for that tax was not sustainable. If the corporation did not choose to rlsk levying the tax by seizure, they might have instituted a suit to determine their right.

This court is unanimously of opinion, that the circuit court erred in giving judgment for the plaintiff, on motion, and therefore, directs that the said judgment be reversed and annulled.

Henderson *v.* Moore.

Error.—Evidence of payment.

The refusal of the court below to grant a new trial, is not matter of error.[1]

Upon the plea of payment, to an action of debt upon a bond, conditioned to pay $500, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff, that it was in full of all demands; and from such evidence, if uncontradicted, the jury may and ought to infer payment of the whole.[2]

Error to the Circuit Court of the district of Columbia.

On the plea of payment to an action of debt, upon a bond for $500, dated in 1781, the defendant offered evidence to prove that in the year 1797, the plaintiff acknowledged that he had received of the money of the defendant to a amount of about $1000, of one Willoughby Tibbs, out of the amount of the decree which the defendant had obtained against him for $3000, and that the money which he so received was in full of all his claims against the defendant, the plaintiff having paid for the defendant several sums of money. There was no settlement made, nor any receipt given. "Where upon, the plaintiff prayed the court to instruct the jury, that if, from the evidence, they should be satisfied, that the bond had not been fully paid off, no declaration of the plaintiff's 'that his claims against the defendant were all satisfied' would be a bar to his recovery in this action; which instruction *the court refused to give, as prayed, but directed the [*12
jury, that if they should be satisfied by the evidence, that the defendant, in the year 1797, paid the plaintiff a sum of money less than the amount mentioned in the condition of the bond, which the plaintiff, at that time, acknowledged to be in full satisfaction of all his claims against the defendant, such payment and such acknowledgment, were competent evidence upon the plea of payment, and that the jury might and ought to presume therefrom, that the whole sum mentioned in the condition of the said bond had been paid to the plaintiff, unless such presumption be repelled by other evidence in the cause; to which refusal and instruction, the plaintiff excepted."

The verdict being for the defendant, the plaintiff's counsel moved the court for a new trial, and grounded his motion upon sundry affidavits, tending to prove that the whole amount of the bond remained due to the plaintiff, and that he was surprised by unexpected testimony at the trial. But the court refused to grant a new trial.

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[1] Marine Ins. Co. *v.* Young, *post*, p. 187; Marine Ins. Co. *v.* Hodgson, 6 Cr. 206; Burr *v.* Gratz, 4 Wheat. 213; Blunt *v.* Smith, 7 Id. 248; Doswell *v.* De la Lanza, 20 How. 29; Warner *v.* Norton, Id. 448; Schuchardt *v.* Allen, 1 Wall. 371; Laber *v.* Cooper, 7 Id. 565; Indianapolis and St. Louis Railroad Co. *v.* Horst, 93 U. S. 301.

[2] United States *v.* Child, 12 Wall. 232; United States *v.* Clyde, 13 Id. 35.

Two errors were assigned. 1. That the court below refused a new trial. 2. That the court ought to have given the instruction to the jury as prayed by the plaintiff; and ought not to have given the direction which they did.

MARSHALL, Ch. J., said, that this court had decided at the last term, that a refusal by the court below to grant a new trial was not error.

The case being submitted upon the other point, without argument—

MARSHALL, Ch. J., delivered the opinion of the court, that there was no error in the opinion of the court below. A part of the money due on
*13] the bond *might have been paid before; and such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence, upon the plea of payment.

Judgment affirmed, with costs.

COOKE and others *v.* WOODROW.

Jurisdiction in error.—Matter in dispute.—Evidence.

In an action of trover, if the judgment below be in favor of the original defendant, the value of the matter in dispute, upon a writ of error in the supreme court of the United States, is the sum claimed as damages in the declaration.[1]

Due diligence must be used to obtain the testimony of a subscribing witness.

If inquiry be made at the place where the witness was last heard of, and he cannot be found, evidence of his handwriting may be admitted.[2]

Cooke *v.* Woodrow, 1 Cr. C. C. 437, affirmed.

ERROR to the Circuit Court of the district of Columbia, in an action of trover, brought by the plaintiffs in error for sundry household goods.

A bill of exceptions stated, that the plaintiffs, on the trial, produced in evidence to support their title to the goods, a certain paper writing signed by one John Withers, to which one John Pierson had subscribed his name as a witness, and offered parol evidence to prove that the subscribing witness "had, upwards of a year ago, left the district of Columbia, and that before he left the said district, he declared that he should go to the northward, that is to say, to Philadelphia or New York, and said he had a wife in New York. That the said subscribing witness went from the said district to Norfolk, and that when he got there, he declared, that he should go on further to the south, but where, was not known, and that he has not been heard of by the witness, for the last twelve months. It appeared, that a *subpœna* had been issued in this case, for the said subscribing witness, directed to the marshal of the district of Columbia, but he could not be found in the said district, by the said marshal. The plaintiff then offered to prove the handwriting of the subscribing witness, and of the said John Withers, to the said writing, but the court refused to permit the plaintiffs to produce evidence of the handwriting of the said subscribing witness, and refused to per-
*14] mit the plaintiffs to prove the handwriting of the said John Withers, otherwise than by the testimony of the said *subscribing witness; to which refusal, the plaintiffs excepted."

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[1] See Peyton *v.* Robertson, 9 Wheat. 527; Walker *v.* United States, 4 Wall. 164.

[2] Longworth *v.* Close, 1 McLean, 282; Jones *v.* Lovell, 1 Cr. C. C. 183.