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that fact ; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it.

Had this fact been established, the court is inclined to think, that the circumstances of the case, as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed on the question, whether the sale was fraudulent or not. But if a whole tract of land was sold, when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained.

It is, therefore, the opinion of the court, that there is error in the decree of the circuit court for the district of Georgia, in sustaining the plea of the defendants, and dismissing the bill of the plaintiffs, and that the said decree ought to be reversed and annulled, and the cause remanded, with directions that the defendants shall answer over, and that further proceedings be had in the said cause, according to equity.

Decree reversed.

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Confiscation.

The act of Georgia confiscating the estate of a mortgagor, is no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war.

The estate of the mortgagor only was confiscated, not that of the mortgagee.

The act of limitations of Georgia does not apply to mortgagees. The possession of the mortgagor is not adverse.

Quere? Whether a presumption of payment of the debt, does not arise from the circumstances of this case?

THIS was an appeal from a decree of the Circuit Court for the district of Georgia, which dismissed the complainant's bill, brought to foreclose a mortgage. The facts, as stated by MARSHALL, Ch. J., in delivering the opinion of the court, were as follows :

In November 1769, Alexander Wyly, then residing in Georgia, executed his bond to Greenwood & Higginson, merchants of London, for the sum of 2108*l.* 4*s.* sterling, conditioned to pay 1054*l.* 2*s.* like money, on or before the 1st of January 1773 ; and also executed a deed of mortgage (which was admitted to record in the secretary's office) to secure the payment of the bond. Alexander Wyly took part with the British in the war of our revolution, in consequence of which, his estate was confiscated, and commissioners were appointed to take possession of it, and to sell it. In 1784, the mortgaged premises were sold and conveyed by the commissioners to certain persons in Savannah, who sold and conveyed them to James Houston, who retained peaceable possession of them, until his death. In 1796, these lands were sold under execution, by the marshal, to satisfy a judgment obtained against James Mossman, as executor of James Houston. The purchaser at the marshal's sale had notice of the mortgage deed to Greenwood & Higginson.

This suit is brought against the agent of the purchaser (to whom notice was given, and to whom the purchaser had since conveyed his right), in order to obtain payment of the debt due from Wyly, and to foreclose all

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equity of redemption in the mortgaged premises. The bill was filed on the 4th of November 1802.

*416] *P. B. Key*, for the appellant.—The treaty of peace of 1783 removed all legal impediments to the recovery of debts. By the fourth article, “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 *bond fide* debts heretofore contracted.” And by the 5th article, “it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage-settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.” At the time of the treaty, this land was not sold, but holden by the state, under the confiscation act. After the treaty, the state held it subject to the mortgage, and could sell only such right as it had. It could, at most, sell Wyly’s right of redemption.

Harper, contra.—The estate both of the mortgagor and mortgagees in this land was confiscated, and vested in the state of Georgia. If the treaty is to set up the title, no estate of a British subject indebted to a British subject could ever be confiscated; for the land may be the only fund out of which the creditor can get payment.

The impediments intended to be removed by the treaty were only legal impediments, not everything which went to impair the security; not that which merely rendered the debtor less able to pay. Confiscations were not included under the expression legal impediments, because there is a separate provision for the case of confiscations. If confiscations were meant to be included in the expression, it might as well be extended to any general acts of the legislature by which the debtor’s means of payment may be diminished. This being a particular lien, does not differ the case from that of a general lien. Every judgment-creditor had a lien upon all the lands of his debtor, and if all these liens are saved by the treaty, there were very few *417] confiscations which it would not annul. *The fifth article of the treaty extends no further than the fourth.

MARSHALL, Ch. J.—The decisions of this court have been uniform, that the acts of the states, confiscating debts, are repealed by the treaty; and if, in this case, the debt remains, does not the security remain also? Is not the remedy as much protected by the treaty as the debt itself?

Harper.—We contend not. The lapse of thirty years induces a presumption that the bond is satisfied. We do not rely upon the statute of limitations, but the general presumption. In England, it is decided, that the presumption arises by the lapse of twenty years, without a demand or payment of interest.

MARSHALL, Ch. J.—The period of twenty years is fixed upon, in case of a bond, because in that time the interest at five per cent., equals the principal; and no further interest is covered by the penalty of the bond.

Harper.—That is not the reason stated in the English books. But the reason is, that a man is presumed to depend upon the interest of his money as a revenue. The fact of the plaintiff’s being beyond seas, does not remove the

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presumption, because both parties were equally beyond seas, and probably both within one jurisdiction.

P. B. Key, in reply.—The fifth article of the treaty expressly provides for the case. How can a man have an interest, by debt, in confiscated lands, unless it be by mortgage, or other lien? The practice in Maryland has always been to protect such liens.

LIVINGSTON, J.—I have never heard that confiscated property has been restored by force of the treaty. The *treaty only provides that con- [*418
gress shall recommend such restitution.

Key.—Debts due to British subjects were not confiscated by the act of Georgia. They were only sequestered.

March 14th, 1808. MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows :—It is contended, on the part of the purchaser, 1st. That the lands are exonerated from the mortgage by the confiscation and sale thereof made by the state of Georgia. 2d. That they are exonerated by the length of time which has intervened since that confiscation and sale, during which an adverse possession has been held. 3d. That payment of the mortgage is to be presumed.

Several acts of confiscation were passed, during the war, by the state of Georgia, in which the name of Alexander Wyly is to be found. That under which the defendants in this case claim, was made in the month of May, in the year 1782. That act contains also a clause confiscating generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered. The debt due to Greenwood & Higginson came within this exception, and the majority of the court is of opinion, that the lien given by the mortgage on the land of Wyly, for the security of that debt, was not confiscated.

The estate of Wyly, not the interest of Greenwood & Higginson in that estate, being confiscated, it is not to be inferred, that the lien of Greenwood & Higginson on that estate was discharged. The treaty of peace *was [*419
made, while the estate remained unsold. The fifth article of the treaty, after discovering much solicitude on the part of Great Britain for the entire restoration of confiscated estates, concludes with this clause : “And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage-settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.”

This article applies to those cases where an actual confiscation has taken place, and stipulates expressly, that in such cases, the interest of all persons having a lien upon such lands shall be preserved. Neither the confiscation, nor any act in consequence of the confiscation, can constitute a legal impediment to the prosecution of their just rights. The preceding part of the article had contemplated sales of the confiscated property, and consequently, this clause must have been intended to charge the lands, even in the hands of a purchaser. But respecting its application to this particular case, the court cannot conceive a doubt. The lands, at the time of the treaty, remained unsold, and the government claiming them as confiscated, stipulates through the proper constituted authorities, for their liability to this mortgage. If, then, the act of confiscation, independent of the treaty, would be

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construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force, and the subsequent sale of the property could only pass it with the burden imposed upon it.

2. Is this remedy barred by the act of limitations? Upon an attentive consideration of that act, it appears to be intended for suits at law, claiming the lands themselves, not to suits in equity for the purpose of subjecting the lands to the payment of debts for which they are mortgaged. The words of the law would lead to that opinion, and it is confirmed by the consideration that, in such cases, the possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee. Unless, therefore, this statute has been otherwise construed *in Georgia, it would not be considered as applicable to such a case *420] as this. But this point must be decided in favor of the plaintiffs because there is a saving in the act of the rights of persons beyond sea.

3. Is payment in this case to be presumed? The length of time which elapsed between the day when this bond and mortgage became payable, and that on which the suit was instituted, is certainly sufficient to warrant a presumption of payment. But this presumption may be met by circumstances which account for the delay in bringing this suit. In this case, the war, and those events which succeeded the war, have not the same influence as in ordinary cases of British debts, because the debtor was within the reach of his creditor from the date of his banishment, in the year 1778, and might have been sued. It does not sufficiently appear in the proceedings, where he was, nor what was his situation, to enable the court to judge whether the long delay in bringing this suit is, or is not, sufficiently accounted for. Neither is it shown satisfactorily, that Alexander Wyly has left no personal representative, who might show payment of this debt. If there be a personal representative of Alexander Wyly in existence, such person ought to be a party to this suit; if there be no personal representative, some evidence that there is none, ought to be adduced. In any event, under all the circumstances of this case, enough does not appear to enable the court to decide whether payment ought to be presumed, or whether the delay in instituting this suit can be accounted for, and the court is, therefore, of opinion, that an issue ought to have been directed by the circuit court, for the purpose of ascertaining the fact of payment.

The decree of the circuit court is, therefore, to be reversed, and the cause remanded to that court, with instructions to direct an issue to determine whether the bond in the bill mentioned has been paid, and with liberty to the plaintiff to amend his bill and make new parties, if he shall desire it.

LIVINGSTON, J., dissented from this opinion, but did not state his reasons.

Decree reversed.