detained. She was within an hour's sail of Jacmel, and would have gone in with safety.

*484] *Two questions present themselves for consideration. 1st. Was the capture lawful? and 2d. Was there probable cause? A third question may also arise, whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted to by the counsel for Maley?

1. The first question is, whether the capture was lawful? On this point, the case of the *Charming Betsy* is conclusive. It was there decided by this court, 1st. That the non-intercourse law did not extend to vessels built in the United States, and *bond fide* sold, before the act of trading. In the present case, the vessel was sold, before the existence of the act under which her seizure is now attempted to be justified. 2d. That the sale must appear to be made with intent to evade the law. 3d. That a native citizen of the United States may so far change his national character, as to take him out of the operation of that act. The present appellee is the same person whose property was in contest in that case; and although that fact does not appear on this record, yet it appears that he is a person in exactly the same circumstances.

But the sentence of the vice-admiralty court in Jamaica is said to be conclusive evidence against Shattuck. But the sentence is only conclusive evidence that she was good prize to the British. It does not state, for what cause. It contains no direct reference to the libel, or other parts of the proceedings. If it refers to the libel, the property is there stated to be French or Spanish, or to belong to some other enemy of Great Britain. If you look into the proof exhibited in that court, it shows it clearly to be the property

*485] of Shattuck. *At all events, neither the record, nor the proceedings in Jamaica, show it to be American property, violating the laws of

the United States, which is the only case that could justify the capture by Maley. If it was Spanish property, he had no right to touch it. If it was a French vessel, unless armed, he had no right to seize it. So that if the sentence is conclusive evidence, it is as conclusive against Maley as it is against Shattuck.

But it is said, he ought to have prosecuted his appeal; and, not having done so, he has been guilty of negligence. So far from this is the truth, that he was not bound to resort at all to the British captors. It was the duty of Maley, or the United States, to resort to them. His remedy was against Maley. He was not bound to look further. It can be no ground of a charge of negligence to say, that he has done more than he was bound to do.

2. Was there probable cause? On this point too, the case of the *Charming Betsy* is conclusive. The grounds of suspicion in this case are not so strong as they were in that. But probable cause is no ground on which to deny restitution of the thing itself, or its value. It only excuses from damages for the *tort*. It is no bar to a reimbursement of actual loss. Shattuck asks only for restitution and expenses; and this is the least that a friendly nation ought to give.

3. As to the items in the statement of the value, and expenses, which have been excepted against. All the outfits of the vessel, and expenses of shipping the cargo, together with the outward duties, in addition to the first cost, constituted the value of the vessel and cargo, at the time of seizure, and ought to be allowed. The premium of insurance also was a proper charge. For, although no insurance was actually made, yet Shattuck was to be considered in the light of his own insurer, and the risk was worth the premium. *There is evidence in the record that it is a customary charge in such cases. [*486

Argument, *in reply*.—This case is not like that of the *Charming Betsy*. In that case, the loss was produced by Captain Murray's own act. But in this, the loss is not the immediate effect of the act of Maley, but of the commander of the British privateer, who is liable to Shattuck for the injury he has sustained. To convert an originally lawful act into a trespass, by subsequent misconduct, that misconduct must proceed from the party himself, and not from the act of another, whose conduct he cannot control.

In the case of the *Charming Betsy*, the court decided, in express terms, that, "her papers were perfectly correct." In the present case, some of the papers were false and delusive, and others were not shown, or were not found.

The sentence in Jamaica is conclusive evidence, that the property was not neutral Danish property, which is the very ground of the present libel. Unless, therefore, the admiralty court of one nation can reverse the sentence of an admiralty court of another nation, that sentence in Jamaica is conclusive against Shattuck's title. If he had prosecuted his appeal, and reversed the sentence, he would have obtained indemnification. By his instructions from his government, Maley was bound to act on reasonable suspicion. They gave him notice of the practice of covering this illicit trade with the Danish flag. When, therefore, he found a recent sale of an American vessel to a person pretending to have become a Danish subject, and

residing in a place notorious for it abuse of its neutral flag, when he found the vessel attempting to enter a prohibited port, with an ostensible destination to a port not prohibited, when no evidence was exhibited to show that the master of that vessel was a Danish subject, and when his instructions required him "to be vigilant, that vessels really American, but covered by
*487] Danish papers and bound to or from French ports, do not escape *you," how is it possible to say that he had not "reason to suspect?" Although any one of these circumstances alone might not afford "reason to suspect," yet the combination of the whole certainly did.

With respect to the claim of insurance, the case of the *Charming Betsy* is full in point. It is admitted, that no insurance has been paid. And the court in that case expressly said, that "a public officer, intrusted on the high seas, to perform a duty deemed necessary by his country, and executing, according to the best of his judgment, the orders he has received, if he is the victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages." The claim for insurance not paid is certainly a claim for speculative damages. The direction of the court to the assessors was, "to take the prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid."

The consideration of the other items is submitted to the consideration of the court.

March 3d, 1806. MARSHALL, Ch. J., delivered the opinion of the court. —In this case, each party has appealed from the sentence of the circuit court. Maley complains of that sentence, because it subjects him to damages and costs for the value of the Mercator and her cargo, first captured by him, and afterwards taken out of his possession by a British privateer, and because, also, some items are admitted into the account, taken for the purpose of ascertaining the sum for which he is liable, which ought to be excluded from it. Shattuck complains of the sentence, because he was not allowed by the circuit court, all the items contained in the report, to the whole of which he thinks himself entitled.

*In discussing the right of Shattuck to compensation for the Mer-
*488] cator, and her cargo, the first question which presents itself is, was that vessel and cargo really his property? Without reciting the various documents filed in the cause, it will be admitted, that they demonstrate the affirmative of this question, unless the court be precluded from looking into them, by the sentence in Jamaica, condemning the ship and cargo as lawful prize.

On the conclusiveness of the sentence of a foreign court of admiralty, it is not intended now to decide. For the present, therefore, such sentence will be considered as conclusive, to the same extent which is allowed to it in the courts of Great Britain. But, in those courts, it has never been supposed to evidence more than its own correctness; it has, consequently, never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. If then, in the present case, the Mercator, with her cargo, may have been condemned as prize, although, in fact, they were both known to be the property of a neutral, the sentence of condemnation does not negative the averment, that they both belonged to Jared Shattuck.

It is well known, that a vessel libelled as enemy's property, is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved, that the vessel is in truth the vessel of a friend.[1] Of consequence, this sentence, being only conclusive of to its own correctness, leaves the fact of real title open to investigation. This positive impediment to inquiry being removed, no doubt upon the subject can be entertained.

It being proved that the Mercator and her cargo belonged to Jared Shattuck, who, though born in the United States, had removed to the island of St. Thomas, *and had acquired all the commercial rights of his domicil, before the occurrence of those circumstances which occasioned [*489 the acts of congress under which this seizure is alleged to have been made, the case of the *Charming Betsy* determines that the vessel and cargo were not liable to forfeiture under those acts.

It remains then to inquire, whether the Mercator appeared under such circumstances of suspicion as to justify her seizure? On this point too, the authority of the *Charming Betsy* appears to be decisive. In each case, the vessel was built in America, and had been recently sold to a person born in the United States, who had become a Danish burgher, before the rupture between this country and France; and both cases present the same circumstances of suspicion, derived from the practice of the island to cover American as Danish property. The points of dissimilitude are, that in the *Charming Betsy*, the captain and crew were of a description to give greater suspicion than the captain and crew of the Mercator; and in the Charming Betsy, was found a *procès verbal*, which stated facts unfavorable to that vessel, whereas, no similar paper was found in the Mercator. The only circumstance of suspicion attending the Mercator, which did not belong to the Charming Betsy, is, that she was bound to Port-au-Prince, and was taken entering the port of Jacmel. This circumstance appears to be sufficiently accounted for, but if it was not, the court can perceive in it no evidence of her being American property, which can weigh against the testimony offered by the papers that she was Danish. The documents on this point which were thought decisive in the case of the *Charming Betsy* exist in this case also. The information of the captain, uncontradicted by any of his crew, in this case, as in that, is corroborated and confirmed by the documents on board the vessel.

The only paper, the absence of which could be important, was an authenticated burgher's brief proving the captain to have been a Danish subject. How far *the absence of this paper might have justified a suspicion [*490 in a belligerent that she was enemy-property, so as to excuse from damages for capture and detention, according to the usages of belligerents, the court will not undertake to determine; but it was a casualty which is not sufficient to justify a suspicion that the vessel was American. The burgher's brief is stated to have been in possession of the captain; but is supposed not to have been produced, and, consequently, it could have no influence on Lieutenant Maley. However this may be, no inquiry respecting

[1] The Baigorry, 2 Wall. 474.

it was made, and he does not appear to have suggested any difficulty on that ground.

Unquestionably, Lieutenant Maley had a right to stop and to search the Mercator, and to exercise his judgment on the propriety of detaining her; but, in the exercise of that judgment, he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case, were not sufficiently strong to justify the seizure which was made.

But it is obvious, that Lieutenant Maley suspected the Mercator to be a French, not an American vessel. In his answer, he says, that he mistook the captain for a Frenchman; in his letter of instructions, he speaks of the vessel as a prize; and in the protest of the American prize-master, she is denominated "a French prize." From these circumstances combined, it is supposed to be sufficiently apparent, that the mistake committed by Lieutenant Maley was in supposing the Mercator to be a French vessel, liable to capture under the laws of the United States.

The argument of the attorney-general, that Lieutenant Maley is not liable for this loss, because it was produced by a superior force, which it was not in his power to resist, would have great weight, if the circumstances under which the Mercator appeared had been such as to justify her seizure. But the court is not of that opinion, and, consequently, that argument loses its application to this case.

*491] *Neither is it conceived, that the failure of Shattuck to appeal in time, destroys his claim on Lieutenant Maley. He had certainly a right to abandon, if he chose to do so, and to resort to the captor for damages.

In the opinion given in the circuit court, that the libellant was entitled to compensation for the Mercator and her cargo, this court can perceive no error; but in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear. In its circumstances, this case so strongly resembles that of the *Charming Betsy* that the court will be governed by the rule there laid down. In pursuance of that rule, the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel, and the necessary advance to the crew, is disapproved. Although the general terms used in the case of the *Charming Betsy* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principles with the premium of insurance, if actually paid, which was expressly allowed. But this claim is nearly balanced by two items in the account which were admitted, as this court thinks, improperly. One is the charge of $540 for the expense of soliciting compensation from the United States. The court can perceive no reason for charging this expense to Lieutenant Maley. The other is the charge of $326.12, the account of Ross & Hall, for expenses in England.

Had the appeal been prosecuted in time by Shattuck, it is scarcely possible to doubt, but that the sentence of the court, in Jamaica, would have been reversed, in which case, it would have been reasonable, that the expense of the prosecution should have been paid by Lieutenant Maley. But as it was not prosecuted in time, in consequence of which the proceeds of the vessel

and *cargo were lost, it is not conceived, that Lieutenant Maley ought to be charged with the cost of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect. What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire; but his claim against Lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator, and her cargo, to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel, and the wages of the crew, and which admits the charges of $540, on account of the expenses attending the application to the government of the United States, and of $326.12, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects, the account is to be reformed, for which purpose, so much of the sentence of the circuit court as respects this part of the subject is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

Lawrason *v.* Mason.

Letter of credit.

A letter from the defendants to J. M., saying, that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of *assumpsit* against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn.[1]

Error to the Circuit Court for the district of Columbia.

This was an action of *assumpsit*, brought by Mason against Lawrason, surviving partner of the firm of Lawrason & Smoot, upon the following note:

*"Alexandria, 28th November 1800. [*493

"Mr. James McPherson,

"Dear Sir—We will become your security for one hundred and thirty barrels of corn, payable in twelve months."

(Signed) Lawrason & Smoot."

The declaration contained several counts, laying the *assumpsit* in different forms, but the substance of each was, that the plaintiff, relying on, and placing confidence in, the promise of the defendants, and at their instance and request, sold and delivered the corn to McPherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendants had notice, whereby the defendants became liable, and in consideration thereof, promised to pay.

The defendants pleaded the general issue; and at the trial, a verdict was taken for the plaintiff, subject to the opinion of the court, upon a demurrer to evidence, which stated, in substance, that the defendants signed and delivered the said note to McPherson; that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months; that the agent consulted the plaintiff, who agreed that

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[1] And see Union Bank *v.* Coster, 3 N. Y. 203.

McPherson should have the corn on those terms, if he would give security; that McPherson then offered, as his security, Lawrason & Smoot. The agent agreed to take them, if they would give their assumption in writing. In a few days afterwards, McPherson sent to the agent the said note of Lawrason & Smoot. Before the corn was delivered, the agent informed the plaintiff what had passed between himself and McPherson, relative to the corn, and also showed him the note, and asked him whether it would do; to which he replied, he supposed it would. But they called upon Lawrason, and asked him if he was content to be McPherson's security for this corn. He hesitated, at first, but said, he must be so, as he had promised; or, as his word was out, he would; or words to that effect; whereupon, the
*494] plaintiff suffered McPherson to take the corn, *at the price of three dollars per barrel, which he agreed to give.

That there was another debt due to the plaintiff from McPherson, about the 1st of January 1801, which he was unable to pay. That about the 1st of January 1800, McPherson gave his promissory note for the amount due for the corn, payable to Lawrason & Smoot, with intent that they should indorse it, but upon its being presented to Smoot, he refused, saying, that McPherson had failed to furnish them with meal, which he had agreed to deliver to them for their indorsement; he, therefore, would not become security, but, upon being shown the note of 28th of November, he acknowledged that it had been given by them.

The plaintiff also produced the certificate of discharge of McPherson, under the bankrupt law, dated the 15th of September 1802, and proved by witnesses, that he became insolvent in the year 1800.

Upon this demurrer, the judgment of the court below was for the plaintiff.

Swann, for the plaintiff in error.—The promise in this case was not made to the plaintiff; and no action can be maintained against a person who is a stranger to the consideration, and who is not a party to the agreement. *Jordan* v. *Jordan*, Cro. Eliz. 369; Esp. N. P. 105, 106. Perhaps, an action might lay for the deceit, but not for the *assumpsit*. The will of both parties must concur, at the same moment. If I make an offer of goods, at a certain price, and give time to the other party to consider of it, and within the time, the other party agrees to the terms, I am not bound to comply. There was no consideration, and consequently, no contract. *Cooke* v. *Oxley*, 3 T. R. 653.

Besides, it does not appear that the money was ever demanded of McPherson; and until he had refused to pay, no right of action could accrue against the defendant.

*495] *C. Lee*, contrà.—There is an essential difference between common contracts and a letter of credit. The latter is a mercantile instrument, bottomed upon the principle of good faith. It is a promise to him who will give credit to the third person, and the consideration is, the actual delivery of the money or goods to the third person, upon the faith of the letter of credit. This is, therefore, a promise to the plaintiff, and a good consideration is raised by the delivery of the corn, upon the faith of the defendant's note in writing. All the forms of action upon a letter of credit, are in *assumpsit*.

It is objected that no demand was made on McPherson; the answer is, that he was known to both parties to be insolvent.

Marshall, Ch. J., delivered the opinion of the court to the following effect:—This action is grounded upon a note in writing, which was certainly intended by the defendants to give a credit to McPherson. They are bound, by every principle of moral rectitude and good faith, to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear, that the credit was given upon the faith of the letter.

Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported. In the case cited from Espinasse, the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified. Thus, if money be delivered by A. to B., to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of *assumpsit*. If it be said, that in such a case, the law raises the *assumpsit* from the facts, and if the facts do not imply *an *assumpsit*, no action will lie; it may be answered, that in the present case, there is an actual *assumpsit* to all the world, and any person who trusts, in consequence of that promise, has a right of action. [*496

It has been suggested by the counsel for the defendants, that although an action of *assumpsit* will not lie, yet, possibly, the plaintiff might support an action for the deceit. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lie, in any form, the present seems to be, at least, as proper as any other.

Judgment affirmed.

Knox & Crawford *v.* Summers and Thomas.

Appearance.— Waiver.

An appearance of the defendant, by attorney, cures all antecedent irregularity of process.
Quære? Whether a deputy-marshal can plead in abatement, that the *capias* was not served on him by a disinterested person?[1]
Knox *v.* Crawford, 1 Cr. C. C. 260, reversed.

Error to the Circuit Court of the district of Columbia.

The plaintiffs in error brought an action of debt on a bond, against the defendants, in the court below; to which the defendant, Summers, after *oyer* of the writ, pleaded in abatement, that on the day of the issuing of the original writ, as well as on the day of its service on him, he was one of the marshal's deputies for the district of Columbia, and that the writ was not directed to a disinterested person, appointed by the court of the district of Columbia, or by any justice or judge thereof, to execute the same.

To which plea, the plaintiffs demurred specially; 1st. Because the plea was filed long after the appearance of the defendant, Summers; 2d. Because, after his appearance to the suit, no objection can be urged to the irregularity of the service of the process; 3d. Because, if the process was

[1] See the opinion of the court below, 1 Cr. C. C. 260.

irregularly issued, directed or served, the remedy was by motion, and not by plea; and 4th. Because the process was duly issued, directed and served. *497] But the court below adjudged the *plea to be good, and ordered the writ to be quashed as to both defendants. Whereupon, the plaintiffs sued out their writ of error.

By the 28th section of the act of congress of the 24th of September 1789 (1 U. S. Stat. 87), it is enacted, "That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein shall be directed to such disinterested person, as the court, or any justice or judge thereof, may appoint: and the person so appointed, is hereby authorized to execute and return the same."

Swann, for the plaintiffs in error.—The provision of the act of congress was not intended for the benefit of the marshal, or his deputy, but of the other party. The word "shall," in this, as in many other cases, means may. It shall be directed to a disinterested person, if the other party shall request it. But if the direction of the writ to the marshal was an informality, it is cured by the general appearance of the deputy-marshal. Co. Litt. 325. *Blenkinson* v. *Iles*, 2 Ld. Raym. 1544. The record states, that there was judgment by default, at the rules, against both defendants, and that at the next court, on the motion of the defendants, by Walter Jones, jr., their attorney, it was ordered, that the suit be returned to the rules for proceedings anew. At the next rules, the record states, that "the said Lewis Summers, in his proper person, comes and defends the force and injury, &c., and prays *oyer* of the writ," &c. So that this plea in abatement was not put in, until after he had appeared by his attorney, and set aside the office-judgment.

But this is not a matter pleadable in abatement. If a person is improperly arrested, his remedy formerly was by a writ of privilege, but now it is by motion to be discharged. He cannot plead it.

C. Lee, contrà.—When the cause was sent back to the rules for proceedings anew, it was as if nothing had been done at the rules. Everything was to begin *de novo*. The defendant, Summers, is to be considered as then appearing for the first time; and instantly, upon his appearance, he pleaded in abatement *in propriâ personâ*.

*498] *It does not appear upon the writ, that he was a deputy-marshal. It could not, therefore, be taken advantage of, upon motion. Or, if it could, yet that is not the most regular way. Upon a motion, the fact must appear by affidavit, and the court must decide the fact. But upon a plea, the fact is put in issue and tried by the jury, the proper tribunal to try a question of fact.

The law is express and positive; "the writ shall be directed" to a disinterested person. There is no discretion in the court. Where it appears to the court, from the writ itself, that it ought to abate, there the court, *ex officio*, ought to give judgment against the plaintiff, though the defendant does not plead it in abatement; but it is otherwise, where it does not appear in the writ. 4 Bac. Abr. 44. Where the fact does not appear upon the record, it must be pleaded in due time.

Washington, J.—The defendant could not set aside the office-judgment, without entering his appearance.

C. Lee.—If such an appearance is to cure all antecedent error, no plea in abatement could be put in, although the office-judgment was irregularly obtained; nor could the defendant take advantage of irregularity, at the rules; although the court is, by the express provisions of the law, authorized to set aside the proceedings at the rules.

The Court were unanimously of opinion, that the appearance by attorney cured all irregularity of process. The defendant, perhaps, might have appeared *in propriâ personâ*, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity.

The judgment reversed, the defendant ordered to answer over, and the cause remanded for further proceedings.

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*Sands *v.* Knox. [*499

Non-intercourse act.

The non-intercourse act of June 13th, 1798, did not impose any disability upon vessels of the United States, sold *bonâ fide* to foreigners, residing out of the United States, during the existence of that act.

Error to the Court for the Trial of Impeachments and the Correction of Errors, in the state of New York.

Thomas Knox, administrator, with the will annexed, of Raapzat Heyleger, a subject of the King of Denmark, brought an action of trespass *vi et armis*, in the supreme court of judicature of the state of New York, against Joshua Sands, collector of the customs for the port of New York, for seizing and detaining a schooner called the Jennett, with her cargo.

The defendant, Sands, pleaded in justification, that he was collector, &c., and that after the 1st day of July 1798, viz., on the 16th of November 1798, the said schooner, then being called the Juno, was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz., from Middletown to the island of St. Croix, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel was not, and should not be, employed, during her said intended voyage, or before her return as aforesaid, in any traffic or commerce with, or for, any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December 1798, she did proceed, and was voluntarily carried from Middletown to the island of St. Croix, in the West Indies, and from thence, before her return within the United States, to Port de Paix in the island of St. Domingo, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or *want of provisions, or actual force and violence, whereby, and according to the form of the [*500

statute, the said schooner and her cargo became forfeited, the one-half to the use of the United States, and the other half to the informer; by reason whereof, the defendant, being collector, &c., on the 1st of July 1799, arrested, entered and took possession of the said vessel and cargo, for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, &c., that at the time she sailed from Middletown for St. Croix, she was owned by a person then resident in the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to St. Croix, where she arrived on the 1st of February 1799, the said island of St. Croix then and yet being under the government of the King of Denmark. That one Josiah Savage, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at St. Croix, to the said Raapzat Heyleger, who was then, and until his death continued to be, a subject of the King of Denmark, and resident at St. Croix, who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from Port de Paix to St. Croix, without that, that she was at any other time carried, &c.

To this replication, there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the court for the trial of impeachments and correction of errors, in the state of New York, was affirmed. The defendant now brought his writ of error to this court, under the 25th section of the judiciary act of the United States. (1 U. S. Stat. 85.)

The only question which could be made in this court, was upon the construction of the act of congress, of June 13th, 1798 (1 U. S. Stat. 565), commonly called the non-intercourse act; the 1st section of which is in these
*501] words: "That no ship or vessel, owned, hired or employed, *wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the 1st day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed, to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within and for the district where the seizure shall be made."

The condition of the bond stated in the plea, corresponded exactly with that required by the 2d section of the act. The 70th section of the act of 2d of March 1799 (1 U. S. Stat. 678), makes it the duty of the several officers

of the customs, to seize any vessel liable to seizure, under that or any other act of congress respecting the revenue.

C. Lee, for the plaintiff in error.—The question is, whether the act of congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom, after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West Indies, under the acknowledged government of France." She was also a vessel which, "in a voyage *thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act which, according to the letter of the law, rendered her liable to forfeiture, seizure and condemnation. [*502

It is true, that the decision of this court, in the case of the *Charming Betsy*, 2 Cr. 115, seems, at first view, to be against us. But the present question was not made, and could not arise, in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents were to be permitted, the whole object of the non-intercourse act would be frustrated. A vessel of the United States may, according to the judgment in the case of the *Charming Betsy*, be sold and transferred to a Dane, and he may trade with her as he pleases; but we say, it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American citizens, but American vessels, from carrying on an intercourse with French ports.

The case of the *Charming Betsy* was under the act of February 1800; but the present case arises under that of 1798, which is very different in many respects. The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination. Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel, before her return. If, therefore, a sale is made, it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom-house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better *situation than before, for she will receive her usual supplies, and we shall be weakened by the loss of the carrying trade. [*503

Bayard, contrà, was stopped by the court.

Marshall, Ch. J.—If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no *bonâ fide* sale and transfer of the vessel, the court does not wish to hear any argument on

the part of the defendant in error. It considers the point as settled by the opinion given in the case of the *Charming Betsy*, with which opinion the court is well satisfied. The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bonâ fide* sale and transfer to a foreigner.

Judgment affirmed.

Randolph *v.* Ware.

Principal and agent.

A promise by a merchant's factor, that he would write to his principal to get insurance done, does not bind the principal to insure.

This was an appeal from a decree of the Circuit Court for the district of Virginia, which dismissed the complainant's bill in equity.

Ware, the executor of Jones, surviving partner of the house of Farrell & Jones, British merchants, had, in the same court, at June term 1800, obtained a decree against William Randolph, administrator *de bonis non*, with
*504] the will annexed, of Peyton Randolph, for a large *sum of money, with liberty to William Randolph to file this bill against Ware, for relief in regard to fifty hogsheads of tobacco, shipped, in September 1771, in the ship Planter, Captain Cawsey, and consigned to Farrell & Jones ; a credit for which had been claimed, but was by the decree disallowed. The tobacco never came to the hands of Farrell & Jones, having been lost at sea without being insured.

The appellant contended, that he was entitled to a credit for the customary insurance price of the tobacco, viz., 10*l.* per hogshead, with interest.

1. Because, from the usage of the trade between the Virginia planter and the British merchant, it was the duty of the latter to have insured the tobacco, and that having failed so to do, he is responsible as insurer.

2. Because Thomas Evans, the appellee's agent for soliciting consignments and managing this business, having promised to get the insurance done, it is equivalent to the promise of his principals, Farrell & Jones, and they are responsible for the consequences.

3. It was contended, that the claim, under all circumstances disclosed in the record, if not fit to be decreed, according to the prayer of the bill, appears to be of a nature proper to be decided in a court of law, in pursuance of an order of the court of equity, and therefore, that the decree should be reversed, and an order made, directing a trial at law, to ascertain whether the appellee is not liable to the appellant for the value of the tobacco, and the interest from the month of September 1772, as standing in the place of insurer thereof.

C. Lee, for the appellant.—1. The common course of the trade was, for the British merchant to cause insurance to be made, upon notice of the shipment of tobacco ; and it appears by the letters exhibited in this record, that Farrell & Jones did, without any special orders, cause insurance to be made
*505] on some of the tobacco shipped by Randolph's executors. *Thus, in their letter of August 1st, 1769, to Richard Randolph, they say, "We have made the following insurance on the True Patriot, for the two estates,

viz., 480*l.* on 40 hogsheads, W. Randolph's estate ; 816*l.* on 68 hogsheads, P. Randolph's," but say nothing of having received orders therefor. And again, August 10th, 1769, "We have made 816*l.* insurance on the True Patriot, on 68 hogsheads which Captain Cawsey informs us he is to have." It is true, that on the 15th of August 1771, they say, "Captain Cawsey writes us, that he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance." But they had received no orders for the insurance they made in August 1769, on the 68 hogsheads which Captain Cawsey informed them he was to have. The executors had a right to expect, that as Farrell & Jones had made insurance without orders, on the 68 hogsheads, by the True Patriot, they would also have insurance made on the 50 hogsheads by the Planter.

The appellee's amended answer, put in after this point was known, does not pretend that any orders were given for the insurance, made in 1769, on the 68 hogsheads. And in the accounts of Farrell & Jones, there are many charges of premiums on insurances, for which no orders appear to have been given.

2. But the deposition of P. L. Grymes goes to establish an agreement, on the part of Evans, the agent of Farrell & Jones, to get insurance done upon the 50 hogsheads in question. This deposition is corroborated by the fact, that in the correspondence produced, there is no letter of the executors, respecting the shipment of that parcel of tobacco. They relied altogether upon the promise of Evans.

No argument against the claim can arise from the length of time which elapsed before it was made. The estate of Randolph was acknowledged to be indebted ; the executors, therefore, would not bring a suit. It was time enough to exhibit their claim when suit was brought *against them. Besides from 1774 to 1783, the war interposed ; after that time, until the suit was brought, the courts of justice were absolutely shut, or legal impediments existed to the recovery of British debts. The executors also might have been ignorant of their right. This suit, therefore, ought to be considered as if it had been instituted in 1775. *506

3. This is a claim proper to be settled in a court of law. There is a difference between a case where the chancellor will order an issue at law to be tried, to satisfy or inform his conscience, and where the whole claim is a matter properly cognisable at law.

P. B. Key, contrà.—1. There is no evidence in the record of such a general usage of the trade, as is contended for by the appellant. And if there had been, the voluminous correspondence, exhibited in the cause, shows most clearly, that it did not exist in the negotiations between the present parties. For it proves, that in almost every instance, where the Randolphs shipped tobacco, they ordered insurance to be made, at the time they gave notice of the shipment.

Farrell & Jones, in their letter of August 6th, 1770 (stated in the appellee's answer), say, "We made no insurance on the Virginian, though we were a little uneasy that so large a quantity as 66 hogsheads were ventured home without it, for it is our rule, not to make any insurance, without orders, upon tobacco ; which you will please to remember."

On the 15th of August 1771, they say, "Captain Cawsey writes us that

he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance."

On the 17th of September 1771, the tobacco in question was shipped. On the 10th of December 1771, Farrell & Jones write to the Randolphs, as follows: "We wrote you the 15th of August, by the True Patriot, Captain Aselby, to which we refer. We observe, by our agent Mr. Evans's letter, that you have shipped 50 hogsheads of the estate's tobacco on board Captain
*507] Cawsey, and it gives us great concern to find you ordered no *insurance on them, though we wrote you in August 1770, that we never made any insurance on tobacco, without orders; as we are much afraid some accident has happened to him. He has now been sailed from Virginia, twelve weeks, and by accounts we have from captains who sailed from America about that time, he must have had dreadful weather, in a few days after he came out. We think, there is no other chance for him, but that he has lost his masts, and obliged to bear away for the West Indies."

In their letter to the Randolphs of 4th April 1772, they say, "You have also, inclosed, the estate's account current to the 31st December, balance in our favor ———*l.*, if any error, you will please to advise us."

And in August 15th, 1772, they say, "As yet we have received no orders for insurance on the Elizabeth, on account of the estate. If any tobacco is shipped in her, we hope to receive directions, in time to prevent the like accident as happened last year."

On the 23d of April 1773, they say, "Having settled the account-current agreeable to what Mr. Evans wrote us, we send it to you inclosed. Balance in our favor ———*l.*, if any error, please to advise."

On the 10th of August 1774, they write, "You have also, inclosed, the estate's account-current to 31st December last; balance in our favor ———*l.*, if any error, please to advise."

And on the 10th of March 1773, they sent the estate's account-current to 31st of December, with the same request, "if any error, please to advise."

Here the correspondence was closed by the war; after which, in 1783, the house of Farrell & Jones sent out an agent, Mr. Hanson, who was known as such to the Randolphs, and who, in that capacity, transacted business with
*508] them, and who continued in Virginia until the year 1800. *During the whole of this period, of nearly 30 years, not a syllable was said of any claim against Farrell & Jones, on account of the 50 hogsheads of tobacco lost in the Planter. In addition to all this, it appeared, by the exhibits in this cause, that some time in June 1772, after the loss of the tobacco was known to the Randolphs, they gave their bond, ante-dated on the 1st of January 1772, for the balance then due, without any credit being given for the lost tobacco.

2. But it is contended, that Farrell & Jones had, in some instances, made insurance, without orders, and therefore, they were bound to do it in this instance. We deny the fact. Although, in one or two instances, Farrell & Jones have in their letters mentioned having made insurance, without stating it to be by order, yet it does not follow, that no orders were given. And the whole general tenor of the correspondence shows, that it was not their usual practice to insure without orders.

3. The appellant relies upon the affidavit of Grymes, to show that Evans,

the agent of Farrell & Jones, promised to have insurance done. This affidavit appears in the transcript of the record, without date, place or circumstance. It does not appear to have been sworn before any magistrate, competent to administer an oath, and no cross-examination, nor anything to show upon what occasion it was made. It is uncertain in itself, uncorroborated by any other part of the testimony, and inconsistent with the general tenor of it. He says, the conversation happened early in the year; but the tobacco was shipped in September. His words are, "he the said Evans informed the aforesaid Peyton and Richard Randolph, that he was writing to the aforesaid house of Farrell & Jones, that he would direct insurance to be made," "and that they need give themselves no further trouble in the business."

*The long time which had elapsed before this deposition was made [*509
(probably 30 years), renders its contents of very little weight, especially, as there were a number of shipments of tobacco made at different times in the same ship, and he swears the conversation happened early in the year. It appears from the correspondence, that early in the year preceding, viz., 1770, the same ship had been loaded with tobacco at the same place; and this renders it probable that Mr. Grymes had mistaken the year. But admitting that it proves all that is contended, yet Evans was not competent to bind his principal to insure; it was not a matter within his agency.

Johnson, J.—I found my opinion in this case upon a single consideration. It was incumbent on the appellant, to show that Evans's neglecting to comply with his promise to insure, made Farrell & Jones liable. I think it did not, because it appears that Farrell & Jones did not generally hold themselves bound to insure shipments of tobacco, without receiving express instructions to do so. It was, therefore, incumbent upon the executors of Randolph, to communicate such instructions to Farrell & Jones. If they confided in the promise of Evans to give these instructions, it was to their own prejudice. And although the failure of Evans to do so, certainly made him personally liable to them, yet it could not produce a liability in Farrell & Jones. So far as Evans was intrusted to do an act incumbent on the appellant's testator himself to do, he was the agent of the executors of Randolph, and not of Farrell & Jones.

Washington, J.—In this case, it appears, that a letter was written by Farrell & Jones, in August 1770, notifying the executors of Randolph, that they would not make insurance without orders. And it is shown also, that the Randolphs were accustomed to give orders for insurance, whenever they wished to have it made. Whatever, then, may be the general usage of the trade, it will not apply to the present case.

*The deposition of Grymes comes in a very questionable shape. [*510
It speaks of things thirty years ago, and in very uncertain language. But admitting for a moment that it applies to this shipment, Evans had not authority to bind his principal, by a promise to insure. He did not promise for them, but promised for himself, that he would write to them to make insurance. This, it is admitted, he did not do. Are Farrell & Jones liable for his personal engagement?

But the deposition of Grymes is not only uncorroborated, but opposed,

by the other evidence in the cause. If the Randolphs relied upon this supposed engagement of Evans, why did they give their bond in 1772, nine months after the loss, and long after they had notice of the loss, for the balance of the account, without demanding a credit for the lost tobacco? Three accounts-current were sent them for the years 1772, 1773 and 1774, at several times, and they were requested at each time to examine them, and if they contained any error, to advise Farrell & Jones of it. By not doing this, they have given strong evidence that there was no such agreement with Evans, that there was no error in the accounts, and that Mr. Grymes must have been mistaken, or that his deposition refers to some other transaction.

Paterson, J.—The complainant filed a cross-bill to obtain credit for 50 hogsheads of tobacco, which were shipped on board the Planter, the 17th September 1771, by Richard and Peyton Randolph, executors of William Randolph, and consigned to Farrell & Jones, merchants, at Bristol, in England. The tobacco was not insured. The Planter foundered at sea, and the tobacco was lost. The question is, who shall sustain the loss? It is contended, on the part of the representatives of the Randolphs, that Farrell & Jones ought to have insured the tobacco, and, not having done so, they have made themselves liable to the amount, as if it had been insured. To establish this position, the counsel for the complainant has taken the following grounds.

1st. From the nature and usage of the trade between the Virginia planter and the English merchant, it was *the duty of the latter to have insured the tobacco, and failing so to do, he is responsible as the insurer. *511]

2d. That Thomas Evans, the agent of Farrell & Jones, having promised to have insurance made, it is equivalent to the promise of his principals, Farrell & Jones, and they were responsible for the consequences.

As to the first point, no usage has been proved. And if a usage did exist, this case was taken out of it; as it appears by the whole course of correspondence, between the parties, that Farrell & Jones never did insure tobacco, without orders; and that the Randolphs gave them orders to effect insurances on tobacco, whenever they thought it expedient or necessary.

Great stress is laid on the contract which, it is stated, was entered into between the Randolphs and Thomas Evans, the agent of Farrell & Jones. The contract is founded on the deposition of Philip Grymes. This deposition is certainly open to the strictures which have been made upon it by the counsel on the part of the defendant. It does not appear when, and before whom, the deposition was taken. The deposition is *ex parte*, for neither the defendant nor his attorney had an opportunity to cross-examine the witness. If it was taken at or about the time that the bill was filed, then it is liable to the objections resulting from the frailty and uncertainty of memory, and the misconception or misconstruction of words used in a general conversation, after a long period of time, exceeding twenty years. Besides, the quantity of tobacco to be insured was not mentioned in the course of the conversation, nor does it appear, that it was at any time afterwards communicated to the agent; and unless the quantity was ascertained, an insurance could not be effected. How this paper, purporting to be a deposition, became annexed to the bill, I have not been able to discover from the pro-

ceedings ; and if it be admitted as a piece of evidence in the cause, its credit is much impaired in consequence of the observations already made.

The acts of the agent bind the principal ; and supposing Evans to have been the general agent of Farrell *& Jones, it may well be questioned, whether his undertaking to insure, is obligatory upon them ; as it is [*512 manifest, from the correspondence between the Randolphs and Farrell & Jones, that the latter did not insure tobacco, without express orders for the purpose ; that the Randolphs wrote to them to insure, when they deemed an insurance proper. The fair inference is, that if Evans engaged to have an insurance made in this instance by Farrell & Jones, it was a personal contract on his part, which bound himself and no other, and for the performance of which he was responsible in his private character. Orders for insurance were invariably transmitted by the Randolphs to Farrell & Jones, and not communicated to them, through the medium of Evans, unless the present should be considered as an exception. Under such circumstances, the Randolphs, if they relied on the promise of Evans, must look to him individually, and not through to him to Farrell & Jones. By this promise, Evans bound himself, and not the firm.

The house of Farrell & Jones transmitted, annually, their accounts to the Randolphs ; they did so for the year 1771, after the loss of the tobacco, which it is admitted was not passed to the credit of the Randolphs. The bond given for the balance is dated the 1st January 1772, though, from the letter of the 4th April 1772, it was not, probably, executed until some months after its date. It was made to bear date the 1st January 1772, that it might correspond with the accounts rendered, and carry interest from that period. Farrell & Jones annually rendered regular and stated accounts to the Randolphs of their mutual dealings in the years 1772, 1773 and 1774; and in a letter of the former to the latter, Farrell & Jones particularly requested that errors, if any occurred, should be pointed out, that they might be rectified. But the Randolphs made no objections ; they made no mention of the tobacco which was lost, nor did they ever intimate an opinion that Farrell & Jones were liable for its amount. Why this silence, this acquiescence? The period of the war, we will let pass, without animadversion, as no dealings or communication took place between the parties. Evans died in 1778. In 1780, Hanson was appointed the agent of Farrell & Jones. It was never suggested to Hanson, that the Randolphs, *or their [*513 representatives, claimed an allowance for the tobacco ; no intention was manifested to charge Farrell & Jones with it, until an action was commenced on the bond, in 1793 or 1794, when, for the first time, a claim was set up for the tobacco. Mr. Lee has endeavored to account for this silence and acquiescence, but not in a satisfactory manner ; and it is probable, that the Randolphs never thought of making any demand, because they were convinced that they had no right to do so, and that they must sustain the loss themselves, as they had neglected to order Farrell & Jones to make the insurance. It was a loss justly imputable to their own neglect or imprudence ; or if not, then they intended to stand their own insurers.

Farrell & Jones expressed regret, whenever they received no orders to insure ; and this flowed from the nature and situation of their accounts and dealings : for as the Randolphs were indebted to the firm, in a large amount,

it became the interest of Farrell & Jones that the tobacco should be insured, as it was property intended to be appropriated towards the payment of the debt due to them. The loss rendered the Randolphs the less able to pay, and increased the risk of Farrell & Jones, by diminishing their security. An insurance, therefore, of the property of the debtor, must have been beneficial and satisfactory to the creditor. But this insurance, it seems, the house of Farrell & Jones never thought themselves authorized to make, unless they received immediately from the Randolphs explicit directions for the purpose.

The charge is stale. The claim comes too late; it is brought forward after a sleep of near 30 years, during which period the original parties and their agents have disappeared and are no more. An acquiescence for such a length of time, and under such circumstances, is too stubborn and inveterate to be surmounted. The claim was put into oblivion; and there it ought to have remained. A court of equity should not interpose in a case of this kind; and therefore, the decree pronounced by the circuit court ought to be affirmed.

Cushing, J., concurred.

Judgment affirmed.(*a*)

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*514] *Field *v.* Milton.

Certiorari.

A *certiorari* will be awarded, upon a suggestion that the citation has been served, but not sent up with the transcript of the record.

W. Pinckney, for plaintiff in error, suggested that the citation had been served, but was not returned by the clerk below, with the writ of error, and prayed a *certiorari.*

The Court said it was a new case.

Certiorari granted.

Winchester *v.* Jackson and others.

Costs in error.

Costs will be allowed upon a dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error.

The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states.

Campbell, for the defendants in error, prayed that the dismissal might be with costs, the original defendants being also defendants in error.

The clerk stated that the practice had heretofore been to dismiss, without costs, where the dismission was for want of jurisdiction.

The Court directed it to be dismissed, with costs.

(*a*) Marshall, Ch. J., did not sit in the cause, having decided it in the court below.

INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ABATEMENT.

1. *Quære?* Whether a deputy marshal can plead in abatement, that the *capias* was not served on him by a disinterested person? *Knox* v. *Summers*.....*496

ACTION.

1. An action for goods sold and delivered cannot be maintained by him who received a note as conditional payment therefor, and has passed away that note. *Harris* v. *Johnston*.....*311
2. If part of the goods were the sole property of D., and the residue the sole property of I., and if I. had authority from D. to sell D.'s part, I. may maintain an action for the whole in his own name.....*Id.*
3. An action for money had and received will not lie, for the United States, against the assignees of a bankrupt, for the price of a ship sold by them as the property of the bankrupt, who had taken a false oath to obtain a register; the ship not having been seized by the United States for the forfeiture, before the sale and transfer. *United States* v. *Grundy*.....*337
4. *Quære?* Whether an action for money had and received will lie, to establish a forfeiture, for an act committed by a third person.....*Id.*

AGENT.

1. A factor may be justified by the orders of an agent, in deviating from the written orders of the principal. *Manella* v. *Barry*.....*415
2. An agent for collecting of debts merely, is not a factor, within the 13th section of the act of limitations of Virginia. *Hopkirk* v. *Bell*.....*454
3. A promise by a merchant's factor, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph* v. *Ware*.....*503

See ACTION, 2.

AGREEMENT.

1. The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States. *Hannay* v. *Eve*.....*242

See AGENT, 4.

APPEAL.

1. The act of congress allowing appeals without a statement of facts, applies to decrees made before the date of that act. *United States* v. *Hooe*.....*79
2. No appeal or writ of error lies in a criminal case. *United States* v. *More*.....*159
3. A decree for a sale of mortgaged property, on a bill to foreclose, is a final decree, from which an appeal lies. *Ray* v. *Law*.....*179

APPEARANCE.

1. An appearance of the defendant, by attorney, cures all antecedent irregularity of process. *Knox* v. *Summers*.....*496

ASSUMPSIT.

1. *Assumpsit* will lie upon a letter of credit, by him who trusts a third person upon the faith of that letter. *Lawrason* v. *Mason*.....*493

See ACTION, 1, 2, 3, 4.

ATTORNEY.

1. Notice of the time and place of taking a deposition, given to an attorney-at-law, is not sufficient, under the law of Virginia. *Buddicum* v. *Kirk*.....*293
2. An attorney-at-law may agree to receive or waive notice, and cannot afterwards allege the want of it.....*Id.*

BANKRUPT.

1. The United States have no lien on the real estate of their debtor, until suit brought, or bankruptcy, &c. *United States* v. *Hooe*...*73
2. If the defendant plead the bankruptcy of the indorser in bar, the plaintiff may reply, that the note was given to the indorser in trust for the plaintiff. *Wilson* v. *Codman*.....*193

See LEGACY.

BOND.

1. A variance in date between the bond declared upon, and that produced on *oyer*, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke* v. *Graham*.....*229
2. The court may depart from the letter of the condition of a bond, to carry into effect the intention of the parties.....*Id.*
3. A discharge from the prison-rules, under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law: and upon such discharge, no action can be maintained upon the prison-bounds bond. *Simms* v. *Slacum*.....*300

See COLLECTOR, 2.

BRITISH SUBJECTS.

1. *Quære?* Whether a British subject, born in England, in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia, by descent or devise? *Lambert* v. *Paine*.....*97
2. The treaty of peace between Great Britain and the United States prevents the operation of the act of limitations of Virginia, upon British debts contracted before that treaty. *Hopkirk* v. *Bell*.....*454

CAPTURE.

1. The commander of a United States ship of war, if he seizes a vessel on the high seas, without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon, and hold the original captor liable for the whole loss. *Maley* v. *Shattuck*.....*458

CAVEAT.

1. A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits. *Wilson* v. *Speed*...*283

CERTIORARI.

1. A *certiorari* will be awarded, upon a suggestion that the citation has been served, but not sent up with the transcript of the record. *Field* v. *Milton*.....*514

CHANCERY.

1. A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree, and may be appealed from. *Ray* v. *Law*...*179
2. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea. *Milligan* v. *Milledge*.....*220
3. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.....*Id.*
4. The want of proper parties is not a sufficient ground for dismissing the bill.....*Id.*
5. If an executor has no assets, the devisees or legatees may be proceeded against in equity.....*Id.**228

CITATION.

See CERTIORARI.

COLLECTOR.

1. To support a judgment on a collector's bond, at the return-term, it must appear by the record, that the writ was executed fourteen days before the return-day. *Dobynes* v. *United States*.....*241

See MORTGAGE, 1: PETERSBURG.

CONTRACT.

1. The court has the exclusive power of deciding whether a written contract be usurious. *Levy* v. *Gadsby*.....*181
2. He who sells property on a description given by himself, is bound in equity to make good that description. *McFerran* v. *Taylor*..*270
3. On a contract to deliver flour, its value is to be ascertained on the day when it ought to have been delivered. *Douglass* v. *McAllister*.....*298

COSTS.

1. Costs are not to be awarded against the United States. *United States* v. *Hooe*....*73
2. In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both. *Peyton* v. *Brooke*.....*92
3. Costs will be allowed, on the dismissal of a writ of error for want of jurisdiction, if the original defendant be also defendant in error. *Winchester* v. *Jackson*.....*514
4. If errors are not assigned, according to the rule of court, the writ of error may be dismissed, with costs. *General Rule*.....*239
5. If the plaintiff in error does not appear, the defendant may have the writ of error dismissed, with costs. *Montalet* v. *Murray*....*249

COURT.

1. The court has the exclusive power to decide whether a written contract be usurious. *Levy* v. *Gadsby*.....*181
2. The court, upon a jury trial, is bound to give an opinion, if required, upon any point relevant to the issue. *Douglass* v. *McAllister*.....*298

COURT-MARTIAL.

1. A court-martial of the district of Columbia has not exclusive cognisance of the question who are subject to military duty, and its sentence is not conclusive upon that point. *Wise* v. *Withers*.....*331
2. The court-martial who impose a fine upon a man, not liable to militia duty, are equally trespassers with the officer who distrains for such fine.....*Id.*

DAMAGES.

1. In estimating damages for breach of a contract to deliver flour, the jury are to ascertain the value of the flour, on the day when the cause of action arose. *Douglass* v. *McAllister*.....*298

DEBTOR.

See Lien.

DECLARATION.

1. In a declaration, an averment that the assignment of a promissory note was for value received, is an immaterial one and need not be proved. *Wilson* v. *Codman*.....*193
2. A replication, stating that the note was given to the indorser in trust for the plaintiff, is not a departure from the declaration, which avers the note to have been given for value received.....*Id.*

DECREE.

1. A decree for the sale of mortgaged property, on a bill to foreclose, is a final one and may be appealed from. *Ray* v. *Law*.....*179

DEMURRER.

See Pleading.

DEPARTURE.

See Pleading, 5.

DEPOSITION.

See Attorney, 1, 2: Notice, 1, 2, 3.

DEVIATION.

See Insurance, 3.

DEVISE.

1. A devise of "all the estate called Marrowbone, in the county of H., containing by estimation 2585 acres of land," carries the fee. *Lambert* v. *Paine*.....*97
2. *Quære?* Whether a British subject, born in England, in 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia, by descent or devise?..*Id.*

See Chancery, 5.

DISCHARGE.

1. A discharge from prison by a competent tribunal, obtained by fraud, is a discharge in due course of law. *Simms* v. *Slacum*...*300

DISTRICT OF COLUMBIA.

1. No appeal or writ of error, in a criminal case, lies from the judgment of the circuit court of the district of Columbia. *United States* v. *More*.....*159
2. *Quære?* Whether the act of congress, abolishing the fees of justices of the peace, in the district of Columbia, can affect those justices who were in commission when that act was passed?.....*Id.*
3. The plaintiff in error must file a transcript of the record, with the clerk of the supreme court of the United States, within the first six days of the term. *General Rule*...*239
4. An executor cannot maintain a suit, in the district of Columbia, upon letters testamentary granted in a foreign country. *Dixon* v. *Ramsay*.....*319
5. A justice of the peace in the district of Columbia is an officer of the government of the

United States, and is exempt from militia duty. *Wise* v. *Withers*.....*331

See COURT-MARTIAL, 1, 2.

EQUITY.

1. The holder of a promissory note, in Virginia, payable to order, may, in equity, sue a remote indorser, but not at law. *Harris* v. *Johnston*.....*311

See APPEALS, 1: CHANCERY, 1, 5: CONTRACT, 2.

EVIDENCE.

1. If usury be specially pleaded, and the court reject the evidence offered upon the special plea, it may be admitted, upon the general issue. *Levy* v. *Gadsby*.....*180
2. The court has the exclusive power to decide whether a written contract be evidence of usury.....*Id.*
3. A report of surveyors, that a vessel is unsound, is not evidence that she was not seaworthy, when she commenced the voyage. *Marine Ins. Co.* v. *Wilson*.....*187
4. *Quære?* Whether such report, even if it related to the commencement of the voyage, is conclusive evidence.....*Id.*
5. The assignee of a pre-emption warrant is a competent witness, if his testimony does not tend to support the title of the party producing him. *Wilson* v. *Speed*.....*283
6. Notice to an attorney-at-law of the time and place of taking a deposition, is not sufficient, under the law of Virginia. *Buddicum* v. *Kirk*.....*293
7. The deposition must be taken at the time notified; an adjournment from the 12th to the 19th, is not an adjournment from day to day.....*Id.*
8. Evidence of wheat delivered, is good, on the plea of payment.....*Id.*
9. An assignment of debts cannot be given in evidence, under the plea of accord and satisfaction.....*Id.*
10. A bill of parcels, stating the goods as bought of D. & I., is not conclusive evidence that D. & I. were joint owners of the goods. *Harris* v. *Johnston*.....*311
11. The sentence of a court-martial is not conclusive evidence that a man is liable to militia duty. *Wise* v. *Withers*.....*331
12. A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation. *Maley* v. *Shattuck*.....*458

ERRORS.

1. If errors are not assigned according to the rule of court, the writ of error will be dismissed with costs. *General Rule*.....*239

EXECUTOR.

1. Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute. *Wilson* v. *Codman*.....*193
2. An executor cannot maintain a suit, in the district of Columbia, upon letters testamentary granted in a foreign country. *Dixon* v. *Ramsay*.....*319

See LEGACY, 1.

FACTOR.

1. A factor may be justified by the orders of a general agent, in departing from the written instructions of the principal. *Manella* v. *Barry*.....*415
2. An agent for collecting debts merely, is not a factor, within the 13th section of the act of limitations of Virginia. *Hopkirk* v. *Bell*..*454
3. A promise by a factor, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph* v. *Ware*.....*503

FOREIGN SENTENCE.

1. A foreign sentence as good prize, is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation. *Maley* v. *Shattuck*.....*458

FORFEITURE.

1. If a false oath be taken to procure a register for a vessel, the United States have an election to proceed against the vessel, as forfeited, or against the person who took the false oath, for its value. But, until that election is made, the title to the vessel does not vest in the United States, under the forfeiture; and the United States cannot maintain an action for money had and received, against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel and received the purchase-money before the seizure of the vessel. *United States* v. *Grundy*.....*337

FRAUD.

1. The courts of the United States will not enforce an agreement entered into in fraud of

law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement, a mere stratagem of war. *Hannay* v. *Eve*.....*242
2. A discharge under an insolvent act, obtained by fraud, is a discharge in due course of law. *Simms* v. *Slacum*.....*300

FREIGHT.

1. *Quære?* Whether the mortgagee of a ship is entitled to the freight? *Hodgson* v. *Butts*.....*140

GENERAL RULE.

1. If the transcript be not filed by the 6th day of the term, either party may have a continuance.....*239
2. If judgment below be thirty days before the sitting of this court, the record must be filed within the first six days of the term.....*Id.*
3. In all cases from the district of Columbia, the record must be filed, within the first six days of the term.....*Id.*
4. If errors are not assigned, according to the general rule, the writ of error will be dismissed with costs.....*Id.*
5. If the defendant refuses to plead, the court will proceed *ex parte*.....*Id.*

HABEAS CORPUS.

1. A warrant of commitment by justices of the peace, must state a good cause certain, supported by oath. *Ex parte Burford*....*448

INSOLVENT.

1. The United States have no lien on the real estate of their debtor, until suit brought, or bankruptcy, or a notorious insolvency has taken place; or being unable to pay all his debts he has made a voluntary assignment of all his property; or having absconded, his property has been attached by process of law. *United States* v. *Hooe*.....*73
2. A discharge under an insolvent law, though obtained by fraud, is a discharge in due course of law. *Simms* v. *Slacum*.....*300

INSURANCE.

1. If a policy upon a vessel has a clause "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors, that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters. *Marine Ins. Co.* v. *Wilson*.....*187
2. *Quære?* Whether such report, even if it relate to the commencement of the voyage, would be conclusive evidence?.....*Id.*
3. If a vessel be insured at and from K. to A., and take a cargo for B. and A., and sail with intent to go first to B. and then to A., and is captured before she arrives at the dividing point between A. and B., this is a case of intended deviation only, and not of non-inception of the voyage insured. *Marine Ins. Co.* v. *Tucker*.....*357
4. It depends upon the particular circumstances of the case, whether, if the vessel be captured and re-captured, the loss shall be deemed total or partial.....*Id.*
5. A promise by a factor, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph* v. *Ware*.....*503

See NON-INTERCOURSE, 1.

JUDGMENT.

See CAVEAT, 1: COLLECTOR, 2.

JUDGE.

See COURT, 2.

JURISDICTION.

1. The want of proper parties is not a good plea to a bill in chancery, which suggests that such parties are out of the jurisdiction of the court. *Milligan* v. *Milledge*.....*220
2. If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction. *Strawbridge* v. *Curtiss*.....*267
3. This court has not jurisdiction upon a writ of error to a state court, if the decision of the state court be in favor of the privilege claimed under an act of congress. *Gordon* v. *Caldcleugh*.....*268
4. All the rights to a testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed. *Dixon* v. *Ramsay*.....*319
5. If the court has not jurisdiction, the officer executing its process is a trespasser. *Wise* v. *Withers*.....*331

JURY.

See DAMAGES, 1.

JUSTICES OF PEACE.

1. *Quære?* Whether the act of congress abolishing the fees of the justices of peace of the district of Columbia, can affect those justices who were in commission when the act was passed? *United States* v. *More*.....*159
2. A justice of peace of the district of Columbia is an officer of the government of the United States, and exempt from militia duty. *Wise* v. *Withers*.....*331

See HABEAS CORPUS, 1: WARRANT, 1.

KENTUCKY.

See CAVEAT, 1.

LANDS.

1. Under the act of Pennsylvania of 3d April 1792, for the sale of the vacant lands, &c., the grantee, by warrant, of a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, for the space of two years from the date of his warrant, but during that time, persisted in his endeavors to make such settlement and improvement, is excused from making such settlement as is described in the 9th section of the act, and the warrant vests in such grantee a fee-simple. *Huidekoper* v. *Douglass*.....*1
2. *Quære?* Whether a British subject, born in England, in 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia, by descent or devise? *Lambert* v. *Paine*.....*97

See LIEN, 1.

LEGACY.

1. If a testator declares that a certain legacy shall abate, if the personal and real estate of which he shall die seised and possessed, shall not be sufficient to pay all his debts and legacies, and if the estate be more than sufficient at the time of the testator's death, but afterwards become insufficient, by means of the bankruptcy of the executor, such legacy shall abate for the benefit of the other legacies. *Silsby* v. *Young*.....*249

LETTER OF CREDIT.

See ASSUMPSIT, 2.

LETTERS TESTAMENTARY.

See EXECUTORS, 1, 3.

LEX LOCI.

See JURISDICTION, 4.

LIEN.

1. The United States have no lien on the real estate of their debtor until suit brought, or a notorious insolvency or bankruptcy; or being unable to pay all his debts, he has made a voluntary assignment of all his property; or having absconded, &c., his property has been attached by process of law. *United States* v. *Hooe*.....*73

LIMITATIONS.

1. The act of limitations of Virginia begins to run against a creditor residing out of the state, if he comes into the state for temporary purposes, provided the debtor be in the state at that time. *Faw* v. *Roberdeau*...*174
2. The treaty of peace prevents the operation of the act of limitations of Virginia, upon British debts contracted before the treaty. *Hopkirk* v. *Bell*.....*454
3. An agent for collecting debts merely, is not a factor, within the 13th section of the act of limitations of Virginia.....*Id.*

MILITIA.

See COURT-MARTIAL, 1, 2: JUSTICES OF PEACE, 2.

MISTAKE.

1. He who sells property on a description given by himself, by mistake, is bound, in equity, to make good that description. *McFerran* v. *Taylor*.....*270
2. *Quære?* If the mistake be of a matter deemed perfectly immaterial by both parties, at the time of the contract, and which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere.....*Id.*

MORTGAGE

1. A mortgage of part of the property of a collector of the revenue, to the surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgagor at bank, is valid against the United States, although it turns out, that the collector was unable to pay all his debts, at the time the mortgage was given, and although the mortgagee knew, at the time of taking the mortgage, that the

mortgagor was largely indebted to the United States. *United States* v. *Hooe*.....*73
2. A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded. *Hodgson* v. *Butts*.....*140
3. *Quære?* Whether the mortgagee of a ship is entitled to the freight?..... .....*Id.*
4. A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree, and may be appealed from. *Ray* v. *Law*...*179

NAVY.

1. The commander of a United States ship of war, if he seizes a vessel on the high seas, without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by superior force: and the owner is not bound to resort to the re-captor, but may abandon and hold the original captor liable for the whole loss. *Maley* v. *Shattuck*.....*458

NON-INTERCOURSE.

1. A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo, in order to make repairs, and prevented by the officers of the French government, from relading her original cargo, and from taking away, in exchange, anything but produce or bills, might lawfully purchase and take away such produce, and such voyage was not illegal, so as to avoid the insurance. *Hallet* v. *Jenks*.....*210
2. The act of June 13th, 1798, did not impose any disability upon vessels of the United States *bonâ fide* sold to foreigners residing out of the United States, during the existence of that act. *Sands* v. *Knox*.....*499

NOTICE.

1. Notice of the time and place of taking a deposition given to the attorney-at-law, is not sufficient, under the law of Virginia. *Buddicum* v. *Kirk*.....*293
2. An attorney-at-law may agree to receive, or to waive notice, and will not afterwards be permitted to allege want of it.....*Id.*
3. If notice be given, that a deposition will be taken on a certain day, and if not finished on that day, that the commissioners will adjourn from day to day, until it be finished, and the commissioners adjourn over several intermediate days, such deposition is not taken agreeable to notice.....*Id.*

OFFICER.

See COURT-MARTIAL, 2: JUSTICE OF PEACE, 2: NAVY, 1: TRESPASS, 1.

OPINION.

See COURT, 2.

PAYMENT.

See ACTION, 1: EVIDENCE, 8.

PENNSYLVANIA.

See LANDS, 1.

PERSONAL GOODS.

1. All rights to the testator's personal property are to be regulated by the laws of the country where the testator lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed. *Dixon* v. *Ramsay*.....*319

PETERSBURG.

1. By the act of congress of 10th of May 1800, the collector of the district of Petersburgh was not restricted to a commission of 2½ per cent. on the moneys by him collected and received after the 30th of June 1800, on account of bonds previously taken for duties arising on goods imported into the United States. *United States* v. *Heth*..... *399

PLEADING.

1. In a declaration, an averment that the assignment of a promissory note was for value received, is an immaterial one, and need not be proved. *Wilson* v. *Codman*.....*193
2. If the defendant plead the bankruptcy of an indorser in bar, a replication stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration, which avers the note to have been given for value received.....*Id.*
3. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea. *Milligan* v. *Milledge*..... ....*220
4. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.....*Id.*
5. A variance in date between the bond declared upon, and that produced on *oyer*, is

matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke* v. *Graham*....*229
6. A finding by a jury which contradicts a fact admitted by the pleadings, is to be disregarded. *McFerran* v. *Taylor*.....*270
7. Upon the plea of payment to debt on bond, the defendant may give in evidence wheat delivered on account of the bond, at a certain price; and also an assignment of debts to the plaintiff, part of which he collected, and part were lost by his negligence or indulgence. *Buddicum* v. *Kirk*.....*293
8. An assignment of debts cannot be pleaded as an accord and satisfaction, to debt on bond.....*Id.*
9. *Quære?* Whether a deputy-marshal can plead in abatement, that the *capias* was not served on him by a disinterested person? *Knox* v. *Summers*.....*496

See Evidence, 1.

PRACTICE.

1. If statements of the case are not furnished, according to the rule of the court on that subject, the cause will be dismissed or continued. *Peyton* v. *Brooke*.....*93
2. A *certiorari* will be awarded, upon a suggestion that the citation has been served, but not sent up with the transcript of the record. *Field* v. *Milton*.....*514
3. If usury be specially pleaded, and the court reject the evidence offered upon such a special plea, it may be admitted, upon the general issue, notwithstanding it has been refused upon the special plea. *Levy* v. *Gadsby*..*180
4. An averment that the assignment of a promissory note was for value received is immaterial, and need not be proved. *Wilson* v. *Codman*.....*193
5. Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.....*Id.*
6. The want of proper parties, is not a proper ground for dismissing the bill.....*Id.*
7. If the executor has no assets, the devisees and legatees may be proceeded against, in equity.....*Id.*
8. To support a judgment on a collector's bond, at the return-term, it must appear by the record, that the writ was executed fourteen days before the return-day. *Dobynes* v. *United States*.....*241
9. If the plaintiff in error do not appear, the defendant may either have the plaintiff called, and dismiss the writ of error with costs, or he may open the record and go for an affirmance. *Montalet* v. *Murray*.....*249
10. A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits. *Wilson* v. *Speed*.....*283
11. The court, upon a trial by jury, is bound to give an opinion, if required, upon any point relevant to the issue. *Douglass* v. *McAllister*.....*298
12. An appearance of the defendant, by attorney, cures all irregularity of process. *Knox* v. *Summers*.....*496

See Appeal, 1, 2, 3: Costs, 1–5: General Rule: Jurisdiction, 2, 3: Notice, 1–3: Pleading, 4–6: Variance, 1.

PROMISSORY NOTE.

1. An indorser may avail himself of usury between the maker and the indorsee. *Levy* v. *Gadsby*.....*180
2. The averment that the assignment of a promissory note was for value received, is immaterial, and need not be proved. *Wilson* v. *Codman*.....*193
3. If the defendant plead the bankruptcy of an indorser in bar, a replication, that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration, which avers the note to have been given for value received.....*Id.*
4. If a promissory note be received as conditional payment for goods sold and delivered, and be passed away, the vendor of the goods cannot maintain an action for the goods sold and delivered. *Harris* v. *Johnston*.....*311
5. An indorsee of a promissory note, payable to order, cannot, in Virginia, maintain an action at law, against a remote indorser; but he may, in equity.....*Id.*

REGISTER.

See Forfeiture, 1.

REVENUE.

See Collector, 2: Forfeiture, 1: Lien, 1: Mortgage, 1: Non-Intercourse, 1, 2: Petersburg, 1.

RULE OF COURT.

See General Rule.

SEIZURE.

See Forfeiture, 1: Navy, 1.

SHIP.

See FORFEITURE, 1: NAVY, 1.

SLAVE.

1. If the owner of a slave, removing into Virginia, take the oath required by the act of assembly, within sixty days after the removal of the owner, it will prevent the slave from gaining his freedom, although he was brought into Virginia, by a person claiming and exercising the right of ownership over him, eleven months before the removal of the true owner; and although the person who brought him in, never took the oath; and although the slave remained in Virginia, more than one year; and although the true owner never brought him in. *Scott* v. *Negro London*.....*324

STATUTE.

1. The words of a statute, if dubious, ought to be taken most strongly against the lawmakers. *United States* v. *Heth*.....*413

TRESPASS.

1. Trespass lies against the officer who executes the process of a court not having jurisdiction. *Wise* v. *Withers*.....*331

TRUST.

1. If the payee of a note hold it in trust, his bankruptcy will not take away his power to indorse it over to *cestui que trust*. *Wilson* v. *Codman*.....*193

USURY.

1. If A. lend money to B., who puts it out at usurious interest, and agrees to pay A. the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B., and an indorser of B.'s note to A. may avail himself of the plea of usury. *Levy* v. *Gadsby*.....*180

VARIANCE.

1. A variance between the date of the bond, as stated in the declaration, and as it appears on *oyer*, is a matter of substance, and fatal on the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke* v. *Graham*..*229

VERDICT.

1. A finding by the jury which contradicts a fact admitted by the pleadings, is to be disregarded. *McFerran* v. *Taylor*.....*270

VIRGINIA.

See AGENT, 3: BOND, 4: BRITISH SUBJECTS, 1, 2: COSTS, 2: LIMITATIONS, 1, 2, 3: MORTGAGE, 2: PROMISSORY NOTE, 5: SLAVES, 1.

WARRANT.

1. A warrant of committal by justices of the peace, must state a good cause certain, supported by oath. *Ex parte Burford*.....*448

WITNESS.

See EVIDENCE, 5.

WRIT OF ERROR.

1. No appeal or writ of error lies in a criminal case, from a judgment of the circuit courts of the United States. *United States* v. *More*.....*159